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WOODFALL'S, Williams

PRACTICAL TREATISE

ON THE LAW OF

LANDLORD AND TENANT:

WITH

A FULL COLLECTION OF PRECEDENTS,

AND

FORMS OF PROCEDURE.

By S. B. HARRISON, Esq.

The Seventh Edition

BY

HENRY HORN, ESQ.,
RECORDER OF HEREFORD.

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TO

THE SEVENTH EDITION.

THE time that has elapsed since the publication of the last Edition, the passing of the Common Law Procedure Act, 1852, and the decision of many important points connected with the Law of Landlord and Tenant, have rendered another Edition of this Work necessary.

Much matter has been omitted, as being too remotely connected with the subject of Landlord and Tenant, to require its retention; this has enabled the Editor to incorporate in the text so much of the Common Law Procedure Act, 1852, as relates to Ejectment, together with the recent decisions, without increasing the size of the work. A large portion of the Common Law Procedure Act and other Statutes have been inserted in the Appendix. The arrangement of the work has been preserved, as being one possessing many recommendations, and to which the majority of readers are accustomed. Large additions have been made to the Index, and, on the whole, the Editor trusts that the work has been rendered more useful, although he is conscious of the existence of defects and errors; but he hopes that they will not be found more numerous or serious than may be fairly expected in a work relating to a subject of much magnitude and intricacy.

HENRY HORN.

2, HARE COURT, TEMPLE,
November, 1855.

PREFACE

TO

THE FIRST EDITION.

THE object of this Treatise is to present to the reader a *complete* exposition of the law, as it affects personal standing in the relative situations of Landlord and Tenant. In addition to the usual body of technical learning, which is essential to the professional reader, it embraces a full explanation of many important subjects of ordinary occurrence and daily practice. It is in this respect—which may be considered as somewhat of a novel feature—that the present undertaking chiefly differs from its predecessors. It was considered advantageous to take, as a basis, the work of the late Mr. WOODFALL on the same subject; and by entirely remodelling its form, with a view to practical usefulness—curtailing its redundancies, by the omission of obsolete learning—and supplying its deficiencies, by the addition of popular and useful matter—to frame a Treatise adapted to the present wants of the profession and the public. It must, however, be obvious, that the work alluded to—although excellent in many respects, and elaborate upon questions applicable to intricate points of rare occurrence—could not, by merely reprinting it, with the addition of subsequent information, be rendered completely suitable to the purpose contemplated; accordingly, the alterations have been so extensive, that the present Treatise may fairly be considered as an original work.

The book contains not only a discussion of the statutory enactments and judicial determinations *strictly* applicable to the Law of Landlord and Tenant, but also a great body of inci-

dental matter, which has been hitherto usually omitted in Treatises of a similar nature, from the dread of inconvenience in bulk. In the present instance, however,—besides including these neglected subjects, without any material trespass in regard to size—room has been afforded for the insertion of much additional information of importance in the ordinary management of the subjects treated of; and of a series of tables, illustrative of the customs observed throughout the kingdom, in the absence of any specific agreement.

An analytical arrangement, as simple as the nature of the subject would admit, has been adopted, in order to render the work available to the student and non-professional reader; and at the same time, to make it useful as a book of practice to the fully employed lawyer. The course pursued will be readily seen, by reference to the Introduction, which shows the relation the several parts of the work bear to each other; and the Table of Contents, in which the whole system is fully developed. With a view to facility of reference every mechanical aid has been resorted to; and a careful and uniform division of the several subjects has been made into separate paragraphs, to each of which a short abstract has been appended in the margin: therefore, as the substance of the whole work is *there* mentioned, it may be safely asserted, that—so far as the practitioner is concerned—in order to *use* the book *it need* NOT *be read.*

S. B. H.

4, LAMB BUILDINGS, TEMPLE,
21 *Dec.* 1830.

INTRODUCTION.

THERE are Four Books:—the First Book treats of the Contract between parties standing in the relative situation of Landlord and Tenant:—the Second points out the Rights and Liabilities which arise out of that situation:—the Third describes the course of Judicial Procedure to substantiate those rights, and to enforce those liabilities—and the Fourth contains the usual Precedents and Forms of proceeding applicable to the subject.

The discussion of the nature of the contract which subsists between Landlord and Tenant, and the incidents attending it, is commenced by showing the persons *by* whom terms may be granted, or in other words, the persons who can convey to others a legal interest in real property for a determinate period; the persons *to* whom such terms may be granted are then enumerated; and mention is made of the several descriptions of property which may be the subject of demise. The nature of leases, and their incidents, are then fully considered: and the situation of persons having tenancies for a less term than years, such as—yearly tenants—tenants of lodgings—and persons in the *quasi* relation of Landlord and Tenant, are discussed. The changes in the relative situation of the parties are pointed out, whether they are consequent upon an assignment of the reversion, or of the term—either absolutely or by way of mortgage—upon under-leases, attornments, writs of execution against the tenant, his bankruptcy or insolvency, the marriage or death of either party, or the sale of the property. The several methods by which the contract may be determined are shown; and the nature and operation of surrenders, forfeitures, notices to quit, and other means of determination, are explained.

Rent being the most important of the rights and liabilities of the parties, the Second Book begins with a full discussion of that subject: it then proceeds to explain the nature and propriety of proceedings to recover rent—by distress—by notice to the sheriff when the tenant's goods are taken in execution, or by extent, or the tenant is outlawed—by action at law—and by suit in equity. The nature of taxes, rates and assessments, and the effects of contracts respecting

them, are shown: and the important subjects of repair, cultivation, timber, waste, fixtures, and the survey and valuation of dilapidations, are fully developed. The nature of the other usual contracts, relative to insurance, not parting with the premises without the lessor's license, residence on the premises, trading, and quiet enjoyment are treated of. The rights and liabilities of the parties on the termination of the contract are considered; amongst which are mentioned, the consequences of holding over after the tenancy has expired, the nature of emblements, and the situation of outgoing and incoming tenants. The book concludes with the mention of several miscellaneous rights and liabilities, such as commons, ways, lights, tithes, game and fishing, and the like.

The Third Book explains the several species of action applicable to persons in the situation of Landlord and Tenant. The subject of Procedure in Equity is next considered: in the first instance generally, and then as connected with the subject-matter of the work. The book concludes with a description of such offences against the Criminal Law as relate to the subject of Landlord and Tenant.

The Fourth Book contains a full collection of precedents of leases —agreements, both for the granting of terms, and other things connected with the work—assignments—attornments—surrenders—and notices to quit, to pay rent, and to repair: it then gives particular directions as to the practical mode of proceeding to levy a distress, or obtain rent where the tenant's goods are taken in execution: and concludes with a collection of such of the Forms, in the actions treated of in the work, as are of general utility and in constant use.

To the whole is added a full Index, in which the analytical arrangement of the work is recast in alphabetical order, and much enlarged, for the purpose of affording facility of reference.

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THE

LAW

OF

LANDLORD AND TENANT.

BOOK I.

THE CONTRACT BETWEEN LANDLORD AND TENANT.

CHAPTER I.

BY WHOM TERMS MAY BE GRANTED.

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SECT. 1.—*Tenants in Fee.*

Who may lease generally.

ALL persons who are not under any legal disability may grant leases for such terms as are not inconsistent with the nature and quantity of the estates which they have: but it is necessary that the party granting the lease,—and who is called the lessor,—should be in possession of the lands intended to be leased; for if he have a mere right of entry, he cannot grant it to another.

Leases by Tenant in Fee.

The most extensive estate a man can have in lands and tenements is a tenancy in fee simple; and the person who possesses it is called a tenant in fee simple, and is defined to be one who has lands or tenements to hold to him and his heirs for ever (*a*): such persons may make leases without limitation or restraint (*b*). A lease of lands of which the lessor was seised in fee, and of other lands of which he was seised for life (with power of leasing), at one entire rent, but which was not well executed according to the power, was held to be good after the death of the lessor for the lands in fee, though not for the other lands.

SECT. 2.—*Tenants in Tail.*

Power of Tenant in Tail to lease.

By the common law, a tenant in tail could make no leases which should bind either his issue in tail or the reversioner; but by the statute 32 Hen. VIII. c. 28, commonly called the Enabling Statute, a tenant in tail has power, by observing the directions therein specified (*c*), to bind his issue, so that they shall not, after his death, avoid such leases, as they might have done previously at common law, and may do still, if the statute be not pursued. If a tenant in tail reserve an entire rent upon a farm, in which some leasehold lands are mixed with the entailed lands, the lease is not good against the reversioner (*d*).

Confirmation by Issue in Tail.

A lease for years by a tenant in tail, since the statute De Donis, is not absolutely determined by his death, but the issue in tail is at liberty either to affirm or avoid it, as he may think fit (*e*). Acceptance by the issue in tail of the rent (*f*), or fealty, or bringing an action for the recovery thereof, or an action of waste, have been considered such acts as amount to a confirmation of the lease, because they plainly manifest an intent to continue the lessee in possession upon the terms of his lease. A lease at common law by the tenant in tail differs from a rent granted by such tenant; for the last is void by the death of the grantor: whereas the former is only voidable by the issue in tail, whose acceptance of rent amounts to a confirmation (*g*).

Tenants in Tail after Possibility of Issue extinct.

An estate in tail after possibility of issue extinct, is where one is tenant in special tail, and the person from whose body the issue was to spring dies without issue, or having issue, that issue becomes ex-

(*a*) An heir *apparent* is he who, if he survive his ancestor, must succeed; an heir *presumptive* is he who, although heir, if the ancestor died presently, *may* be ousted by the intervention of a nearer title. *Anon.* Lofft, 273.

(*b*) Semble, that the owner of land agreeing to grant a lease, does not thereby impliedly engage that he has a good title to the fee simple, and that he will deliver a written abstract. *Temple* v. *Brown*, 6 Taunt. 60. See also *Gwillim* v. *Stone*, 3 Taunt. 433.

(*c*) See post, Chap. IV., Sect. 18, (c).

(*d*) *Rees* d. *Parkins* v. *Philip*, Wightw. 69.

(*e*) Bac. Abr. tit. *Leases*, (D).

(*f*) *Doe* d. *Southouse* v. *Jenkins*, 5 Bing. 469; 3 Moore & Payne, 59. See also *Doe* d. *Phillips* v. *Rollings*, 4 Com. B. R. 188.

(*g*) Cruise's Dig. tit. II. c. 2, s. 8; Bro. Abr. tit. *Grant*, 145; 2 Lord Raym. 779. And see *Andrew* v. *Pearce*, 1 New Rep. 158.

tinct (*h*). The law looks upon this estate as equivalent to an estate for life only: his power to demise, therefore, will come more properly under consideration in the next section.

SECT. 3.—*Tenants for Life.*

Ability of Tenant for Life to lease.

A tenant for his own life, unless he has a special power for that purpose, can make no leases to continue longer than his own life; for they are absolutely void at his death (*i*).

Confirmation by Remainder-man.

Although, generally, the acceptance of rent by a person who is entitled to set aside a lease, will confirm it (*k*); yet a lease which is absolutely void against him in remainder, cannot be set up in a court of law by such remainder-man's acceptance of rent, and suffering the tenant to make improvements after his interest vests in possession (*l*); but when the remainder-man lies by, and suffers the lessee or assignee to lay out money in rebuilding, and may be presumed to have had notice of the fact, he will be prevented in a court of equity from controverting the lease afterwards (*m*): and, even at law, subsequent acceptance of rent, or other acknowledgment of tenancy, may be evidence of a new demise by the remainder-man from year to year (*n*); the lessee being a mere tenant by sufferance in the interval (*o*). The liability of a lessee of tenant for life ceases with the determination of the estate by the death of the lessor; nor is the lessee estopped from showing that the estate has so determined (*p*). But if a tenant for life, seised also of the remainder in fee expectant on an intervening estate tail in the premises, make a lease, the demise, though defeated by his death as to his life estate, may ultimately take effect for the residue of the term out of his remainder in fee, by the decease of the tenant in tail without issue, and without his having acquired the fee by a proper mode of assurance (*q*). If a tenant for life grant a lease for years, and then surrender or forfeit his estate, the lease will remain

(*h*) 2 Black. Com. 124.

(*i*) Bac. Abr. tit. *Leases*, (I); *Doe* d. *Potter* v. *Archer*, 1 Bos. & Pul. 531. And see *Roe* d. *Jordan* v. *Ward*, 1 H. Black. 97. Wherever there is a tenancy for the term of life, there must necessarily be a remainder, which is the residue of an estate in land depending upon a particular estate, and created together with it. Thus if a man seised in fee let lands or tenements for years, with remainder over to another for life, in tail or in fee; here the estate for years is called a particular estate, as being carved or sliced out of the fee; and the subsequent disposition is called a remainder. There may be more than one remainder; but the particular estate, together with all the remainders, are considered in law as but one estate.

(*k*) *Doe* d. *Joliffe* v. *Sybourn*, 2 Esp. 677.

(*l*) *Doe* d. *Simpson* v. *Butcher*, Dougl. 50; *Jenkins* d. *Yates* v. *Church*, Cowp. 482; *James* d. *Aubray* v. *Jenkins*, Bull. N. P. 96; *Doe* d. *Martin* v. *Watts*, 7 Term Rep. 83; 2 Esp. 501; *Doe* d. *Collins* v. *Weller*, 7 Term Rep. 478; *Jones* d. *Cowper* v. *Verney*, Willes, 169.

(*m*) *Stiles* v. *Cowper*, 3 Atk. 692. And see *East India Company* v. *Vincent*, 2 Atk. 83; *Jackson* v. *Cator*, 5 Ves. jun. 688; and *Dunn* v. *Spurrier*, 7 Ves. 231, 235, 236.

(*n*) *Doe* d. *Martin* v. *Watts*, 2 Term Rep. 83; *Roe* d. *Jordan* v. *Ward*, 1 H. Black. 97; *Roe* d. *Brune* v. *Prideaux*, 10 East, 187; *Doe* d. *Collins* v. *Weller*, 7 Term Rep. 478; *Doe* d. *Tucker* v. *Morse*, 1 B. & Adol. 365. And see *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. Rep. 998.

(*o*) *Preston* v. *Love*, Noy, 120; *Roe* d. *Jordan* v. *Ward*, 1 H. Black. 99.

(*p*) *Brudnell* v. *Roberts*, 2 Wils. 143.

(*q*) *Taylor* v. *Stibbert*, 2 Ves. jun. 437, 442. And see 3 & 4 Will. IV. c. 74, s. 40.

good during his life, if the years so long continue (*r*). A lease executed by a tenant for life, in which the reversioner, who was then under age, is named, but which was not executed by him, is void on the death of the tenant for life, and an execution of it by the reversioner afterwards is no confirmation so as to bind the lessee, for it is not his covenant (*s*).

Leases by tenants for life under powers.

Where a tenancy for life is created, with power to make leases which may continue beyond the existence of the life, such leases, provided they are in strict accordance with the terms of the power, will be binding upon the remainder-man: but a lease granted under a power by a tenant for life, who has a bare naked power without any legal interest, and which is not authorized by the power, is void, and consequently not capable of being confirmed by the remainder-man having accepted rent (*t*).

Tenancy pur autre Vie.

Where a person holds for the term of another's life, he is called tenant pur autre vie; leases made by him, of course, determine on the death of the cestui que vie, or person during whose life he holds, but not on his own death (*u*) (*x*); and a lease by him may be made to commence after his death (*y*).

(*r*) *Sutton's case*, 12 Mod. 557, 558.

(*s*) *Ludford* v. *Barber*, 1 Term Rep. 86. But *quære* how far the lessee would have been estopped, if the lessor had not himself shown, by his declaration, that the lease was not executed by the reversioner until after the death of the tenant for life.

(*t*) *Miller* v. *Maynwaring*, Cro. Car. 398, 399; *Jenkins* d. *Yates* v. *Church*, Cowp. 482. See post, Sect. 23, *Leases by Persons having Powers;* and as to the form of such leases, post, Chap. IV. Sect. 17.

(*u*) Com. Dig. tit. *Estates* (E 1); 2 Black. Com. 136.

(*x*) To remedy a difficulty which frequently occurred in proving the death of the cestui que vie, or person for whose life the estate was held, when he had gone abroad, the statute 19 Car. II. c. 6, was passed, whereby, after reciting, sect. 1, that whereas divers lords of manors and *others* have used to grant estates by copy of court-roll for one, two or more lives, according to the custom of their several manors, and have also granted estates *by lease* for one or more life or lives, or else for years determinable upon one or more life or lives; and it hath often happened that such person or persons for whose life or lives such estates have been granted have gone beyond the seas, or so absented themselves for many years, that the lessors and reversioners cannot find out whether they be alive or dead; by reason whereof such lessors and reversioners have been held out of possession for many years after all the lives upon which such estates depended are dead, in regard that the lessors and reversioners, in actions for recovery of their tenements, have been put to prove the death of their tenants when it was almost impossible to discover the same; for remedy thereof it was enacted, sect. 2, that if such person or persons for whose life or lives such estates have been or shall be granted, shall remain beyond the seas, or elsewhere absent themselves in this realm for seven years together, and no sufficient proof be made of their lives in any action for recovery of such tenements by the lessors or reversioners, in such case they shall be accounted dead, and the judges shall direct the jury to give their verdict accordingly.

By sect. 5, it was provided, that if any person shall be evicted out of any lands or tenements by virtue of the act, and afterwards such person or persons upon whose life or lives such estate or estates depend shall return again from beyond seas, or shall on proof in such action as aforesaid be made appear to be living or to have been living at the time of the eviction; that then and from thenceforth the tenant or lessee who was ousted of the same, his or their executors, administrators or assigns, may re-enter, re-possess, have, hold and enjoy the said lands or tenements, in his or their former estate, during the life or lives, or for so long a term as the said person or persons upon whose life or lives the said estate or estates depend, shall be living; and shall upon action brought by them against the lessors, reversioners, tenants in possession, or other persons respectively, which since the said eviction received the profits of the said lands or tenements, recover for da-

(*y*) *Utty Dale's case*, Cro. Eliz. 182.

SECT. 4.—*Joint Tenants and Tenants in Common.*

Powers of Joint Tenants and Tenants in Common to lease to Strangers.

Joint tenants and tenants in common may, according to the interests they have, join or sever in making leases; and such leases shall bind, whether made to commence in præsenti or in futuro (*z*) (*a*). If joint tenants join in a lease, this shall be but one lease, and they all make but one lessor, for they have but one freehold; but if tenants in common join in a lease, it shall be several leases of their several interests (*b*): for although tenants in common cannot make a joint lease of the whole of their estate (*c*), yet if they join in a lease for years by indenture of their several lands, it is the lease of each for their respective parts, and the cross confirmation of each for the part of the other, and no estoppel on either part, because an actual interest passes

mages the full profits thereof, with lawful interest from the time he or they were ousted and kept out of the same lands or tenements; and this as well in the case where the said person or persons upon whose life or lives such estate or estates did depend are or shall be dead at the time of bringing such action, as if they were then living.

And by statute 6 Ann. c. 18, it was enacted, that any person who hath or shall have any claim to any remainder, reversion, or expectancy, in or to any estate, after the death of any person within age, married woman, or other person whatsoever, upon affidavit in the Court of Chancery that they have cause to believe that such party is dead, and that the death is concealed, may once a year move for an order on the guardian, &c. suspected to conceal the person, to produce and show the person, and on neglect or refusal he shall be taken to be dead, and it shall be lawful for any person claiming any right, title, or interest, in remainder or reversion, or otherwise, after the death of such infant, &c. to enter upon such lands, &c. as if such infant, &c. were actually dead.

Provided, sect. 3, that if it shall afterwards appear, upon proof in any action brought, that such infant, &c. for whose life any such estate is holden, were alive at the time of such order made, that then it shall be lawful for such infant, married woman, or other person, having any estate or interest determinable upon such life, to re-enter upon the said lands, &c. and for such infant, married woman, or other person, having any estate or interest determinable upon such life, their executors, administrators, or assigns, to maintain an action against those who since the said order received the profits of such lands, &c. or their executors or administrators, and therein to recover full damages for the profits so received from the time that such infant, &c. were ousted of possession.

Provided also, sect. 4, that if such guardian, trustee, husband or other person holding or having any estate or interest determinable upon the life or lives of any other person or persons, shall, by affidavit or otherwise, to the satisfaction of the Court, make appear that they have used their utmost endeavours to procure such infant, &c. to appear in the said Court or elsewhere, according to the order of the said Court, and that they cannot procure or compel such infant, &c. so to appear, and that such infant, &c. is, are, or were living at the time of such return made and filed as aforesaid, then it shall be lawful for such person or persons to continue in possession of such estate and receive the rents and profits thereof during the infancy of such infant, and the life or lives of such married woman or other person or persons, on whose life or lives such estate or interest depends, as fully as they might have done if the Act had not been made.

And by sect. 5, every person who, as guardian or trustee for any infant, and every husband seised in right of his wife only, and every other person, having any estate determinable on any life or lives, who after the determination of such particular interests, without the express consent of the next immediately entitled, shall hold over and continue in possession of any manors, messuages, lands, tenements or hereditaments, shall be adjudged trespassers; and the party entitled, and their executors and administrators, may recover in damages against every such person or persons so holding over, and their executors and administrators, the full value of the profits received during such wrongful possession.

(*z*) Co. Litt. 186a; Com. Dig. *Leases*, (I. 5); Bac. Abr. tit. *Joint Tenants and Tenants in Common*, (H. 1); Co. Litt. 186; Bro. Abr. *Grant*, 154.

(*a*) Before a joint tenant leases his share he ought to sever the tenancy.

(*b*) 2 Ander. 16; *Jourdain* v. *Steere*, Cro. Jac. 83; Com. Dig. tit. *Estates*, (G. 6).

(*c*) *Heatherley* d. *Worthington* v. *Weston*, 2 Wils. 232; *Doe* v. *Errington*, 1 Ad. & Ell. 750; *Burne* v. *Cambridge*, 1 Moo. & Rob. 539.

from each respectively, and that excludes the necessity of an estoppel (*d*). Where joint tenants concur in granting a lease, the interest of the lessee continues, notwithstanding the decease of either of the lessors, and the survivor is entitled to the whole rent (*e*). So, if the lease be at will, the death of one of the lessors does not operate as a countermand of the tenancy even for a moiety; all survives to the other, and if the lessee continue his possession, the survivor may maintain an action for the whole rent on account of the privity (*f*). But though each joint tenant is considered entitled to the whole while the joint tenancy continues, and is said to be seised *per my et per tout*, that is, by the half and by the whole (*g*), yet, for the purposes of alienation, each has an exclusive right to, and dominion over, a moiety; and, therefore, if one of two joint tenants make a lease of the whole, his moiety only will pass (*h*). So a lease purporting to be made by both, and executed by one only, is a good lease for the moiety of him only who has executed (*i*).

If one joint tenant makes a lease of his moiety for years, and die before the lessee's entry, the lease will bind the survivor, and the lessee shall retain his interest in the moiety demised until his term expire. And so one joint tenant may make a lease to commence after his death, and his co-tenant, if he survive, will be bound by it (*j*).

To each other.

One joint tenant or tenant in common may make a lease for years of his part to his companion; for it only gives the latter a right of taking the whole profits, instead of the moiety; and he may contract with his companion for that purpose, as well as he may with a stranger (*k*); and such a lease extinguishes the jointure for the time (*l*). If there be three or more joint tenants, the lessee would hold the share demised to him as tenant in common with the others (*m*).

SECT. 5.—*Coparceners.*

Definition of Estate in Coparcenary.

Where tenant in fee or in tail dies, leaving several daughters and no sons; or several sisters and no issue, or no brothers; or several aunts, &c., lands descend among all the daughters, sisters, aunts, &c., equally, who make but one heir, and are called coparceners: therefore, if a man leases, rendering 2*s*. rent, and if he die, his heir being within full age, then 20*s*., and afterwards die, leaving two daughters, the one

(*d*) Com. Dig. tit. *Estates*, (K. 8); Bac. Abr. tit. *Joint Tenants and Tenants in Common*, (H. 1); *Mantle* v. *Wollington*, Cro. Jac. 166; *Brooks* v. *Foxcroft*, Clayt. 137; 1 Roll. Abr. 877, l. 48, 52.

(*e*) *Henstead's case*, 5 Rep. 10 b; *Doe* d. *Aslin* v. *Summersett*, 1 B. & Adol. 135, 140.

(*f*) *Henstead's case*, sup.

(*g*) Litt. s. 288; Co. Litt. 186 a; 2 Black. Com. 182.

(*h*) Co. Litt. 186 a; *Bellingham* v. *Alsop*, Cro. Jac. 53.

(*i*) *Cartwright's case*, cited 1 Vent. 136.

(*j*) Litt. s. 289; *Grute* v. *Locroft*, Cro. Eliz. 287; *Harbin* v. *Barton*, Moor, 395; *Whitlock* v. *Horton*, Cro. Jac. 91; *Bellingham* v. *Alsop*, Cro. Jac. 52; *Clerk* v. *Clerk*, 2 Vern. 323.

(*k*) Com. Dig. tit. *Leases*, (I. 5).

(*l*) Co. Litt. 186 a.

(*m*) *Jurdain* v. *Steere*, Cro. Jac. 83; *Blackasper's case*, Noy, 13.

within age, the other of full age, the 20*s*. rent is not due; for his heir was not within age, both the daughters being but one heir, and only one being of full age (*n*).

Power of Coparceners to lease.

Joint tenants who are seised *per my et per tout*, that is, by the half or moiety and by all, each of them having the entire possession as well of every part as of the whole, when they lease, may each of them be said to demise the whole; but with respect to coparceners, though they have an unity, they have not an entirety of interest, but are properly entitled each to the whole of a distinct share, wherefore there is no survivorship among them (*o*). As coparceners, until partition is made, have one entire estate, they may therefore either join in a lease, or each may make a lease of her moiety or share. If they join in making a lease, the lease operates as with tenants in common as the separate demise of each of her share, and must be so pleaded (*p*). If they join in a lease they hold the rent reserved in common (*q*); the observations, therefore, made as to leases by tenants in common apply also to leases by coparceners. If two be coparceners of two acres, and one leases one acre, which on writ of partition is allotted to the other, the lease is wholly avoided (*r*) (*s*).

Sect. 6.—*Tenants for Years.*

Power to lease.

A lessee or tenant for years, who by his lease is not restrained from assigning or granting over his interest, clearly may lease for any fewer or less number of years than he himself has; and such derivative lessee is compellable to pay rent, perform covenants, &c., according to the terms agreed on (*t*). A termor so parting with a portion of his interest may distrain for the derivative rent, without any power reserved for that purpose; though a person who assigns his whole interest cannot, because he has no reversion (*u*); but such derivative lessee is not liable to the original lessor for the rent reserved on the original lease, otherwise than as his goods, &c., may be liable to a distress for rent in arrear to the original lessor, as any stranger's property may be; for there is no privity between him and the original lessors, as there is between a lessor and an assignee; and therefore such an one, though he take the whole term except one day, shall not be liable to any of the covenants in the original lease (*x*). The original lessor, however,

(*n*) Com. Dig. tit. *Parceners*, (A. 1) (A. 3).

(*o*) Bull. N. P. 107; 2 Black. Com. 182, 188; Co. Litt. 164 a.

(*p*) *Milliner* v. *Robinson*, Moore, pl. 939.

(*q*) 2 Prest. Abstr. 74.

(*r*) Co. Litt. 46, n. 5.

(*s*) Like joint tenants, coparceners have the same unity of interest, title and possession; and may sue and be sued jointly for matters relating to their own lands. But one coparcener cannot sue separately for her portion of rents accruing to her and her fellows. *Decharms* v. *Horwood*, 10 Bing. 526; 4 Moo. & Scott, 400. The subject of procedure to obtain partition will be treated of hereafter in the Book on Judicial Procedure. Vide post, Book III. Chap. X. Sect. 6.

(*t*) Bac. Abr. tit. *Leases*. And see *Rex* v. *Wilson*, 5 Man. & Ryl. 157, n.

(*u*) Bro. Abr. tit. *Distress*, 7.

(*x*) Bac. Abr. tit. *Leases*; *Holford* v. *Hatch*, 1 Doug. 183; *Brewer* v. *Hill*, 1 Anstr. 413, 419; *Anon.*, Moor, 93, pl. 230;

may evict the sub-lessee if the lessee has allowed the rent to be in arrear or has incurred a forefeiture (*y*). By an assignment, however, the entire interest of the lessee is transferred to the assignee, and the original lessor may sue the assignee or be sued by him on all the covenants in the original lease which run with the land (*z*).

Sect. 7.—*Tenants for a less Period than Years.*

Power of such Tenants to lease generally.

Tenants for a less period than for years, but who are possessed of a certain quantity of interest, may alienate the whole, or any part of it, unless restricted from so doing by agreement with the party from whom they derive that interest or estate, or by the terms upon which they take it. In fact every tenant has a right to make a sub-tenancy as incident to his tenancy: in order to do which, it is by no means necessary to have the first landlord's consent; unless by the terms of the agreement such consent is made necessary (*a*).

Tenants from Year to Year.

A tenant from year to year, therefore, may assign his term, or may underlet part of it, as for three-quarters of a year, or so many months, &c.; but he cannot by underletting grant an interest exceeding his own in point of duration. Upon the same principle, one possessed of lands or tenements for a less term, as for half a year, a quarter, or a month, or the like, may grant his interest, or any portion of it, to another; for while such interest continues, he has the absolute disposition of it, unless some agreement subsists between him and his lessor, which by circumscribing his power restricts him from making such disposition.

Tenants at Will.

A tenant at will, however, cannot grant a lease available against any one but himself, for there can be no such thing as an under-tenant to a tenant at will; the demise itself would amount to a determination of the will (*b*); neither can he surrender any more than he can grant; for to surrender also would be to determine his will and relinquish his estate (*c*).

With regard to the operation of such a lease upon the estate of the original lessor being the owner of the freehold, it would seem that the entry of the lessee of the tenant at will would operate by way of disseisin or not, at the election of the freeholder. And should he refuse

Earl of Derby v. *Taylor*, 1 East, 502; *Sparkes* v. *Smith*, 2 Vern. 275; *Pilkington* v. *Shaller*, 2 Vern. 374; *Doe* d. *Wyatt* v. *Byron*, 1 C. B. Rep. 623, 626. See post, Chap. IV. Sects. 3, 4. A rent-charge granted for life by a tenant for years is not void, but is good as a chattel interest; *Saffery* v. *Elgood*, 1 Ad. & El. 191; 3 Nev. & Man. 346. And the goods of a stranger not shown to hold the premises by title paramount to the rent-charge (as by a prior demise) may be distrained for the arrears. Id.

(*y*) *Arnsby* v. *Woodward*, 6 B. & C. 519; S. C. 9 Dow. & R. 536.

(*z*) 5 Hen. 7, 19 a; Cro. Jac. 309, 521, 522; 3 Rep. 22 b; 1 Saund. 240; *Walker* v. *Reeves*, 2 Dougl. 461, n.; *Spencer's case*, 5 Rep. 17 a; *Campbell* v. *Lewis*, 3 B. & Ald. 392; *Palmer* v. *Edwards*, 1 Dougl. 186, n.

(*a*) *Rex* v. *Aldborough*, 1 East, 598.

(*b*) *Shaw* v. *Barber*, Cro. Eliz. 830; *Birch* v. *Wright*, 1 Term Rep. 382.

(*c*) 1 Inst. 57 a; *Moss* v. *Gallimore*, 1 Dougl. 283; *Sweeper* v. *Randal*, Cro. Eliz. 156; *Spark's case*, Cro. Eliz. 676.

to treat the lease and entry as a disseisin, the lessee would probably stand in the relation of a new tenant at will until converted into a tenant from year to year by acceptance of rent or other acknowledgment of a tenancy (*d*).

Tenants on Sufferance.

As a tenant at will cannot grant or surrender, so à fortiori cannot a tenant on sufferance (*e*).

SECT. 8.—*Corporations.*

Their Divisions.

Corporations are either ecclesiastical or lay, the latter being divided into eleemosynary and civil. The Universities of Oxford and Cambridge are regarded as civil corporations (*f*).

Dispositions of their Property.

Corporations cannot make any disposition of their property, or relating to it, without deed, sealed by their common seal; thus they cannot, without deed, make a lease for years (*g*). Though the affixing of the common seal to a deed of conveyance by a corporation is sufficient to pass the estate without a formal delivery, if done with that intent; yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands until accounts have been adjusted with the purchaser (*h*). A lease by the warden and poor of a hospital under the corporation seal, made before the expiration of a former lease, to a lessee who then had only a part interest in the first lease, but to whom the entire interest was assigned within three years afterwards, was held to be binding upon the succeeding warden and poor of the hospital (*i*). Where a lease was made by certain persons by name, as the master and governors of a hospital, and the covenants were made by and to the master and governors and their successors, the lease being sealed with their common seal, but not signed by any one on their part, it was held that an action could not be brought on it in the names of some of the governors so named, who survived (*k*). A lease to charitable uses by a corporation of lands already in mortmain is not affected by the provisions of the statute 9 Geo. II. c. 36 (*l*). By statute 2 & 3 Will. IV. c. 69, leases and other dispositions of lands of municipal corporations, for providing for expenses of elections of members of parliament, are declared void.

(*d*) 1 Platt on Leases, 105; *Blunden* v. *Baugh*, Cro. Car. 302; *Gerrard* v. *Norris*, Latch. 53; *Fisher's case*, Latch. 75; *Powsley* v. *Blackman*, Cro. Jac. 659.

(*e*) See post, Chap. V., Sect. 4.

(*f*) *Parkinson's case*, Carth. 93; *R.* v. *Vice-Chancellor of Cambridge*, 3 Burr. 1656.

(*g*) *Dean and Chapter of Rochester* v. *Pierce*, 1 Campb. 466; *Furloy* d. *Mayor, &c. of Canterbury* v. *Wood*, 1 Esp. 198; *R.* v. *Inhabitants of Chipping Norton*, 5 East, 239, 242; *Southwark Bridge Company* v. *Sills*, 2 C. & Pa. 371; *Smith* v. *Barrett*, 1 Sid. 162; *Patrick* v. *Balls*, Carth. 390; *Wood* v. *Tate*, 2 New Rep. 247; *Carter* v. *Dean and Chapter of Ely*, 7 Sim. 211, 217; *Bird* v. *Higginson*, 6 Ad. & Ell. 284; *R.* v. *North Duffield (Inhabitants)*, 3 Mau. & Sel. 247; 1 Kyd on Corp. 263.

(*h*) *Derby Canal Company* v. *Wilmot (Bart.)*, 9 East, 360.

(*i*) *Grumbrell* v. *Roper*, 3 Barn. & Ald. 711.

(*k*) *Cooch* v. *Goodman*, 2 Q. B. Rep. 580; 2 Gale & Dav. 129.

(*l*) *Walker* v. *Richardson*, 2 Mee. & Wels. 882; Mur. & Hurl. 251.

Appointment of Attorney, when necessary.

Where any personal act is necessary in the case of a corporation, that act must be done by attorney appointed by deed under their common seal (*m*): for however it may be as to ordinary services, yet they cannot appoint a person to do any act which concerns their interest or title in land, unless it be by deed (*n*):—therefore, an appointment of an attorney to make or to take livery of seisin, or the like, without deed, is void. If they accept rent from the assignee of a lease made by them, that must be by power of attorney, in order to discharge the original lessee: unless the corporation have a particular officer, whose business it is to manage the revenues—as is the case of the city of *London*. Wherever delivery of a deed is necessary, that must be done by attorney, who must have a letter of attorney for that purpose. A corporation cannot appear in court but by an attorney (*o*).

Name of the Corporation.

It is a general rule, that a corporation cannot either take or grant but by its proper name of incorporation; though every minute variation in the name is not so material as to avoid a grant (*p*). As to naming the corporation, it need only be observed, that corporations *aggregate*, as dean and chapter, mayor and commonalty, warden and fellows, &c., may make or confirm leases without expressing either the christian or surname of the dean, mayor, warden, &c., because, in their politic capacity as a corporation aggregate, they continue always the same, and are said never to die; but in leases or confirmations by a bishop, dean, mayor, &c., or other *sole* corporation, both the christian and surname, or at least the christian name, ought to be expressed (as John, Bishop of P.), because they are subject to death and succession, &c., and therefore must be particularly named, to show whose lease, &c., it was (*q*) (*r*).

Leases by Parish Officers.

Churchwardens alone cannot execute leases as a body corporate of parish lands under the statute 59 Geo. III. c. 12, s. 17 (*s*), by which parish officers are enabled to hold parish property in land in the character of a corporation; the overseers ought to join (*t*). A demise to

(*m*) *Doe* d. *Bank of England* v. *Chambers*, 4 Ad. & Ell. 410; S. C. 6 N. & M. 539; 1 Kyd on Corp. 268.

(*n*) Bac. Abr. tit. *Corporations*, (E. 3).

(*o*) 1 Kyd on Corp. 270.

(*p*) 1 Kyd on Corp. 234, 237. See *Carlisle* (*Mayor*) v. *Blamire*, 8 East, 487.

(*q*) 2 Inst. 666; Bac. Abr. tit. *Leases*, (G. 3).

(*r*) The constitution of dean and chapter in the present day differs materially from the ancient corporation of abbot and convent. The convent were considered all dead men in law, and incapable of granting their interest except by their superior or head; and therefore if an abbot and convent were parsons impersoné of a church, the abbot was said to grant with the consent of the rest; but a dean and chapter may make leases in their joint names of the possessions which they hold as a corporation aggregate. So in a corporation of master and fellows of a college, the master is but a constituent part, and is one of the grantors like the rest. Chamb. on Leases, 33; Dyer, 40; *Anon.*, 12 Mod. 232.

(*s*) This enactment does not apply to copyhold land. *Doe* d. *Bailey* v. *Foster*, 3 Com. B. R. 215.

(*t*) *Phillips* v. *Pearce*, 5 Barn. & Cress. 433; 8 Dowl. & Ryl. 43. See also *Doe* d. *Jackson* v. *Hiley*, 10 Barn. & Cress. 885; 5 Man. & Ryl. 706; *Allason* v. *Stark*, 9 Ad. & El. 255; 1 Per. & Dav. 183; *Attorney-General* v. *Lewin*, 8 Sim. 366; *Rumball* v. *Munt*, 8 Q. B. Rep. 382; *St. Nicholas, Deptford* (*Churchwardens, &c.*) v. *Sketchley*, 8 Q. B. Rep. 394.

them in their name of office is good, and their acceptance need not be by an instrument under seal (*u*). And where the churchwardens and overseers of a township leased lands belonging to the poor to the plaintiff for a term of years, covenanting that it should be lawful for him to take all manure, &c., from the poor house, and use it upon the demised premises, and the plaintiff covenanted to provide straw for the use of the poor; it was held by Bayley, J., that the plaintiff could not maintain trover against a succeeding overseer, who used the manure from the poor house on his own land, even although it arose from the straw supplied by him, as the covenant entered into by previous overseers could not bind their successors in office (*x*). A person holding under a lease granted by parish officers before the statute, is a tenant from year to year (*y*). In the making of leases under this statute, the terms of it must be strictly observed; therefore, a memorandum not signed by all the parish officers, or by their order, is not a lease pursuant to 59 Geo. III. c. 12, s. 17 (*z*).

Leases of Hospital Lands.

By stat. 39 Eliz. c. 5, s. 2, leases of lands for the support of hospitals and houses for the poor must not exceed twenty-one years, and be in possession, with the accustomable yearly rent or more reserved.

Leases by Municipal Corporations.

By the Municipal Corporation Reform Act, 5 & 6 Will. IV. c. 76, ss. 94, 95, 96, the powers to lease the lands of those corporations are restrained and regulated.

Sect. 9.—*The Crown.*

Power of the Crown to lease.

The sovereign is a sole corporation, and at common law the crown might have granted leases for lives or for years to any extent, and thereby have bound the successor. The power was, however, greatly restrained by the 1 Ann. sess. 1, c. 7, ss. 5, 6, which avoided leases of crown lands, except of advowsons and vicarages made for a larger period than thirty-one years or three lives. By the same statute, reversionary leases are not to exceed those periods. The tenant is to be punishable for waste; there must be reserved not less than the rent usually reserved for the greater part of the previous twenty years, or not less than a third of the clear yearly value. In the case of buildings, the lease may be extended to fifty years, and by subsequent statutes to ninety-nine years. In modern times the crown lands have been placed principally under the control of the Commissioners of Woods, Forests, &c., under the statutes 10 Geo. IV. c. 50, 2 & 3 Will. 4, c. 1, and 8 & 9 Vict. c. 99, and leases must be made as thereby directed (*a*).

(*u*) *Smith* v. *Adkins*, 8 M. & W. 362; *Goldsworth* v. *Knights*, 11 M. & W. 337.

(*x*) *Snowden* v. *Elmsley*, 3 Stark. 28.

(*y*) *Doe* d. *Higgs* v. *Terry*, 4 Ad. & El. 274; 1 Har. & Wol. 547; 5 Nev. & Man. 556; *Doe* d. *Hobbs* or *Higgs* v. *Cockell*, 4 Ad. & El. 478; 6 Nev. & Man. 179.

(*z*) *Doe* d. *Lansdell* v. *Gower*, 21 Law J. 57, Q. B.

(*a*) See 34 Geo. III. c. 75; 48 Geo. III. c. 73; 52 Geo. III. c. 161, and 1 & 2 Geo. IV. c. 52; 1 & 2 Will. IV. c. 5; 1 & 2 Vict. c. 95.

Where a lease by the Commissioners of Woods, Forests, &c. provided, that the commissioners for the time being might determine the lease by a month's notice under their hands, a notice by two of them was held sufficient (*b*). By 15 & 16 Vict. c. 62, the Commissioners of Woods, Forests, &c. are empowered to release breaches of covenants in leases, &c., and by sect. 3, may apportion rents, &c. Leases of the king or queen regnant, whether made of lands held in right of the crown, or by another title, *ex. gr.*, or Duke of Lancaster, cannot be avoided on the ground of infancy (*c*).

By the common law leases granted by the crown, when invested with the possessions of the Duchy of Cornwall, were determinable by the subsequent birth of a son. But now, by stat. 1 & 2 Will. IV. c. 5, following various other statutes of the same kind, leases of the Duchy of Cornwall, made with certain formalities, are not voidable on that ground. The stat. 1 & 2 Vict. c. 101, revives and continues this act during such time as the duchy shall remain vested in her Majesty. Great care and accuracy are requisite in framing crown leases. A misnomer of the lessee will avoid the lease (*d*). So the misrecital of various matters, or the omission to recite them, or a misdescription, will in many cases vitiate the lease (*e*). A crown lessee, holding over after the determination of the lease, is liable to an information in the Exchequer (*f*).

Henry VIII., being seised of lands in fee in right of his crown, granted them by letters-patent in tail male to W., reserving rent to himself, his heirs and successors. After the passing of the stats. 22 Car. II. c. 6, and 22 & 23 Car. II. c. 24, Charles II., by letters-patent, referring to and professing to pursue the former statute, granted the rent to trustees named in sect. 2 of stat. 22 & 23 Car. II. c. 24, their heirs and assigns, and the trustees granted the rent to a dean and chapter, and their successors, for ever. It was held, in the Queen's Bench, and by the Court of Exchequer Chamber on error, that the grant to the trustees was not authorized by either statute, the rent being reserved upon an estate whereof the reversion was in the crown, and therefore being within the exception in sect. 3 of stat. 22 Car. II. c. 6. It was further held, in the Queen's Bench, and semble, by Exchequer Chamber on error, that, on demurrer to an avowry for a distress on the land by the dean and chapter, stating the conveyances as above, but not setting out the recitals or the terms of the grants, that it was to be taken that the truth appeared on the face of the grant of the rent to the trustees,

(*b*) *Coombes* v. *Dutton*, 5 Mee. & W. 469.

(*c*) *Case of the Duchy of Lancaster*, Dyer, 209 b; Plowd. 212 b; Bacon on Leases, 12; *Alcock* v. *Cooke*, 5 Bing. 340; 4 Inst. 209. As to the effect of omissions to recite existing leases in those granted by the Duchy of Lancaster, see *Alcock* v. *Cooke*, sup., and as to enrolment, see *Kinnersley* v. *Orpe*, 1 Dougl. 56; *Rowe* v. *Brenton*, 8 B. & C. 737, 756; 3 M. & R. 133, 233.

(*d*) *Legat's case*, 10 Rep. 112 a.

(*e*) *Wing* v. *Harris*, Cro. Eliz. 231; *Fulham* v. *Fulham*, March, 206; 2 Bla. Com. 348; *Aprice* v. *Hayes*, Hardr. 498; *Stockdale's case*, 12 Rep. 86.

(*f*) 3 Bla. Com. 261. For further particulars as to this subject, see 1 Platt on Leases, part iii. chap. i. sect. 4.

and therefore that the crown did not appear to be deceived (as not having the power to grant the rent in fee simple), nor was the grant void on that account, but that it operated not as a grant in fee simple, but of a rent determinable on the failure of the estates tail; and, further, that there was thus no ground for the objection that a subject might have a right to distrain on the crown when the reversion fell in, although the avowry alleged that the trustees became seised in fee of the rent. Also, that the grant, in effect, by severing the rent from the reversion, converted it from a rent-service to a rent-seck, which, if paid for three years of the space mentioned in stat. 4 Geo. II. c. 28, s. 5, might be distrained for. It was also held by the Queen's Bench, and semble, by the Exchequer Chamber on error, that the grant of such rent-seck by the trustees to a dean and chapter was not void by the Statutes of Mortmain, the rent not being perpetual. It was also decided by the Exchequer Chamber, that the avowry was bad on general demurrer, for not expressly averring attornment by the terre-tenant to the grant by the trustees, or that such grant was made after stat. 4 Ann. c. 16, and that the defect was not supplied by an averment that the rent had been paid, not saying to whom, and not saying that the payment was made in the life of the grantor; nor by an averment, following the statement of the grant by the trustees, "whereupon and whereby" the grantees became and were seised of the rent, and an averment that the rent was due and in arrear to them (*g*) (*h*).

SECT. 10.—*The Master of the Rolls.*

Leases by the Master of the Rolls.

By statutes 17 Geo. III. c. 59; 20 Geo. III. c. 32; and 6 & 7 Will. IV. c. 49, the Master of the Rolls is empowered to make leases of tenements, vested in him by virtue of his office, under certain restrictions (*i*). The 1 Vict. c. 46, s. 2 (repealing 17 Geo. III. c. 59), vests the Rolls' estates in the queen, as part of the possessions of the crown, within the ordering and survey of the Court of Exchequer, subjecting them to the provisoes, &c. contained in the 10 Geo. IV. c. 50, and 2 Will. IV. c. 1, and to all such other provisions, &c. as the other possessions of the crown within the ordering of the Exchequer are subject to.

SECT. 11.—*Ecclesiastical Persons.*

Power of Ecclesiastical

By the common law, all ecclesiastical corporations *aggregate* pos-

(*g*) *Vigers* v. *Dean of St. Paul*, 14 Q. B. Rep. 911.

(*h*) As to property of the crown being affected by lands clauses in canal acts, and as to adverse possession against the crown, see *Doe* d. *The Queen* v. *The Archbishop of York*, 14 Q. B. Rep. 81.

(*i*) See *Wilson* v. *Sewell*, 4 Burr. 1975; 1 W. Black. 617.

Persons to lease by Common Law.

sessed the power of making any leases they thought fit, without the confirmation of any person (*j*); and a similar power was possessed by eleemosynary corporations, as masters and fellows of colleges, masters of hospitals, and their brethren (*k*). But ecclesiastical corporations *sole*, as bishops, deans, archdeacons, prebendaries, precentors, chancellors, parsons and vicars, and others, could make laws binding on their successors, of lands and tenements whereof they were seised in their corporate right, only with the consent, and in some cases with the confirmation, of such persons as the law required (*l*).

Statutes. 32 Hen. VIII. c. 28.

By the *enabling* statute, 32 Hen. VIII. c. 28, bishops and the rest of the said spiritual persons (except parsons and vicars) may make leases of their spiritual livings for three lives or twenty-one years only, without confirmation, provided they comply with the conditions imposed by that statute. Those conditions are:—1st. That the leases must be by indenture, and not by deed-poll or by parol. 2ndly. That if there be an old lease in being, it must be expired, surrendered or ended within one year next after making the new lease. 3rdly. The lease must be made to begin from the making thereof, and must not be of any reversion of lands. 4thly. It must be of lands and tenements that have been most commonly let for twenty years next before the making of such lease. 5thly. It must be of lands, &c. manurable or corporeal, which are necessary to be let, and whereout a rent may issue. The statute therefore does not apply to things which lie in grant, as advowsons, fairs and the like (*m*). 6thly. The lease must not be made without impeachment of waste. 7thly. It must not be made for more than twenty-one years *or* three lives from the day of the making. And, 9thly. There must be reserved yearly upon such lease the rent accustomably paid within twenty years next before such lease. The 4th section of this act provides, that it shall not extend to enable any parson or vicar to lease or grant his church lands, tithes, &c., otherwise than he might have done before the act. A prebendary is within this statute (*n*), as also a chancellor of a cathedral church (*o*); so are all ecclesiastical corporations sole, such as bishops, &c. but not corporations aggregate, such as deans and chapters, &c. (*p*) Next follows in order of time the *disabling* or *restraining* statute, 1 Eliz. c. 19, applicable to archbishops and bishops only, and made entirely for the benefit of the successor. This statute, s. 5, enacts, that all grants by archbishops and bishops, including even those confirmed by the dean and chapter, which were good at common law, other than

1 Eliz. c. 19.

(*j*) Co. Litt. 44a.
(*k*) Ibid.
(*l*) Ibid.; Shep. Touch. 281; Co. Litt. 67a. As to the proper parties to confirm, see post, 20.
(*m*) By the 5 Geo. III. c. 17, this condition is dispensed with.
(*n*) *Acton* v. *Pritcher*, 4 Leon. 51; *Watkinson* v. *Mann*, Cro. Eliz. 350.
(*o*) *Bisco* v. *Holte*, Lev. 112; Sid. 158; *Ensden* v. *Dennis*, Palm. 105.
(*p*) 10 Rep. 60a.

for the term of twenty-one years, or three lives from the making, without reserving the usual rent, shall be void. Concurrent leases, if confirmed by the dean and chapter, are held to be within the exception of this statute, and therefore valid, provided they do not exceed (together with the lease in being) the term permitted by the act. By a saving clause, the statute does not extend to any grants made by any bishop to the crown; the stat. 1 Jac. I. c. 3 (*o*), however, extends the prohibition to grants and leases made to the king, as well as any of his subjects. Next comes the stat. 13 Eliz. c. 10 (*p*), which extends the restrictions of the stat. 1 Eliz. c. 19, to all spiritual corporations, whether sole or aggregate (*q*), and also to all eleemosynary corporations. This statute, s. 3, enacts, that all leases, gifts, &c. by any master or fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, [or other house for the sustentation or relief of the poor, 14 Eliz. c. 14, and 39 Eliz. c. 5, s. 2,] parson, vicar, &c. of any houses, lands, tithes, &c. [other than houses in any city, borough, town-corporate or market-town, or the suburbs thereof, not being the capital or dwelling-house used for the habitation of the persons aforesaid, and other than the grounds, not exceeding ten acres, to such house appertaining, 14 Eliz. c. 11, s. 17], being any parcel of the possessions of such college, cathedral church, &c. other than for twenty-one years or three lives, whereupon the accustomed rent or more shall be reserved yearly, shall be utterly void. By the 18 Eliz. c. 11, s. 2 (*q*), if there be any former lease which is not to expire, &c. within three years after the making of the new lease, such new lease shall be void. The 13 Eliz. c. 10, s. 4, also enacts (*q*), that the act shall not be construed to make good any lease or grant by such college or collegiate church in the Universities of Oxford or Cambridge, or elsewhere, for more years than are limited by the private statutes of such college. As parsons and vicars are not enabled, by the 32 Hen. VIII. c. 28, to make leases, so they are not enabled to make them by the 13 Eliz. c. 10, but merely prohibited by that statute from making them for more than twenty-one years or three lives: so that if they make a lease within this statute, confirmation

1 Jac. I. c. 3.

13 Eliz. c. 10.

14 Eliz. c. 14; 39 Eliz. c. 5, s. 2.

14 Eliz. c. 11, s. 17.

18 Eliz. c. 11, s. 2.

(*o*) The statute 1 Eliz. c. 19, leaving bishops their former power of granting to the queen, her heirs and successors, was to little effect, for many estates were granted to the queen purposely that she should grant them over to others; to prevent this fraud, the statute 1 Jac. I. c. 3, was passed. 11 Rep. 71; Gibs. Codex, 679.

(*p*) The statutes of 32 Hen. VIII. c. 28, and 13 Eliz. c. 10, are in *pari materia*, and must be taken together. *Doe* d. *Tennyson* v. *Yarborough* (*Lord*), 1 Bing. 24; 7 Moore, 258.

(*q*) 2 Black. Com. 320. The 5th and 6th sects. of the 18 Eliz. c. 11, empower St. John's College, Oxford, to let the manor of Fifield, Oxfordshire, to the kindred of their founder, Sir Thos. White, for ninety-nine years; and see 2 Black. Com. 322. The stat. 18 Eliz. c. 6, s. 1, also imposes particular restrictions on leases made by the Universities of Cambridge and Oxford, and by the Colleges of Winchester and Eton. The 22 Car. II. c. 11, s. 61, enables the dean and chapter of St. Paul's to make a lease of Newgate Market to the city of London from forty years to forty-eight years for ever.

is still necessary to its validity (r). All other ecclesiastical sole corporations are enabled, by the 32 Hen. VIII. c. 28, to make leases, provided they conform to the provisions of that statute; and the effect of the 13 Eliz. c. 10, is merely to restrain them from making the leases thereby prohibited.

39 & 40 Geo. III. c. 41.

The statutes of Elizabeth are, however, in some respects altered by the statute 39 & 40 Geo. III. c. 41, which enacts, sect. 1, that where any part of the possessions of any archbishop, bishop, master and fellows, dean or chapter, master or guardian of any hospital, or any other person or persons, or body or bodies politic or corporate, having any ecclesiastical living, shall be demised by several leases which was formerly demised by one; or where a part shall be demised for less than the ancient rent, and the residue shall be retained in the possession of the lessor; the several rents reserved on the separate demises of the specific parts shall be taken to be the ancient rents within the meaning of the statutes 32 Hen. VIII. c. 28, 1 Eliz. c. 19, 13 Eliz. c. 10, and 14 Eliz. c. 11. Sect. 2 provides, that no demise made before passing the act shall be valid, unless the several rents reserved upon the separate demises shall be equal to the whole amount of the ancient rent or rents. Sect. 3 provides, that where the whole of such demises shall in future be demised in parts, the aggregate rents reserved shall not be less than the accustomed old rent, and so in proportion where a part shall be retained in possession of the lessor. Sect. 4 provides, that no greater proportion of the accustomed rent shall be reserved by any separate lease than the part of the premises demised will bear. Sect. 5 provides, that where any specific thing shall have been reserved by the lessor, it may be charged on a competent part of the premises; and in case such provision shall have been made for payment of any sum of money, stipend, &c., it shall be deemed lawful if the lands, &c. charged be of greater annual value, exclusive of the rent reserved. Sect. 6 provides, that no lease shall be confirmed whereon no annual rent is reserved to the lessors, &c. Sect. 7 provides, that the act shall not authorize the reservation of any rent on any such lease, made by any master, &c. of any college, in any other manner than is required by the 18 Eliz. c. 6. Sects. 8 and 9 provide, that where payments have been reserved to vicars, curates, schoolmasters and other persons than the lessor, provision shall be made in the leases for the future payment thereof out of premises of three-times the annual value, exclusive of the rent, except such payment depends only on the will of the person granting or renewing the lease. Sect. 10 provides, that persons holding such leases in trust, or granting under-leases of specific parts under covenants of renewal, may surrender them, in order that separate leases may be granted by the original lessors to the cestui que trusts and under-lessees, on rea-

(r) Bac. Abr. tit. *Lease*, (I. G).

sonable terms, subject to the accustomed rent, &c.; and every such surrender, and the new leases granted thereupon, shall be good in law and equity, notwithstanding such under-lessees and cestui que trusts may be infants, issue unborn, &c., or other persons incapacitated to act for themselves; provided such new leases be for their benefit, and such be expressly declared in the body of each lease. The statute 6 & 7 Will. IV. c. 20 (*r*), (explained by c. 64,) sect. 1, moreover enacts, that ecclesiastical persons may not grant any new lease by way of renewal of any lease for two or more lives, until one or more of the persons for whose lives the lease had been made is dead, and then only for the surviving lives or life, and for such new life or lives as together with the life or lives of the survivor or survivors shall make up the number of lives not exceeding three in the whole; and that where the old lease has been granted for forty years, no new lease shall be granted until fourteen years of the term have expired; where it has been for thirty years, not until ten years have expired; and where it has been for twenty-one years, no new lease shall be granted by way of renewal, or in the case of archbishops or bishops, concurrently therewith, until seven years have expired; and that where a lease has been granted for years, no new lease shall be granted by way of renewal for life or lives. Sect. 4 excepts from the above enactment cases where it has been usual to renew leases at shorter periods, on certain provisions being complied with. Sect. 5 directs that this enactment is not to prevent new leases being granted for the purpose of effectuating the exchange of any lives in being, certain provisions being complied with. Sect. 6 directs that the enactment is not to extend to leases authorized by special acts of parliament; and sect. 9 enacts, that leases granted contrary to that act are to be void.

6 & 7 Will. IV. c. 20, and c. 64.

Previously to mentioning the recent statutes of 5 & 6 Vict. (*s*), it will be as well to state the law as it stood on the above enactments. From these it may be collected, that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars, were restrained from making any leases of their lands unless under the following regulations:—1. They were not to exceed twenty-one years, or three lives, from the making. 2. The accustomed rent, or more, was to be yearly reserved thereon (*t*); respecting which, the first sections of the 39 & 40 Geo. III. are particularly explanatory. 3. Houses in corporations or market-towns might be let for forty years; provided they were not the mansion-houses of the lessors, nor had above ten acres of ground belonging to them; and provided the lessee were bound to keep them in repair (*u*). 4. Where there was an old

General Conclusions, from the above Enactments, as to the Right of Ecclesiastical Persons to grant Leases.

(*r*) This and other recent statutes have for the present imposed restrictions on leases by ecclesiastical persons with a view to a further change in this branch of the law.

(*s*) See post, 22.

(*t*) See post, Book II., Chap. I., Sect. 2, (e).

(*u*) *Crane* v. *Taylor*, Hob. 269.

lease in being, no concurrent lease could be made, unless where the old one would expire within three years (*x*). 5. Leases might not be renewed before their expiration, unless according to the provisions of 39 & 40 Geo. III. c. 41, s. 10, and 6 & 7 Will. IV. c. 20, and c. 64. 6. No lease could be made without impeachment of waste. 7. All bonds and covenants tending to frustrate the provisions of the statutes 13 and 18 Eliz. were void (*y*) (*z*).

What Leases are valid.

It was held that, in order to render a lease valid under stat. 13 Eliz. c. 10, s. 3, it must be made of land which had been previously let, which was capable of producing profit, or on which some rent had been before reserved; therefore a lease by a vicar for three lives of uninclosed waste land, not proved to have been let before, was held not to be binding on his successor, although the lessee covenanted therein to inclose the land, and pay a rack rent for it (*a*); but a lease by a rector of his glebe lands and other rectorial property, made between the years 1803 and 1816, while the statute 13 Eliz. c. 20, continued repealed, was held to be valid (*b*). A lease for twenty-one years, made within three years of the expiration of a former existing

(*x*) 2 Black. Com. 320.

(*y*) Ibid.

(*z*) In leases made by parsons, vicars and others, having benefices with cure of souls, these things (previous to the statutes 5 & 6 Vict. c. 27 and c. 108) were to be observed:—1. That parsons and vicars were expressly excepted out of 32 Hen. VIII. c. 28, so they were not, as other sole corporations, enabled by that statute to make any leases to bind their successors without the confirmation of the patron and ordinary, but remained as they did at common law, for anything in that statute. 2. That an annual rent must be reserved to the lessor or lessors, otherwise the lease could not be confirmed. 3. That they were not restrained by 13 Eliz. c. 10, from making leases for twenty-one years or three lives; but then such leases must not only be confirmed by the patron and ordinary, but must also be made in conformity with the rules or qualities before mentioned, otherwise they would not bind the successor. 4. They, as well as others, were restrained by 13 Eliz. c. 10, from making leases for any longer time, notwithstanding any confirmation, or conformity to those rules or qualities. Bac. Abr. tit. *Leases*, (F).

The leases of beneficed clergymen were farther restrained, in case of their non-residence, by stats. 13 Eliz. c. 20, 14 Eliz. c. 11, 18 Eliz. c. 11, and 43 Eliz. c. 9; and see Bac. Abr. tit. *Leases*, (F). But by 57 Geo. III. c. 99, which repeals the 43 Geo. III. c. 84, s. 10, (by which the 13 Eliz. c. 20, is repealed, together with every explanation, &c. thereof made by the 14 Eliz. c. 11, 18 Eliz. c. 11, and 43 Eliz. c. 9), the penalties for non-residence are altered altogether.

As far as the 1 & 2 Vict. c. 106, (repealing the 57 Geo. III. c. 99,) respects the present subject, it may be observed, that by s. 59 "any agreement made for the letting of the house of residence, or the buildings, gardens, orchards or appurtenances necessary for the convenient occupation of the same, belonging to any benefice, to which house of residence any spiritual person may be required, by order of the bishop, to proceed and to reside therein, or which may be assigned or appointed as a residence to any curate by the bishop, shall be made in writing, and shall contain a condition for avoiding the same upon a copy of such order, assignment or appointment, being served upon the occupier thereof, or left at the house, and otherwise shall be null and hoid:" "and any person continuing to vold any such house of residence, or any such building, &c., after the day on which such spiritual person shall be directed by such order to reside in such house of residence, or which shall be specified in any such order, assignment or appointment, and after such copy shall be so served or left as aforesaid, shall forfeit the sum or forty shillings for every day he shall, without the permission of the bishop in writing, under his hand for that purpose obtained, wilfully continue to hold any such house, &c., together with the expense of serving or leaving such order, assignment or appointment."

(*a*) *Goodtitle* d. *Clarges* v. *Funucan*, 2 Dougl. 565; *Doe* d. *Tennyson* v. *Yarborough* (*Lord*), 1 Bing. 24; 7 Moore, 258; *S. P. Hereford* (*Bishop*) v. *Scory*, Cro. Eliz. 874; post, Chap. III., Sect. 11.

(*b*) *Doe* d. *Cates* v. *Somerville*, 9 Dowl. & Ryl. 100.

lease, by a vicar, of premises belonging to the vicarage, situate in London, not used as the habitation of the vicar, was held to be a valid lease, not being void under any of the restraining statutes of Elizabeth (*c*); namely, the 13 Eliz. c. 10, the 14 Eliz. c. 11, and the 18 Eliz. c. 11. The statutes 5 & 6 Vict. c. 27 and c. 108, are not confined to leases of land which has been previously let; and under those statutes, therefore, all land, &c. belonging to the ecclesiastical benefices and corporations named may be let, with, however, some small exceptions as to the houses of residence, some land and the gardens, &c. &c. adjoining, and necessary and convenient to the occupation (*d*). In some cases leases made contrary to these statutes are good against the lessors during their incumbency (*e*), and in other leases made by parsons and vicars are rendered void by non-residence (*f*). But no such lease shall be impeached or avoided for simony in the lessor, to which the lessee is not privy (*g*). In order, however, to make the leases of bishops and others of the clergy binding upon the successors, it is necessary that the lessor should have been regularly inducted (*h*); but it seems to be sufficient if the lessor be parson de facto. But where the church is full, and another parson is instituted and inducted, and makes a lease, such lease is void (*i*). The non-age of the lessor at the time of making the lease is no ground of avoiding a lease (*k*) properly confirmed. By the Land Tax Redemption Act, 42 Geo. III. c. 116, ss. 69, 83, 88, the land tax, when redeemed by any bishop, shall be considered as yearly rent, and shall be reserved in all demises. A lease in which such land tax is not expressly reserved as rent is voidable by the successor (*l*). Where lands are already in mortmain, being vested in an ecclesiastical corporation, a lease of such lands to charitable uses is not within the statute of 9 Geo. II. c. 36 (*m*).

Confirmation, when necessary.

In some cases the confirmation of the patron was necessary, and in some not. Where sole corporations who had *not* the absolute fee and inheritance in them, as prebends, parsons and vicars, made any leases, in order to bind their successors, the patron must have confirmed the same; but sole corporations who *had* the whole estate and right in them, as bishops, abbots, &c., or corporations aggregate, who had the whole fee and inheritance in them, as dean and chapter,

(*c*) *Vivian* v. *Blomberg*, 3 Bing. N. C. 311; 3 Scott, 681; 2 Hodges, 255; 7 Sim. 548.

(*d*) See ante, Chap. I., Sect. 11. As to leases of tithes, see post, Sect. 3.

(*e*) See Bac. Abr. tit. *Leases*, (H).

(*f*) Ibid. (F).

(*g*) 1 Will. & M. c. 16, s. 2.

(*h*) Bro. Abr. tit. *Leases*, pl. 68; Bac. Abr. tit. *Leases*, (F); *Hare* v. *Bickley*, Plowd. 528. And see *Costard* v. *Winder*, Cro. Eliz. 775; S. C. Moore, 606; 1 Roll. Abr. 476, l. 45; *Dr. Harcot's case*, Comb. 202. See also *Bishop of Ossory's case*, Palm. 22; S. C. nom. *O'Brian* v. *Knivan*, Cro. Jac. 552; 2 Roll. 101.

(*i*) Year Book, 9 Hen. VI. 34 a; 1 Roll. Abr. 477, l. 3.

(*k*) Bro. Abr. tit. *Age*, pl. 80; Bac. Abr. tit. *Leases*, (F).

(*l*) *Doe* d. *Murray* v. *Bridges*, 1 B. & A. 847. As to the sale of land for the redemption of the land-tax, see *Varner* v. *Potchett*, 3 B. & Ad. 921.

(*m*) *Walker* v. *Richardson*, 2 Mee. & W. 882; Mur. & Hurl. 251.

masters, fellows and scholars of any college, hospital, &c. might make leases to bind their successors without any confirmation of the patron or founder, though the bishop, abbot, dean, master, &c. were presentable: and the reason of this diversity appears in the nature of the right with which each is invested (*n*).

By whom Confirmation to be made.

The parties to confirm the leases of archbishops and bishops are their deans and chapters (*o*); and leases by a bishop, who has two chapters, must be confirmed by both (*p*). The dean must join with the chapter, and the confirmation of the sub-dean will not be sufficient (*q*). The confirmation of a dean in commendam will not be sufficient; but if the dean be elected bishop of another diocese, and before consecration obtain a dispensation to hold his deanery in commendam, his confirmation is good (*r*). If a bishop have no dean and chapter, the parties to confirm his lease are the clergy of his diocese; and this seems to be the proper course when there is merely a dean by recipere in commendam (*s*). Leases by prebendaries and archdeacons, &c. must be confirmed by the bishop as well as by the dean and chapter (*t*). The parties to confirm the leases of a parson or vicar are the patron and ordinary, and the confirmation of the dean and chapter is not necessary (*u*); but if the bishop be patron of the church in right of his bishopric, and also ordinary, the leases of the parson must be confirmed also by the dean and chapter. Where a bishop, being both patron and ordinary, collates a clerk, who makes a lease which is confirmed by the bishop, but not by the dean and chapter, and then dies, and after his death the bishop collates another clerk, the new incumbent cannot avoid the lease of his predecessor (*v*); but after the death of the bishop, although not upon his translation or resignation, the new bishop or his incumbent may avoid the lease. A perpetual curate, whose curacy has been augmented by a grant of lands under the Queen Anne's Bounty Acts, could not make a lease without the consent of the ordinary (*x*).

If a parsonage or vicarage were a donative, then the confirmation of the patron alone was sufficient to all leases, &c. made by the parson or vicar, and would bind the successor without the confirmation of any others (*y*). Yet if there were a lord-paramount as well as an immediate patron, confirmation of the immediate patron, without the other's confirmation, was not good; as if a parson were patron of the vicarage of the same church, and the vicar made a lease confirmed by

(*n*) Bac. Abr. tit. *Leases*, (G. 2); *Collins* v. *Knox*, 11 Ir. Law Rep. 492.

(*o*) *Salisbury's* (*Bishop of*) *case*, 10 Rep. 60.

(*p*) Co. Litt. 301 a; *Anon.*, Dyer, 58 b, pl. 7.

(*q*) Bac. Abr. tit. *Leases*, (G. 2).

(*r*) *Evans* v. *Ascough*, Latch. 233; Palm. 460.

(*s*) *The Proxies' case*, Dav. 1; 1 Roll. Abr. 447, l. 33; Bac. Abr. tit. *Leases*, (G. 2).

(*t*) *Anon.*, Dyer, 61 b, pl. 30; *Champion's case*, Dyer, 106, pl. 21; *Anon.*, Dyer, 240 b, pl. 46.

(*u*) Co. Litt. 300 b.

(*v*) *Anon.*, Dyer, 356 b, pl. 42; *Lancaster* v. *Lucas*, 1 Leon. 255.

(*x*) *Doe* d. *Richardson* v. *Thomas*, 1 Per. & Dav. 578; 9 Ad. & El. 556.

(*y*) Bac. Abr. tit. *Leases*, (G. 2).

the parson and ordinary, it was not good without the confirmation of the patron of the rectory also; because both have an interest in the possessions of the vicarage (z). So where the perpetual curate of a curacy augmented by the governors of Queen Anne's Bounty, with the confirmation of the ordinary and *immediate* patron, granted a lease for years of unopened mines, which had not before been leased, but the patron of the advowson was no party: it was held, that the lease was void at common law for want of such confirmation by such patron paramount; and that it was not set up by acceptance of rent by the lessor's successor in the curacy; the only effect of such acceptance being to create a tenancy from year to year (a).

What Estate the party confirming must have.

As to the estate which they who make such confirmation ought to have, to make the lease effectually binding upon the successors, this regards chiefly the patron, whose advowson or right of patronage being a temporal inheritance, and considered as such, is to be governed by the same rules as other temporal inheritances are; his confirmation, therefore, being in nature of a charge upon the advowson, was to be directed by the estate which he had in the advowson, and could continue no longer than that endured (b). If, therefore, the patron had a conditional estate in the advowson, and he confirmed a lease of the parson's, and afterwards the condition were broken, this defeated also his confirmation, so that the succeeding incumbent would not be bound by it; for his confirmation, which was in virtue of and out of his estate in the advowson, could not be more lasting than the estate itself was (c).

How Confirmation should be made.

A patron might confirm explicitly by his deed or writing, or by consequence of law: for if a parson made a lease for years to the patron, who granted or assigned it over to another, this amounted to a confirmation in law by the patron; because a confirmation being nothing but an assent under the hand and seal of the party confirming, such assent in this case sufficiently appeared by his assigning over the lease to another (d); so if the patron and ordinary confirm the estate of the lessee for part of his term, the lease was well confirmed for the whole; for the estate of the lessee is entire, and cannot be divided (e).

Time when Confirmation should be made.

As to the time of confirmation—generally speaking it was not material whether it were before or after the making of the lease, which was to be confirmed, so that it were made in the lifetime of the parties who made the lease; for the confirmation was but an assent or agreement by deed to the making of such lease or grant, and not a con-

(z) Co. Litt. 300 b; 1 Roll. Abr. 480, pl. 2; Bac. Abr. tit. *Leases*, (E.); Com. Dig. tit. *Estates by Grant*, (G. 5).

(a) *Doe* d. *Brammall* v. *Collinge*, 7 C. B. 939.

(b) Bac. Abr. tit. *Leases*, (G. 3).

(c) Ibid.; Co. Litt. 300 b; 1 Roll. Abr. 480; 1 Roll. Abr. 481; R. Dyer, 273.

(d) By the Statute of Frauds, 29 Car. II. c. 3, all such assignments must be in writing. *Newcome's case*, cited 1 Roll. Rep. 171.

(e) *Beffore* v. *Ford*, Cro. Eliz. 447, 472; *Fitz William's case*, Dyer, 52 b.

firmation of the estate itself (*f*): and if a confirmation were made and delivered before the lease were delivered, it seems it would be good and effectual; the confirmation ought, however, to have been made in the life and during the incumbency of the lessor, for after his death, resignation, deprivation or other amotion, the lease became void for want of confirmation; and then confirmation made after could not revive it, though it were made in the vacation before any successor came in; but if a parson made a lease for years, which was not confirmed by the bishop or patron then in being, but by the succeeding bishop and succeeding patron, it was a good lease, and would bind the successor, because the lease was absolutely good against the parson himself who made it, and the confirmation was only necessary to make it binding on the successor; and in this case the lease, being duly confirmed during the incumbency, had all the sanction the law required (*g*).

A dean and chapter, empowered by a local act to lease, made a lease for a term not in conformity with the act. During the term, after the death of the dean under whom the lease had been granted, the lessee remained in possession, and paid the rent to the succeeding deans and chapters, who distributed it among themselves. The court held that if the lease was voidable only, it was made good as against each successive dean and chapter, for their own times respectively, by their receipt and distribution of the rent. And that if the lease was absolutely void, such receipt and distribution were evidence, from which, without proof of any instrument under seal, a demise from year to year might be presumed against them; the presumption in such a case being the same against a corporation aggregate as against an ordinary person (*h*).

5 & 6 Vict. c. 27.

Additional powers have lately been given by the statutes 5 & 6 Vict. c. 27 and c. 108, of leasing ecclesiastical property. By the statute 5 & 6 Vict. c. 27, reciting that it would be advantageous if the incumbents of ecclesiastical benefices, (which are defined to be every rectory, vicarage, perpetual curacy, donative, endowed public chapel, parochial chapelry and district chapelry, the incumbent of which in right thereof is a corporation sole,) were empowered to demise the lands belonging to their benefices for a term of years certain for farming purposes, it is enacted that they may, by deed, with the consent of the patron and of the bishop of the diocese, and where the lands are copyhold, with the consent of the lord of the manor, in case the lease cannot be effectually made without the licence of the lord, lease the lands belonging to the benefices, either with or without the farm-houses, &c. for any term not exceeding fourteen years; to take effect in possession and not in

(*f*) Bac. Abr. tit. *Leases*, (G. 3).

(*g*) Ibid. 94, p. 117; *Newcome's case*, cited 1 Roll. 171; *Sir Robert Bannister's case*, Cro. Car. 38.

(*h*) *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998.

reversion, so that there be the best and most improved yearly rent that can reasonably be gotten, without taking any fine, &c. (*i*); provided the term may be twenty years where the lessee covenants to adopt any system of cultivation more expensive than the usual course, or to drain or subdivide, or embank and warp any part of the premises, or to erect buildings or to repair more extensively than is usually required of lessees, or in any other manner to improve any part of the premises. Sect. 2 provides, that the act is not to render valid any lease unless the parsonage-house, gardens, &c. and land situate convenient for occupation by the incumbent, altogether to the amount of ten acres, shall be reserved out of the lease. Sect. 3 provides, that a survey is to be made of the lands previous to the lease, and that the surveyor is to make a report respecting them to the bishop and patron. Sect. 4 provides, amongst other things, that the execution of the lease by the bishop and patron shall be conclusive evidence that the lease does not comprise any land that ought not to be leased, and that a proper portion of the glebe remains unleased, and that the rent is the best and most improved rent that can be reasonably gotten. Sect. 5 declares, that no surrender of any lease made under the act shall be valid unless the instrument of surrender is executed by the bishop, the patron and the incumbent.

5 & 6 Vict. c. 108.

By another statute of the same session, 5 & 6 Vict. c. 108, powers are given to any ecclesiastical corporation, aggregate or sole, except any college or corporation of vicars choral, priest vicars, senior vicars, custos and vicars, or minor canons, and also except any ecclesiastical hospital or the master thereof, to grant leases for ninety-nine years for the purpose of building and improvements, and leases for sixty years of water, waterleaves and way leaves, and also of mines and minerals. These leases can only be made with the consent of the ecclesiastical commissioners for England; but the statute itself must be referred to for the particulars required in such leases. By the 12 & 13 Vict. c. 26, intituled "An Act for granting Relief against Defects in Leases made under Powers of Leasing in certain Cases," it is enacted, sect. 7, that the "act shall not extend to any lease by an ecclesiastical corporation or spiritual person, or to any lease of the possessions of any college, hospital or charitable foundation."

12 & 13 Vict. c. 26.

Sect. 12—*Infants.*

Power of Infants to make Leases.

Although the cases in the books are somewhat contradictory on the point, the better opinion seems to be, that leases made by infants are not absolutely void, but voidable on their attaining their majority (*k*).

(*i*) For a summary of the provisions of this statute as to the form of such leases, see post, Chap. IV., Sect. 18 (b).

(*k*) *Ketsey's case*, Cro. Jac. 320; *Ashfield* v. *Ashfield*, Sir W. Jones, 157; Plowd. 418.

That such leases are not absolutely void appears from this, that "the lessee can in no case avoid the lease on account of the infancy of the lessor (*l*)." If the lease be for the benefit of the infant it is binding upon him (*m*). If it be not for his benefit, although not actually void on that account, it is voidable by him when he becomes of age, or by his heir if he die under age (*n*). Subject to the above qualification the law appears to be correctly laid down in Perkins, that "all gifts, grants or deeds made by infants, by matter in deed, or in writing, which take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate (*o*)." The words "take effect" are the essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest (*p*) (*q*). The mere receipt of rent by an executor of infants does not bind the latter. An infant cannot appoint an agent, and therefore his next friend cannot bind him. An infant appointing an agent to make a lease is not bound by such lease, nor by his ratification of it. The lease of an infant, to be good, must be his own personal act (*r*). It has long been settled that "an infant may make a lease without rent to try his title (*s*)." The Court of Chancery will decree building leases for sixty years of infants' estates, when it appears to be for their good (*t*). Infant trustees or mortgagees are empowered by the 6 Geo. IV. c. 74, s. 2, under the direction of the Court of Chancery, &c., to convey the estates they hold in trust or mortgage to such persons as the courts shall appoint. By statute 11 Geo. IV. & 1 Will. IV. c. 65, ss. 16 and 17, infants are empowered to grant renewals of leases under the direction of the Court of Chancery; and that Court is authorized to direct leases of land belonging to infants when it is to the benefit of the estate. An infant is bound by such leases as he makes in his corporate capacity (*u*), and leases by the king or queen regnant, whether of lands held in right of the crown or by another title, cannot be avoided on the ground of infancy (*x*).

Confirmation after Full Age.

Where an infant makes a lease for years, reserving rent, and the lessee enters, the infant upon coming of age has a right of election to confirm the lease, and allow the lessee to continue to be his tenant, or to be his disseisor, whichever is most to his advantage (*y*). Confirma-

(*l*) *Zouch* d. *Abbot* v. *Parsons*, 3 Burr. 1806.

(*m*) *Ketsey's case*, Cro. Jac. 320; *Maddon* v. *White*, 2 T. Rep. 159; 4 Cruise, 74, ss. 66, 67.

(*n*) Ibid. s. 67.

(*o*) Perk. Chap. I. Sect. 12; Bac. Abr. tit. *Leases*, (B.); and see *Baylis* v. *Dineley*, 3 Mau. & Sel. 477; 2 Prest. Conv. 248.

(*p*) *Zouch* d. *Abbot* v. *Parsons*, 3 Burr. 1804.

(*q*) It is said, that if an infant, possessed of a term of years, sell it for money, and after he comes of full age, receives part of the money for it, he may avoid the grant notwithstanding: for the contract being void in the commencement, cannot be made good by any subsequent act. Bac. Abr. tit. *Leases*, (B.)

(*r*) *Doe* d. *Thomas* v. *Roberts*, 16 Mee. & W. 778.

(*s*) *Zouch* d. *Abbot* v. *Parsons*, 3 Burr. 1806.

(*t*) *Cecil* v. *Salisbury*, 2 Vern. 224.

(*u*) Bro. Abr. tit. *Age*, pl. 80.

(*x*) Case of *Duchy of Lancaster*, Dyer, 209 b; *S. C.* Plowd. 212 b.

(*y*) Litt. s. 547; *Baylis* v. *Dineley*, 3 M. & Sel. 477.

tion may be by deed (z), or by parol (a). The acceptance of rent by an infant after he attains his majority clearly amounts to a confirmation of a lease granted by him during his minority (b). And where an infant made a lease for years, and at full age said to the lessee, "God give you joy of it," it was held to be a good confirmation of the lease, as expressing his assent to and approbation of what was done (c). Where a party takes a lease of an infant's lands, and the infant on attaining his majority mortgages the land by a deed which refers to the lease, this amounts to a confirmation (d).

Custom as to Leases by Infants.

By custom in some places, an infant seised of lands in socage may at the age of fifteen years make leases for years, which shall bind him after he comes of age; for the custom makes the age of fifteen his full age for that purpose (e).

SECT. 13.—*Guardians.*

Division of the subject.

For the purposes of this work guardians may be considered under six heads: 1st. Guardians in socage or by the common law; 2ndly. Testamentary guardians or by statute; 3rdly. Guardians by nature; 4thly. Guardians for nurture; 5thly. Guardians by election; 6thly. Guardians appointed by the Lord Chancellor.

Definition of Guardianship in Socage.

A guardian *in socage*, or by the common law, is a person appointed, not by any special designation of the party, but by the wisdom of the law, in respect of the lands descended to the infant, so that where no lands descend there can be no such guardian (f): and this guardianship devolves upon such of the next of kin to whom the inheritance cannot descend (g). The father may also supersede the authority of the guardian in socage by appointing a guardian by will under the 12 Car. II. c. 24.

Power of Guardians in Socage to lease.

To enable guardians to take especial care of the infant and his affairs, the law has invested them, not with a *bare authority* only, but also with an *interest*, till the guardianship ceases (h); and to prevent their abuse of this authority and interest, the law has made them accountable to the infant, either when he comes to the age of fourteen years, at which time the authority of the guardians terminates, or at any time after, as the infant thinks fit; and therefore their authority and interest extend only to such things as may be for the benefit and advantage of the infant, and whereof they may give an account.

(z) *Anon.*, 2 Leon. 220.
(a) 4 Leon. 4, pl. 15.
(b) *Ashfield* v. *Ashfield*, W. Jon. 157.
(c) *Anon.*, 4 Leon. 4; Bac. Abr. tit. *Estate*, (B.)
(d) *Story* v. *Johnson*, 2 You. & Col. 587.
(e) Co. Litt. 45 b.
(f) Bac. Abr. tit. *Leases*, (I.9); *Shoplane* v. *Roydler*, Cro. Jac. 99; 1 Bla. Com. 461.
(g) 1 Bla. Com. 461.
(h) In *Rex* v. *Sutton*, 3 Ad. & El. 597; 5 Nev. & Man. 353; 1 Har. & Wol. 428; it was held, that a guardian in socage is liable to the repair of a bridge ratione tenuræ. This clearly shows that such a guardian has an interest in the estate. Co. Litt. 87 b; Hutt. 16, 17; *R.* v. *Oakley* (*Inhabitants*). 10 East, 494; *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 108; *R.* v. *Sherrington* (*Inhabitants*), 3 B. & Adol. 714.

During the time the guardianship exists, a guardian in socage may make leases for years in his own name, as any other who has an interest in lands may do; for he is quasi dominus pro tempore and the lessee may maintain ejectment on such leases (*l*). If he makes leases for years to continue beyond the time of his guardianship, such leases seem not to be absolutely void by the infant's coming of age, but only voidable by him if he thinks fit; for they are not derived barely out of the interest of the guardian, or to be measured thereby, but take effect also by virtue of his authority, which for the time was general and absolute; and therefore all lawful acts done during the continuance of that authority are good, and may subsist after the authority itself, by which they were done, is determined; and consequently the infant, when he comes of age, may by acceptance of rent, or other act, if he thinks fit, make such leases good and unavoidable (*m*). The lease will be determined by the death of the infant, and also by the death of the guardian in socage (*n*).

Leases by Testamentary Guardians.

A testamentary guardian, or one appointed pursuant to the statute 12 Car. II. c. 24, ss. 8, 9, 10 and 11, is the same in office and interest as a guardian in socage, his authority continuing until the infant attains the age of twenty-one years (*o*): but it has been doubted whether a lease for years, made by the testamentary guardian of an infant, is not absolutely void (*p*). A devise to a person as guardian, that he may "receive, set and let," for his ward, gives him an authority only and not an interest (*q*). Special guardians, by custom of London and other places, do not fall within this statute (*r*).

Guardians by Nature.

Guardians by nature are the father, and in some cases the mother, of the child, until it attains twenty-one years (*s*). They may perhaps possess the power of leasing at will, but not for a term (*t*).

Leases by Guardians for Nurture.

Where no testamentary guardian is appointed, the father or mother is guardian for nurture until the infant attains the age of fourteen years (*u*). A guardian for nurture cannot make any leases for years, either in his own name, or in the name of the infant, for he has only the care of the person and education of the infant; for there may be such guardian, though the infant has no lands at all, although in such a case there cannot be a guardian in socage: but such guardian, it seems, may make leases at will (*x*).

(*l*) *Wade* v. *Baker*, 1 Lord Raym. 131; Hutt. 16; *Osborn* v. *Carden*, Plowd. 293; Bac. Abr. tit. *Leases*, (I. 9); *Willis* v. *Whitewood*, 1 Leon. 322; *R.* v. *Oakley*, sup.; Keilw. 46 b.

(*m*) Bac. Abr. tit. *Leases*, (I. 9.)

(*n*) *Balder* v. *Blackborn*, Brownl. 79.

(*o*) 1 Bla. Com. 462; *Bedell* v. *Constable*, Vaugh. 179; *Roe* d. *Parry* v. *Hodgson*, 2 Wils. 129.

(*p*) *Roe* d. *Parry* v. *Hodgson*, 2 Wils. 129, 135.

(*q*) *Pigot* v. *Garnish*, Cro. Eliz. 678.

(*r*) 1 Bla. Com. 462.

(*s*) 1 Bla. Com. 461; *R.* v. *Thorp*, Carth. 384.

(*t*) *Pigot* v. *Garnish*, Cro. Eliz. 678, 734.

(*u*) 1 Bla. Com. 461; *Roach* v. *Garvan*, 1 Ves. 158; 3 Rep. 38; Moor, 738.

(*x*) See *Willis* v. *Whitewood*, Owen, 45; 1 Leon. 322; *Shopland* v. *Radlen*, Owen, 115; Cro. Jac. 55, 98; Godb. 143; 4 Leon. 238; *Pigot* v. *Garnish*, Cro. Eliz. 678; Bac. Abr. tit. *Leases*, 139.

An infant seised of socage lands, and being unprovided with a testamentary guardian, may, on attaining fourteen years, elect a guardian to act until he attains twenty-one (*y*). This guardianship, like that of socage, involves a similar power of leasing the estate of the infant (*z*).

Guardians by Election.

Guardians appointed by the Chancellor are in the nature of receivers, and must obtain the sanction of the court before they can lease (*a*).

Guardians appointed by the Chancellor.

Though every guardian, except a guardian in socage, is but tenant at will, and by consequence cannot make a lease for any certain time or number of years; yet if a lease be made by such guardian, the lessee is estopped to say, that being only tenant at will, he had no power to make the lease (*b*).

Effect of Leases by Guardians.

Tutors dative, appointed by a Scotch Court as guardians of an infant, have authority to execute on his behalf and in his name tacks or leases; and they are valid, and the infant may sue upon them in his own name, though he was not an executing party to the agreement, nor proved to be of full age at the time of action brought (*c*).

Leases by Tutors dative.

SECT. 14.—*Husband and Wife.*

Leases by married women, unless made under powers, are absolutely void, both during the husband's life and after his death, and they do not even operate by way of estoppel. Indeed, so strict is this rule, that they cannot be rendered valid by any subsequent act of confirmation after the removal of the disability (*d*); but if a woman have power to dispose, she may exeeute her power by conveyance: and as a general rule, a feme covert acting with respect to her separate property, is competent to act in all respects as if she were a feme sole (*e*).

Leases by Married Women.

The right of granting leases by husband and wife, seised in right of the wife, may be considered in three points of view:—1st, at common law; 2ndly, under the enabling statute 32 Hen. VIII. c. 28; and 3rdly, with reference to the 3 & 4 Will. IV. c. 74 (The Abolition of Fines and Recoveries Act). 1st. Although much confusion prevails as to the law on the first point, it would seem, from the authorities, that at common law a lease by *parol* for years of the wife's freehold lands

Leases by Husband and Wife, and Husband seised Jure Uxoris at Common Law.

(*y*) 1 Bla. Com. 462; Co. Litt. 87 b; 2 Atk. 624; 1 Ves. 91.

(*z*) Bac. Abr. tit. *Leases*, 138; *Pitcairne* v. *Ogborne*, 2 Ves. 357. The mother of an infant copyholder, under fourteen years of age, was holden to be guardian by the law of the copyhold, there being no custom of the manor for appointing a guardian. *Reg.* v. *Wilby* (*Inhabitants*), 2 Marsh. 2; Selw. 504.

(*a*) *Rex* v. *Sutton*, 3 A. & E. 608.

(*b*) Bac. Abr. tit. *Leases* (C. 9); *Skipworth* v. *Green*, 8 Mod. 312.

(*c*) *Fitzmaurice* v. *Waugh*, 3 Dowl. & Ryl. 273; *Carnegie* v. *Waugh*, 2 Dowl. & Ryl. 277. Guardians of minors, in order to the surrender and renewal of leases, may apply to the Court of Chancery, and by order may surrender and renew the same; 11 Geo. IV. & 1 Will. IV. c. 65, s. 12.

(*d*) *Goodright* d. *Carter* v. *Straphan*, Cowp. 201; Lofft, 763; and see Com. Dig. tit. *Baron and Feme*, (Q.)

(*e*) Com. Dig. tit. *Baron and Feme* (P. 1).

declaration in ejectment on a lease by the husband alone; for the delivery by attorney being void as to the wife, it is the lease of the husband only (*b*).

Renewal of Leases by Wife.

By statute 11 Geo. IV. & 1 Will. IV. c. 65, s. 16, powers are given, under the direction of the Court of Chancery, to surrender and renew leases, which femes covert would, except for their disability, be compellable to renew.

Sect. 15.—*Tenants by Curtesy, in Dower, or Jointure.*

Power of Tenants by the Curtesy, in Dower and in Jointure to lease.

With respect to tenancy by curtesy, tenancy in dower, tenancy in jointure, and tenancy in tail after possibility of issue extinct, it will be sufficient to observe, that if either of these tenants make a lease for years, reserving rent, and die, the lease is absolutely determined, so that no acceptance of rent by the heir, or those in reversion, can make it good; for though their estate is quodammodo a continuance of the estate of their husband or wife, yet it is a continuance of it only for life, and they have no power to contract for, or intermeddle with, the inheritance; and, consequently, their leases or charges fall off with the estate from whence they were derived, and the lessee is become tenant by sufferance by the continuance of possession afterwards (*c*). If tenant in dower lease for years and marry, her second husband's executors are entitled to the arrears of rent due at his death (*d*).

Sect. 16.—*Persons under Disabilities.*

(a) *Lunatics and their Committees.*

Idiots and Lunatics.

Leases made by idiots, or persons non compotes mentis, are primâ facie binding, but may be avoided. A freehold lease made by feoffment by a lunatic or idiot in person is voidable by the heir, or by the crown, after office found (*e*). A chattel lease made by one who is non compos, may also be impeached by him on his becoming sane. But a lease made during a lucid interval cannot be impeached on the ground of previous or subsequent insanity (*f*).

Committees of Lunatics.

By statute 11 Geo. IV. & 1 Will. IV. c. 65 (repealing 43 Geo. III. c. 75), ss. 19, 23 and 24, the committee of a lunatic may make leases and may surrender and renew leases under the direction of the Lord Chancellor. So by the 15 & 16 Vict. c. 48, committees of lunatics may direct repairs and improvements of or upon the land of lunatics, or make allowance to the tenant executing the same, and make contracts, leases and under-leases. Previously to the passing of the statute

(*b*) *Gardiner* v. *Norman*, Cro. Jac. 617.
(*c*) Bac. Abr. tit. *Leases*, (I. 1); *Miller* v. *Maynwaring*, Cro. Car. 398, 399.
(*d*) *Anon.*, Moor. plac. 25.
(*e*) *Beverley's case*, 4 Rep. 123 b; Co. Litt. 247 a; *Thompson* v. *Leach*, 3 Mod. 301.
(*f*) 1 Dow. Parl. Cas. 177.

43 Geo. III. it had been much doubted whether the committee of a lunatic could grant a lease under any circumstances (*g*).

(b) *Persons under Duress and Intoxicated.*

Persons under Duress.

All deeds, bonds or grants made by persons under duress are voidable by the parties themselves that make them, or others that have their estates, &c.; but if the same object be effected by fine (*h*) they are not so, except in equity, in some particular cases, on the ground of fraud (*i*) (*k*).

Persons in a State of Intoxication.

With respect to the validity of deeds or other acts of persons in an extreme state of intoxication, the opinions seem to have been various. The doctrine of the latter cases both at law and in equity seems to be, to admit evidence of this nature; but the old writers expressly exclude persons so voluntarily depriving themselves of their memory and understanding, and their heirs, from the privilege or benefit of a man who is non compos mentis (*l*). In the case of *Pitt* v. *Smith* (*m*), Lord Ellenborough said, "you have said that there was *an agreement* between the parties; and this allegation you must prove, as it is put in issue by the plea of not guilty: but there was no agreement between the parties, if the defendant was intoxicated when he signed the paper. He had not an agreeing mind." Intoxication is a good defence in an action on a deed, lease, or grant, or on an agreement, provided the party be in such a state of intoxication as not to know what he is doing (*n*): and it is clear, that if through the contrivance and management of the party obtaining the deed the grantor is thrown into intoxication for the purpose of prevailing on him to execute the deed, relief may be administered in equity on the ground of fraud (*o*). In one case in the House of Lords, a lease obtained by fraud and imposition from a person who was intoxicated was held to be void (*p*).

(c) *Persons Attainted and Outlawed.*

Power of such Persons to lease.

Persons attainted of treason or felony may give or grant their lands. A freehold interest is not divested out of an attainted felon until office found: under a demise therefore by a felon after attainder, the lessee has a good title against all but the king and the lord of whom the land is held (*q*). In the case of treason the grant will be void against the

(*g*) *Knipe* v. *Palmer*, 2 Wils. 130; *Foster* v. *Merchant*, 1 Vern. 262.

(*h*) Now abolished by 3 & 4 Will. IV. c. 74.

(*i*) Shep. Touch. Pres. edit. 233; *Thoroughgood's case*, 2 Rep. 9 b; 2 Instit. 483; Perk. 16.

(*k*) Duress of imprisonment is defined to be where one is manifestly imprisoned or restrained of his liberty contrary to law, until he executes a bond or deed to another. *Knight and Norton's case*, 3 Leon. 239.

(*l*) Chamb. Land. & Ten. 48; *Cook* v. *Clayworth*, 18 Ves. 16; *Cole* v. *Robins*, Bull. N. P. 172; *Pitt* v. *Smith*, 3 Campb. 34; Co. Litt. 247 a; *Say* v. *Barwick*, 1 Ves. & B. 195.

(*m*) 3 Campb. 34.

(*n*) *Gore* v. *Gibson*, 13 M. & W. 623.

(*o*) *Johnson* v. *Medlicott*, 3 P. Wms. 139; *Cory* v. *Cory*, 1 Ves. 19; *Nagle* v. *Baylor*, 3 Dru. & War. 60; *Say* v. *Barwick*, 1 Ves. & B. 195.

(*p*) *Butler* v. *Mulvihill*, 1 Bligh, 137.

(*q*) *Doe* d. *Evans* or *Griffith* v. *Pritchard*, 5 Barn. & Adol. 765; 2 Nev. & Man. 489.

king; and so in felony during the party's life the king will be entitled to hold (r). A lease made by an outlaw before an inquisition taken will prevent the title of the crown, if it be made bonâ fide and upon good consideration, but not if it be in trust for the outlaw only (s). The grant of a person outlawed in a personal action is good against all but the king (t).

SECT. 17.—*Assignees of Bankrupts and Insolvents.*

Leases by Assignees of Bankrupts.

By the 147th section of the Bankruptcy Law Consolidation Act, 12 & 13 Vict. c. 106, "all powers vested in any bankrupt which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same (u)." This clause of course gives them a power to grant leases of his estate (x).

Leases by Assignees of Insolvents.

By sect. 49 of the Insolvent Act, 1 & 2 Vict. c. 110 (amended by 2 & 3 Vict. c. 39(y)), the assignee is enabled to grant leases of the insolvent's estate. It enacts, sect. 49, "that all powers vested in any such prisoner, whose estate shall by an order under this act have been vested in the provisional assignee, which such prisoner might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), shall be and are hereby vested in the assignee or assignees of the real and personal estate of such prisoner by virtue of this act, to be by such assignee or assignees executed for the benefit of all and every the creditors of such prisoner under this act, in such manner as such prisoner might have executed the same." The estates of persons petitioning under the act 5 & 6 Vict. c. 116, which gives still further relief to insolvent debtors, and under the 7 & 8 Vict. c. 96, are thereby vested in the assignees in the same way as under the statute relating to bankrupts (z).

SECT. 18.—*Executors and Administrators.*

Power of Executors and Administrators to lease.

Executors and administrators, as they may dispose absolutely of terms of years vested in them in right of their testators or intestates, so they may lease the same for any fewer number of years; and the rent reserved on such leases shall be assets in their hands, and go in

(r) Chamb. Land. & Ten. 46.

(s) *Att.-Gen.* v. *Freeman*, Hardr. 101, and see *Hammond's case*, id. 176; 2 Roll. Abr. 808; pl. 7; see also *King* d. *Poe* v. *Ball*, Ridg. Lap. & Scho. 94.

(t) Shep. Touch. Pres. ed. 232.

(u) The 6 Geo. IV. c. 16 is repealed by 12 & 13 Vict. c. 106, but the 77th section is re-enacted in the 147th section.

(x) See *Doe* d. *Colman* v. *Britain*, 2 Barn. & Ald. 93.

(y) The previous insolvent act was the 7 Geo. IV. c. 57, continued and amended by 11 Geo. IV. & 1 Will. IV. c. 38; 2 & 3 Will. IV. c. 44, and 6 & 7 Will. IV. c. 44.

(z) See *Partington* v. *Woodcock*, 6 A. & E. 690.

a course of administration (*a*). An executor may lease before probate (*b*), but an administrator cannot make a lease until he has obtained letters of administration (*c*). Although the executor has exceeded the proper and regular bounds of his duty and power as a trustee and executor, that will not avoid the lease (*d*). An executor to whom a term is bequeathed for life may assign the whole term or underlet the premises, notwithstanding that the will gives him a limited power of leasing (*e*). A lease by one of several executors is as efficacious as their joint demise (*f*), although it purport to be the grant of all (*g*), and the same rule applies to administrators (*h*). A house being let to A., A. died, leaving B. and C. her executors. B. continued to pay the rent; and it appeared to be the intention both of B. and the landlord that B. should be substituted in the tenancy; but C., the other executor, knew nothing of the intended change. It was held, that such change was inchoate only, and not perfected; and, therefore, A.'s estate still continued liable to the lease (*i*).

Caution to Persons taking Leases from Executors.

Previous to a party taking a lease from an executor or administrator with will annexed, he ought to see whether the property has been specifically bequeathed by the will; for if it has, and the executor has assented to the bequest, his right to grant the lease is gone, and the legal interest in the property is vested in the legatee; and consequently, as the executor has nothing to grant, the lease will be void, and the legatee may maintain ejectment (*j*). Where a party possessed of a term as administrator makes a lease and appoints an executor and dies, the executor shall have the rent and not the administrator de bonis non of the intestate (*k*).

Leases by an Executor who is an Infant.

If an executor be an infant, administration is usually given to an administrator, until the infant attains the age of twenty-one years (*l*); and if administration be granted generally without limitation, and such administrator demise for a term exceeding the duration of the infancy, such term will be good until the expiration of the infant executor's non-age (*m*), perhaps until he enters to defeat the term (*n*). Such an administrator, it has been said, may act in all respects as if he were executor himself (*o*).

(*a*) Bac. Abr. tit. *Leases*, (I. 7).

(*b*) *Roe* d. *Bendall* v. *Summerset*, 2 W. Bla. 692; Roll. Abr. tit. *Executors*, (A.)

(*c*) *Waukford* v. *Waukford*, 1 Salk. 301; *Hudson* v. *Hudson*, 1 Atk. 461.

(*d*) *Doe* d. *Hayes* v. *Sturges*, 7 Taunt. 217; 2 Marsh. 505; *Simpson* v. *Gutteridge*, 1 Mad. Cha. Ca. 616.

(*e*) *Doe* d. *Hayes* v. *Sturges*, 7 Taunt. 217.

(*f*) *Pannel* v. *Fenn*, Cro. Eliz. 347; *Doe* d. *Hayes* v. *Sturges*, 7 Taunt. 217.

(*g*) *Simpson* v. *Gutteridge*, 1 Mad. 609, 616.

(*h*) *Jacomb* v. *Harwood*, 2 Ves. 265.

(*i*) *M'Donnell* v. *Pope*, 16 Jur. 771, Chanc.

(*j*) *Paramour* v. *Yardley*, Plowd. 539; *Young* v. *Holmes*, 1 Stra. 70; *Doe* d. *Lord Say and Sele* v. *Guy*, 3 East, 120.

(*k*) *Drew* v. *Bayley*, 2 Lev. 100; *Norton* v. *Harvey*, 1 Ventr. 259.

(*l*) Previously to the statute 38 Geo. III. c. 87, s. 6, probate was usually granted to the infant on attaining seventeen years.

(*m*) *Finch's case*, 6 Rep. 63 a.

(*n*) *Prince's case*, 5 Rep. 29 b; *S. C.* Cro. Eliz. 718; 2 And. 132; 3 Leon. 278.

(*o*) *Dubois* v. *Trant*, 12 Mod. 436. See also *Finch's case* and *Prince's case*, supra.

Leases by an Executrix who is a married Woman.

The husband of a woman who is an executrix has a joint interest with her in all the effects of the deceased; and is enabled by law to assume the whole administration, and to act in it to all purposes without her consent; but the wife cannot do any act as executrix or administratrix without her husband's concurrence. A demise by her alone, therefore, cannot be supported; and in all leases to be made in respect of such executorship and administration the husband must be the demising party (*p*).

Sect. 19.—*Mortgagors and Mortgagees.*

Leases may be granted by the mortgagor or the mortgagee. As to the nature and effect of these leases, see post, Book I., Chap. V., Sect. 5.

Sect. 20.—*Tenants under Process of Execution.*

Their Power to lease generally.

Leases by tenants under executions, as tenants by elegit, statute-merchant, statute-staple, &c. are conditional, and may be assimilated to tenancies at will, as they may be determined by payment of the sum for which the tenancies are created. Till such contingency occurs, however, they remain as valid as any other demises (*q*). The interest or estate that a man has by extent is assignable from man to man at pleasure; therefore tenant by statute-merchant, statute-staple, or elegit, or he who purchases a lease for years sold under an execution, are assignees (*r*). But if the conusee of a statute sue out an extent, and a liberate be returned, he cannot assign the lands if he suffer the conusor to keep possession; for his possession under the liberate is, by his own entry, turned to a right, and a right is not assignable (*s*). If a first conusee take a lease of the reversion, his extent is suspended during the term; and although he assign the lease, a second conusee may extend the land (*t*).

Where a fieri facias has issued against the property of a debtor, his term for years remains in him until the sheriff has actually assigned it; therefore until such assignment the purchaser of the term cannot make a valid lease of it (*u*).

(*p*) Chamb. on Leases, 35; *Arnold* v. *Bidgood*, Cro. Jac. 318; *Thrustout* d. *Levick* v. *Coppin*, 2 Black. 801.

(*q*) But see the case of *Doughty* v. *Stiles*, Rep. Temp. Finch, 115.

(*r*) Shep. Touch. 242; 5 Co. 17 a; 1 Esp. Dig. 293.

(*s*) *Hannam* v. *Woodford*, 4 Mod. 48; 2 Salk. 563.

(*t*) *Harrington* v. *Garraway*, Cro. Jac. 424.

(*u*) *Playfair* v. *Musgrove*, 14 M. & W. 239.

SECT. 21.—*Trustees and Receivers.*

Trustees generally.

A trustee having the legal estate in lands may make leases, which will be valid provided they are justified by the quantity of his estate. But a party taking a lease from a trustee, with notice of the trust, and without the concurrence of the cestui que trust, is subject to the control of equity (*x*). No general rule can be laid down as to the power of trustees to grant leases. They are authorized to do what is reasonable in each particular case (*y*). A party about to take a lease from a trustee ought, in prudence, to obtain the concurrence of the cestui que trust, if he be competent to join, or the sanction of the Court of Chancery in case of his incompetency (*z*). A cestui que trust, however, having an equitable estate only cannot, without the concurrence of his trustee, confer any legal interest. His lessee would be liable to be ejected by the trustee without notice (*a*).

Powers of Trustees of Charities to lease.

Trustees of charities may grant leases of the lands belonging to the charities, if they be such in all their circumstances as are beneficial to the interests of the charities; for if they be otherwise, the Court of Chancery will set them aside, even at any distance of time (*b*). The ordinary grounds of impeachment are improper length of term (*c*), inadequacy of amount of rent, and a want of security for its payment, or the absence of proper covenants or provisions for the protection of the interests of the charities (*d*). It is of consequence that trustees should not only act *bonâ fide* in the disposition of charity property, but that they should be fully prepared to show satisfactorily to the court that they have done so; in which case the courts of equity will endeavour to protect them from the consequences of mere indiscretion, especially after great length of time has elapsed (*e*). One precaution may be suggested, that trustees for a charity should never grant leases without having the lands surveyed and valued by an experienced surveyor, especially if the lessee is in any manner related to or connected with the trustees, which is a circumstance always regarded with suspicion (*f*).

(*x*) Platt on Leases, 345.

(*y*) *The Att. Gen.* v. *Owen*, 10 Ves. 555.

(*z*) Platt on Leases, 347; *Malpas* v. *Ackland*, 3 Russ. 373.

(*a*) Plowd. 349; *Blake* v. *Foster*, 8 Term. Rep. 487.

(*b*) 4 Jarm. Prec. 259, 3rd ed.

(*c*) A husbandry lease for such a length of time as 99 years at an uniform rent cannot be supported; *Att. Gen.* v. *Hotham (Lord)*, 3 Russ. 415; *Att. Gen.* v. *Cross*, 3 Mer. 540.

(*d*) *Att. Gen.* v. *Cross*, 3 Mer. 540, and cases there cited; *Att. Gen.* v. *Owen*, 10 Ves. 555; *Att. Gen.* v. *Brooke*, 18 Ves. 320.

(*e*) See *Att. Gen.* v. *Warren*, 2 Swanst. 305; *Att. Gen.* v. *The South Sea Company*, 4 Beav. 453.

(*f*) By a local statute prior to the turnpike act, 3 Geo. IV. c. 126, trustees of a turnpike road were empowered to let the tolls by writing under their hands and seals, the rent to be made payable to their treasurer, in default of which every such lease should be "null and void to all intents and purposes whatsoever." Held, that this clause was still imperative, though by the general turnpike act, s. 65, it is enacted, that after the tolls shall have been let as there directed, the purchaser shall "enter into a proper agreement" for the taking thereof, and paying the rent "under such conditions and in such manner" as the trustees shall think fit. Held, further, that a lease making the rent payable to the trustees or their treasurer was not conformable

Powers of Receivers to lease.

Receivers cannot make leases but under the authority and direction of a court of equity (*g*); and they are bound to obtain the best terms (*h*). Without application, the receiver cannot in any case turn out the tenants, nor raise their rents upon slight grounds (*i*).

Sect. 22.—*Lords of Manors and Copyholders.*

Leases by the Lord of the Manor.

Every one having a lawful interest in a manor may make voluntary grants of copyholds escheated or come to his hands, as well as admittances, rendering the ancient rents and services, which bind him who has the inheritance.

Leases of the wastes.

A custom for a lord of the manor to grant leases of the waste without restriction is bad, as amounting to a power of destroying the right of common altogether (*j*). The 13 Geo. III. c. 81, s. 14, empowers lords of manors, with the consent of three-fourths of the commoners, to demise for not more than four years any part of the wastes and commons, not exceeding one-twelfth part, for the best rent that can be obtained by auction. A copyhold, to which a right of common was annexed, having by the custom of the manor vested in the lord by forfeiture, and he having regranted it as a copyhold tenement with the appurtenances; it was held, that, having always continued demisable whilst in the hands of the lord, it was a customary tenement, and, as such, was entitled to the right of common (*k*).

Leases by the Copyholders.

A copyholder cannot make a lease for more than one year without a licence (*l*) or by special custom, without incurring a forfeiture of his estate (*m*); but a lease for one year is good without either, and the copyholder may maintain an ejectment upon it (*n*). But a lease for one year, and so from year to year during ten years, being a good lease for ten years, is a forfeiture; but otherwise of a lease for one year, with a covenant for the holding it for a longer time at the will of the lessor: so a lease for one year, and so from year to year for the life of the lessee, being a lease for two years at least, is not good (*o*).

to the local act; that the words "null and void" in that act were not to be construed as "voidable," but that the lessee or his surety might treat the lease as absolutely void; and that the lessee's surety might take advantage of the above defect, in an action brought against him by the trustees for nonpayment of the rent, though the lessee had taken the tolls for several years under the lease. *Pearce* v. *Morrice*, 3 B. & Adol. 396; 4 Nev. & Man. 48. And see *Willington* v. *Brown*, 8 Q. B. Rep. 169.

(*g*) *Morris* v. *Elme*, 1 Ves. jun. 139. Their power to give notices to quit and to distrain is fully discussed in a subsequent part of this work, under the heads "Notice to Quit," Book I., Chap. VII., Sect. 6, and "Distress," Book II., Chap. II., Sect. 2.

(*h*) *Wynne* v. *Lord Newborough*, 1 Ves. jun. 164.

(*i*) Plowd. 349; *Blake* v. *Foster*, 8 Term Rep. 437.

(*j*) *Badger* v. *Ford*, 3 B. & Ald. 153; and see *Arlett* v. *Ellis*, 7 B. & C. 346.

(*k*) *Badger* v. *Ford*, 3 Barn. & Ald. 153.

(*l*) Ecclesiastical persons may, however, in some cases, see ante, p. 14. The Court of Q. B. has refused to compel the lord of a manor to grant a licence even where there was an alleged custom to pay a certain sum for every year of the term. *Reg.* v. *Hale*, 1 Per. & Dav. 293; 9 Ad. & El. 339; 1 Will. Wol. & Hod. 741.

(*m*) *Anon.*, Moor. 184.

(*n*) *Frosel* v. *Welst*, Cro. Jac. 403; *Mathews* v. *Whetton*, Cro. Car. 233; *Goodwin* v. *Longhurst*, Cro. Eliz. 535; *Erish* v. *Rives*, Cro. Eliz. 717.

(*o*) *Lutterell* v. *Weston*, Cro. Jac. 308.

So if it be from year to year, excepting one day in every year; for it is a certain lease for two years excepting two days, which is a lease in effect for more than one year; and although there be the intermission of a day, yet that is not material (*p*). So if a copyholder make three leases together, each to commence within two days after the expiration of the other, it is a mere evasion of the custom, and therefore not good (*q*). So a lease for more than one year, though intended only as a collateral security, is bad, if it amounts to a present demise (*r*). A lease for years, without licence from the lord, is not good without a special custom, though the lease be made by parol, or be not in possession, but to commence in futuro; and such lease is a forfeiture, for it is a good lease between the parties (*s*).

Under Special Custom to lease.

By special custom, a copyholder may make leases for more than one year, or for life, and a certain number of years after, without licence from the lord.

Under Licence from the Lord.

A copyholder having licence to lease, ought to pursue his licence strictly; otherwise, if he exceed the licence, the lease is bad: thus, if, having a licence to lease for twenty-one years from Michaelmas last, he lease for twenty-one years from December next: so if, being licensed to lease for two years, he lease for three years: so if a copyholder in fee, with a licence to lease for years, if he so long live, lease for years absolutely. So a copyholder, having a licence to make a lease for twenty-one years, cannot make two leases for that term, for he has satisfied his licence by one lease (*t*). A copyholder, having a licence to lease, may, however, lease for fewer years than his licence allows: thus a lease for three years, under a licence to let for twenty-one, is good (*u*). If the lord license his copyholder for life to make a lease for three years, if he so long live, a lease for three years absolutely is good: for a lease by a copyholder for life determines by his death, and therefore the condition annexed, being implied by law, is void; but if the lord license upon condition, the condition is void; for he gives nothing, but only dispenses with the forfeiture (*x*). A tenant at will of a manor cannot grant a copyholder a licence to alien for years: and if a tenant for life of a manor grants a licence to alien for years, it determines at his death (*y*).

What Lease by a Copyholder is a Forfeiture.

A lease without licence, and contrary to the custom, in order to amount to a forfeiture, must be a perfect lease, and must have a certain beginning and a certain end; for otherwise the lease is void, and carries but an estate at will at most, which is no forfeiture; therefore, where a copyholder had demised his copyhold for a year, and agreed to grant a further term of twenty-one years, provided he could obtain

(*p*) *Lady Montague's case*, Cro. Jac. 301.
(*q*) *Matthews* v. *Whetton*, Cro. Car. 233.
(*r*) *Morris* v. *Twist*, 2 Mod. 79.
(*s*) Com. Dig. tit. *Copyhold*, (K. 3).
(*t*) *Jackson* v. *Neal*, Cro. Eliz. 394; Com. Dig. tit. *Copyhold*, (K. 3); and see *Doe* d. *Robinson* v. *Bousfield*, 6 Queen's B. R. 492; 1 Car. & Kir. 558.
(*u*) *Goodwin* v. *Longhurst*, Cro. Eliz. 535; *Worledge* v. *Benbury*, Cro. Jac. 437.
(*x*) *Haddon* v. *Arrowsmith*, Cro. Eliz. 461.
(*y*) Com. Dig. tit. *Copyhold*, (C. 3).

of his lord a licence for that purpose, the licence was held to be a condition precedent, and that therefore no forfeiture was incurred (z). But no forfeiture is incurred provided the interest actually granted be within the period allowed by the custom of the manor, although the lessor covenants that the lessee shall enjoy the land for a longer period; the distinction being between an interest actually granted and a matter which rests entirely in contract (a). No one can take advantage of the forfeiture, except the party who was lord at the time it occurred. The remainder-man or reversioner, after the death of the lord, before entry or seizure, has no such right (b). The admittance of a copyholder, after a forfeiture is incurred, is clearly a waiver; and any act equally solemn will operate in the same manner; and such acts as operate as a waiver do not operate as a new grant, but admit the tenant to be in of his old title (c). If a copyholder, after a lease by licence, forfeit his copyhold, the lord shall not avoid the lease (d).

Effect of Leases by Copyholders.

A lease by a copyholder not warranted by the custom, and without the licence of the lord, is good against the parties themselves and against every one but the lord (e); and as against the lord it is only a ground of forfeiture, which he may waive (f). If a copyholder make a lease by licence, the lessee may assign without licence, or make an under-lease, for the lord by his licence has parted with his interest: so if the lessor after a lease by licence die without heir, the lessee shall have it for his term against the lord; for the licence is a confirmation of the lord (g).

SECT. 23.—*Persons having Powers.*

General Description of Powers.

Powers are the modifications of the uses of that estate which a man has to dispose of; and great latitude is allowed in making these modifications: a power may indeed be defined to be an authority enabling one person to dispose of the interest which is vested in another (h). The creation, execution and construction of powers depend on the substantial intention and purpose of the parties; for the intent of the parties who gave the power ought to govern every construction (i); and such intention is to be collected from the words of the instrument, according to their ordinary and common acceptation,

(z) Bac. Abr. tit. *Leases*, (I. 6).

(a) *Lady Montague's case*, Cro. Jac. 301; *Lenthall* v. *Thomas*, 2 Keb. 267; *Doe* d. *Coore* v. *Clare*, 2 T. R. 739; but see *Richards* v. *Ceely*, 3 Keb. 638.

(b) *Lady Montague's case*, Cro. Jac. 301; *Eastcourt* v. *Weeks*, 1 Salk. 186.

(c) *Doe* d. *Tarrant* v. *Hellier*, 3 Term Rep. 171.

(d) Com. Dig. tit. *Copyhold*, (C. 3).

(e) *Salisbury* d. *Cooke* v. *Hurd*, Cowp. 481; *Wells* v. *Partridge*, Cro. Eliz. 469; *Ashfield* v. *Ashfield*, Sir W. Jones, 157; *Doe* d. *Tressider* v. *Tressider*, 1 Queen's B. R. 416; 1 Gale & Dav. 70.

(f) *Doe* d. *Robinson* v. *Bousfield*, 6 Queen's B. R. 492; 1 Car. & Kir. 558.

(g) *Johnson* v. *Smart*, 1 Roll. Abr. 508, pl. 14.

(h) *Goodhill* v. *Brigham*, 1 Bos. & Pul. 196.

(i) *Ren* d. *Hall* v. *Bulkeley*, 1 Dougl. 293, 574; *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 60, 120; *Pomeroy* v. *Partington*, 3 Term Rep. 665.

and not according to any legal or technical meaning of them (*k*). He to whom the power is given has a right to enjoy the full exercise of it: they, over whose estates it is given, have a right to say "It shall not be exceeded, the condition shall not be evaded; it shall be *strictly pursued* in form and substance; and all acts done under a special authority, not agreeable thereto, nor warranted thereby, must be void."

Execution of Powers to grant Leases.

The circumstances attending the execution of leases granted under powers may be considered, 1. With respect to the lessor; 2, to the lessee (*l*); 3, to the subject on which the power is to operate; 4, to the quality and quantity of interest to be granted; 5, to the rent; 6, to the form of the lease (*m*) (*n*).

With respect to the Lessor.

1. With respect to the lessor; which only is to be considered in this place. He must, as we have observed, pursue the power strictly (*o*). If tenant for life, therefore, have a special power of granting leases for a longer term than his own life, upon his death the lease is void, unless the power has been strictly pursued. So tenant for life, with power of leasing under certain conditions, must demise in strict conformity with those conditions; and if his lease vary from them in the interest demised, or the rent reserved, it cannot be supported against the remainder-man (*p*). If a tenant for life, under a limited power of leasing, grant a lease exceeding his power, the lease is void, and not capable of confirmation by the remainder-man: but if the remainder-man accept rent, *as rent*, after the death of the tenant for life, it is an admission that the defendant is his tenant, and then he is entitled to notice to quit (*q*). A tenant for life, who has a power to make leases for three lives, or twenty-one years, cannot make such leases by letter of attorney by virtue of his power; because such leases not being derived out of the interest of the tenant for life, but by an authority derived from the tenant in fee, and to charge the estate of third persons, the trust for that purpose is personal, and cannot be delegated to another (*r*). Where a power of leasing was given to the father, who was tenant for life, and after his decease to his son, who was also tenant for life, and the son obtained a grant from the father of his life estate (without noticing the power), subject to a certain rent, with a power of re-entry for nonpayment, it was held that the son, during the lifetime of his father, could not lease under the power (*s*). The grantor of a lease under a power need not be in actual possession;

(*k*) *Griffith* v. *Hanson*, 4 Term Rep. 737; *Smith* v. *Doe* d. *Jersey* (*Earl*), 3 Bligh, 290; 7 Price, 281; 3 Moore, 339; 2 Brod. & Bing. 474.

(*l*) See post, Chap. IV., Sect. 17.

(*m*) Powell on Pow. 345.

(*n*) The rules of law adopted in cases of ecclesiastical leases, and leases made by tenants in tail under the statute 32 Hen. VIII. apply equally to leases made by virtue of powers; Bac. Abr. tit. *Leases*, (I. 11), n. See ante, pp. 2, 14, also post, Chap. IV., Sect. 17 and Sect. 18, (b), (c).

(*o*) *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 60, 120.

(*p*) *Doe* d. *Ellis* v. *Sandham*, 1 Term Rep. 705; *Doe* d. *Pulteney* v. *Cavan*, 5 Term Rep. 567; 6 Bro. Par. Cas. 175.

(*q*) *Doe* d. *Martin* v. *Watts*, 7 Term Rep. 83; 2 Esp. 501; and see *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998.

(*r*) 2 Co. Rep. 76 a.

(*s*) *Coxe* v. *Day*, 13 East, 118.

but a constructive possession, by the receipt of the rents and profits, is a sufficient compliance with the power: for, if actual possession were necessary, a leasing power could never be executed where the land is in the hands of a tenant (*t*).

SECT. 24.—*Persons having special Authority.*

(a) *Agents.*

Power of Agents to lease.

A special agent, under a limited authority, cannot bind his principal by an act beyond the scope of such limited authority (*u*): but where a man does such an act as cannot be good by any other means than by virtue of his authority, it shall be intended to be an execution of his authority; although where a man has an interest and authority, and does an act without reciting his authority, it shall be intended to be done by virtue of his interest (*x*). A lease may be made by an agent who has authority from the lessor to execute it in his name (*y*). An agent, who makes an agreement or a lease, ought in prudence to make it as the instrument of his principal (*z*); otherwise, he may make himself responsible for the performance of the contract or covenants, even although he expressly describe himself as an agent (*a*). An agent appointed to contract for the granting of a lease does not require a written authority under the 4th section of the Statute of Frauds, 29 Car. II. c. 3; but an authority to execute a deed must be by writing under seal (*b*). It would seem, also, that an authority to demise an incorporeal hereditament ought to be under seal.

(*t*) *Ren* d. *Hall* v. *Bulkeley*, 1 Dougl. 292. In case by the reversioner, an allegation that the messuage was in the possession of A., as tenant to the reversioner, means that the tenant had a *right* to the possession in point of interest, so that the plaintiff could sue as reversioner. See *Hosking* v. *Phillips*, 3 Exch. R. 168; Book III., Chap. V., Sect. 2, post.

(*u*) *Fenn* v. *Harrison*, 3 Term Rep. 757; see *Hamilton* v. *Clanricarde*, 5 Bro. P.C. 547. Where the owner of a house employed an agent to let it, and a person being in treaty for it, asked the agent if there was any objection to the house; to which he answered, there was not, and a written agreement was then entered into, but it was afterwards discovered, that the adjoining house was a brothel; it was held, it an action by the owner on the agreement, to which there was a plea of fraud, covin and misrepresentation, that the plea was not supported, though the owner was aware of the nuisance, his agent not knowing of it, and it not appearing that the owner had purposely employed the agent, because he was not aware of it. *Cornfoot* v. *Fowke*, 6 Mee. & W. 358. But where an agent made a false representation, believing it to be true, though without the authority of his principal, as to the value of a house on the sale of a lease of it, it was held that the buyer could recover from the principal the difference of the value. *Fuller* v. *Wilson*, 3 Q. B. Rep. 58; 2 Gale & Dav. 460. The judgment in this case was, however, afterwards reversed, the facts of the case appearing to be different. *Wilson* v. *Fuller*, 3 Q. B. Rep. 68, 1009; 3 Gale & Dav. 570. There is no implied duty in the owner of a house, which is in a ruinous and unsafe condition, to inform a proposed tenant that it is unfit for habitation; and no action will lie against him for an omission to do so, in the absence of express warranty or active deceit. *Keates* v. *Cadogan* (*Earl*), 10 C. B. 591.

(*x*) *Parker* v. *Kett*, 1 Ld. Raym. 660.

(*y*) Bull. N. P. 177. See post, Chap. IV., Sect. 18, (e).

(*z*) *Combe's case*, 9 Rep. 77 a; *Berkeley* v. *Hardy*, 5 B. & C. 355.

(*a*) *Norton* v. *Herron*, Ry. & Mo. 229.

(*b*) *Horsley* v. *Rush*, 7 Term Rep. 209; *White* v. *Cuyler*, 6 Term Rep. 176.

(b) *Bailiffs.*

Power of Bailiffs to grant Leases.

A bailiff of a manor cannot, by virtue of his office, make leases for years; for his business is only to collect the rents, gather the fines, look after the forfeitures, and such like; he has no estate or interest in the manor itself, and therefore cannot contract for any certain interest thereout: but the lord of the manor may give him a special power to make leases for years as he may do to any stranger; and then such leases, if they are pursuant to the power, and made in the name of the lord, will be as good as leases by the lord himself. A general bailiff of a manor may make leases at will without any special authority, because, having to collect and answer the rents of the manor to his lord, if he could not let leases at will, the lord might sustain great prejudice by absence, sickness or other incapacity to make leases when any of the former leases were expired; and such leases at will are for the benefit of the lord, and can be no ways prejudicial to him, because he may determine his will when he thinks fit. Such, however, must be taken to be strict tenancies at will; otherwise, as general tenancies at will are construed to be tenancies from year to year, and half a year's notice to quit is required before a tenant can be ousted, such tenancies might prove very prejudicial to the lord's interest (*c*).

SECT. 25.—*Disseisors and Disseisees.*

Power of Disseisor to lease.

A disseisor, though his entry is unlawful, may make leases which shall be good against all persons except him who has the right of possession (*d*).

Power of Disseisee to lease.

If one be disseised of lands, and whilst he is out of possession intend to make a lease for years; the way is to prepare a deed of lease, and after he has signed and sealed it, before any actual delivery thereof as his deed, to deliver it as an escrow to a third person, to be delivered as his deed after entry and actual possession taken in his name (*e*).

(*c*) *Shopland* v. *Rydler*, Cro. Jac. 55; *Gybson* v. *Searls*, Cro. Jac. 84.

(*d*) Vin. Abr. tit. *Estate*, R. A. pl. 5.

(*e*) Bac. Abr. tit. *Leases*, (I. 4).

CHAPTER II.

TO WHOM TERMS MAY BE GRANTED.

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Power of Ecclesiastical Persons to take Leases.

SECT. 1.—*Ecclesiastical Persons.*

EVERY person who is not rendered incompetent by some legal disability is capable of being a lessee.

By the statute 1 & 2 Vict. c. 106 (repealing the 57 Geo. III. c. 99 (*a*)), it is enacted, sect. 28, "that it shall not be lawful for any spiritual person, holding any cathedral preferment or benefice, or any curacy or lectureship, or who shall be licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, to take to farm for occupation by himself, by lease, grant, words or otherwise, for term of life, or of years, or at will, any lands, exceeding eighty acres in the whole, for the purpose of occupying, or using, or cultivating the same, without the permission in writing of the bishop of the diocese, specially given for that purpose under his hand; and every such permission to any spiritual person to take to farm, for the purpose aforesaid, any greater quantity of land than eighty acres, shall specify the number of years, not exceeding seven, for which such permission is given: and every such spiritual person, who shall, without such permission, so take to farm any greater quantity of land than eighty acres, shall forfeit for every acre of land above eighty acres, so taken to farm, the sum of forty shillings for each year during or in which he shall so occupy, use or cultivate such land, contrary to the provisions aforesaid." By the 124th section of the same statute, the word "benefice" is explained to mean benefices with cure of souls, and no others; and to comprehend all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries or districts belonging or reputed to belong, or annexed or reputed to be annexed, to any church or chapel (*b*).

(*a*) This statute repeals all the former statutes upon the subject, and amongst others the 21 Hen. VIII. c. 13, the 43 Geo. III. c. 84, and the 43 Geo. III. c. 109.

(*b*) A lease made contrary to these provisions is not void, but voidable merely on an information brought for holding a quantity of land above eighty acres.

SECT. 2.—*Infants.*

Leases to Infants, whether void or voidable.

Although leases to infants are not absolutely void, yet they are voidable by such infants upon attaining their majority; thus, where in an action of debt for rent, the defendant pleaded infancy at the time of the lease made, the court held upon demurrer, that the lease was voidable only at the election of the infant, and the defendant not having refused and waived the land before the rent-day came, although he came of age before that, and it not being shown to the court that the rent was greater than the value of the land, the plaintiff had judgment (*c*). And it would seem that an infant who has taken possession under a lease which is disadvantageous to him, is liable if he has not disclaimed on attaining his full age (*d*). Where a lease to an infant, however, is not by deed, he perhaps will be liable at all events for use and occupation of the premises in which he resides; for he is liable for necessaries, (which is a relative term, according to his station in life,) under which description lodging must surely come: wherefore such a case would probably be held to fall within the fair liability which the law imposes on infants of being bound for necessaries (*e*). Where an infant rented a house, and exercised his trade as a barber therein, it was held that it was properly left to the jury to decide whether it came within the term of necessaries. It would appear that there is no difference between a trade carried on by a minor, and his occupation of a house in a manual employment; and that he is not liable for the rent of a house taken for either purpose (*f*).

Election to avoid, when made.

The election to avoid a lease must be made by the infant within a reasonable time after he attains his full age; and it would seem that an acquiescence of four months after majority would preclude an infant from afterwards disaffirming a lease (*g*) (*h*). An acquiescence for so long a period would be evidence from which a jury might infer an affirmance of the lease.

If the infant lessee elects to annul the lease, he cannot recover the consideration paid for it, although subsequent events may effect a complete failure of the object for which such consideration was given (*i*).

Infant jointly interested with another.

If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he shall be

(*c*) Bull. N. P. 177; *Ketsey's case*, Cro. Jac. 320; *Baylis* v. *Dineley*, 3 Man. & S. 477.

(*d*) *North-Western Railway Company* v. *M'Michael*, 5 Ex. R. 128.

(*e*) *Hands* v. *Slaney*, 8 Term Rep. 578.

(*f*) *Lowe* v. *Griffiths*, 1 Scott, 458; 1 Hodges, 30.

(*g*) *Holmes* v. *Blogg*, 8 Taunt. 35; 1 Moore, 466.

(*h*) If an infant pay money as a premium for a lease, which he avoids upon coming of age, and never derives benefit from the occupation, he cannot recover back such money in an action for money had and received. *Holmes* v. *Blogg*, 8 Taunt. 35.

(*i*) *Holmes* v. *Blogg*, 8 Taunt. 39.

held to have acted as trustee, and the infant may claim his share of the benefit; but if it do not prove beneficial, he must take it upon himself: this is the peculiar privilege of the unprotected situation of an infant (*j*).

Renewal of Leases to Infants.

By stat. 11 Geo. IV. & 1 Will. IV. c. 65, s. 12, leases to infants may, under the direction of the Courts of Equity, be surrendered and renewed.

SECT. 3.—*Married Women.*

Married Women may be Lessees.

A married woman may be a lessee, her husband's express assent to the lease not being necessary, as the estate vests until he signifies his dissent (*k*). She may however avoid it after his death (*l*).

Leases to Husband and Wife.

If a lease be made to a husband and wife, the wife cannot disagree to it during the life of her husband, and if she acquiesce after his death, she will be liable for all arrears of rent which accrued during his lifetime. So she shall be charged with waste during the coverture (*m*). But it is said, however, that if there be any special covenants inserted in the lease, she is not bound by them after the death of her husband, although she continues tenant by force of the demise (*n*).

Renewal of Leases to married Women.

By stat. 11 Geo. IV. & 1 Will. IV. c. 65, s. 12, leases to married women may, under the directions of the Courts of Equity, be surrendered and renewed.

SECT. 4.—*Lunatics.*

Liability of.

Idiots and lunatics may, it appears, take leases for their benefit (*o*). Use and occupation cannot be maintained on a written agreement entered into by a lunatic to take a house which is unnecessary, if the lessor was aware of it, and took advantage of the lunatic's situation (*p*).

Renewal of Leases.

Committees of lunatics may, by stat. 11 Geo. IV. & 1 Will. IV. c. 65, s. 13, under the directions of the Lord Chancellor, surrender leases and take new ones for the benefit of the lunatics.

SECT. 5.—*Persons Outlawed and Attainted.*

When they may be Lessees.

Outlaws may be lessees (*q*); but leases taken by them for chattel interests are forfeited to the crown, whether the outlawry be in a civil

(*j*) *Ex parte Grace*, 1 Bos. & Pul. 376.
(*k*) *Swaine* v. *Holman*, Hob. 204; Co. Litt. 3 a.
(*l*) Co. Litt. 3 a.
(*m*) 2 Instit. 303; 2 Roll. 827, l. 10, 25; Com. Dig. tit. *Baron and Feme*, (S. 2).
(*n*) 1 Roll. Abr. 349, pl. 2; Brownl. 31. And see Dyer, 13 b.
(*o*) Co. Litt. 2 b.
(*p*) *Dane* v. *Viscountess Kirkwall*, 8 Car. & Pay. 679.
(*q*) *Knowles* v. *Powel*, Owen, 116.

or criminal case (*r*); but outlawry in a civil action does not occasion a forfeiture of freehold leases (*s*). Leases taken by an outlaw in his character of executor are not forfeited to the crown on office found (*t*). Persons attainted of treason or felony may be lessees; but upon office found, their leases become forfeited to the crown (*u*).

SECT. 6.—*Aliens.*

Leases to Aliens.

If a lease for years were made to an alien, upon office found, the king by the common law was entitled to it. If a lease for years were made to an alien merchant friend of land, meadows, pastures, woods, and the like, the estate would, upon office found, devolve to the crown. But such a person was entitled to take a lease for years, but not a freehold lease, of a house for habitation, as incident to commerce; and the crown would not be entitled to such lease unless he departed or relinquished the realm. But if he died, the house would go to the king, not to his executors or administrators. But if the alien were no merchant or an alien enemy, the lease, although for his habitation, belonged to the crown (*x*). Also the statute 32 Hen. VIII. c. 16, s. 13, makes all leases of any dwelling-house or shop within this realm, or any of the king's dominions, made to a stranger, being an artificer or handicraftsman, born out of the king's obeisance, not being a denizen, absolutely void and of none effect. But the late statute 7 & 8 Vict. c. 66, s. 5 (*y*), superseding in effect that of Henry VIII., enacts that every alien, being the subject of a friendly state, may by grant, lease, devise, assignment, bequest, representation or otherwise, take and hold any lands, houses or other tenements for the purpose of residence or of occupation, or for the purpose of any business, trade or manufacture, for any term of years not exceeding twenty-one years, and with the same rights, except that of voting for members of parliament, as if he were a natural born subject. The statute, by section 15, reserves to aliens their rights and privileges, as to the possession of real property, as amply as they were enjoyed before the act. Leases, therefore, exceeding twenty-one years, granted to an alien friend, are not void unless they fall within the 32 Hen. VIII. c. 16; but upon office found the crown would become entitled to them, except in the case of a lease of a house, for the purposes of commerce, granted to an alien friend. Alien enemies, among whom infidels are ranked, cannot hold leases

(*r*) *Reed* v. *Ward*, 1 Lev. 8; *Britton* v. *Cole*, 1 Salk. 395. As to outlawry in a civil case, see Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 24.

(*s*) 2 Roll. Abr. 807; Com. Dig. tit. *Utlagary*, (D. 3).

(*t*) Com. Dig. tit. *Utlagary*, (D. 3).

(*u*) Co. Litt. 2 b; Shep. Touch. 235.

(*x*) Co. Litt. 2 b; *Fourdrin* v. *Gowdey*, 3 Myl. & K. 383; and see 1 Bla. Com. 372, and *Caroon's case*, Cro. Car. 8.

(*y*) This act does not extend to the colonies, see 10 & 11 Vict. c. 83.

either for the purpose of commerce or habitation (*c*). Just before the passing of this statute, 7 & 8 Vict. c. 66, the court refused to nonsuit in ejectment, when title was made in a woman whose husband was an alien (*d*). The statute 32 Hen. VIII. c. 16, may be pleaded in bar to an action of debt for rent brought against an executor or administrator; but, in pleading it, it seems necessary to aver that the messuage demised was a dwelling-house or shop (*e*). The statute 32 Hen. VIII. c. 16, being penal, is to be construed strictly, and therefore an assignment of a lease to an alien is not absolutely void (*f*). It would seem that marriage will not entitle an alien husband to a term which is vested in his wife (*g*).

Occupation of Premises by Aliens.

Although the statute 32 Hen. VIII. c. 16, s. 13, made *leases* of dwelling-houses or shops granted to any stranger artificer void, yet if such artificer occupied a dwelling-house or shop under *an agreement* which did not amount to a lease, or if he were tenant from year to year, or for a shorter time, an action for use and occupation would lie against him notwithstanding that statute (*h*). But an agreement which provided for the granting a future lease was illegal by the statute, and if the alien took possession under it, the lessor might enter at any time and eject him (*i*). An alien may occupy a tenement, and carry on his trade there like another person; and has therefore an interest which enables him to gain a settlement by renting the tenement (*k*).

Naturalization of Aliens.

As to the naturalization of aliens, see 7 & 8 Vict. c. 66, ss. 6, 13 and 16.

SECT. 7.—*Denizens.*

When Denizens may be Lessees.

A denizen is an alien born, but who has obtained ex donatione regis letters-patent to make him an English subject. A denizen occupies a middle state, between an alien and a natural born subject, and partakes of both (*l*). He may take lands by purchase or devise, and may be a lessor or lessee, like a natural born subject (*m*), but he cannot take any grant of lands, &c. from the crown (*n*).

(*c*) Co. Litt. 2 b; *Calvin's case*, 7 Rep. 17 a; Wing's Maxims, 10; 1 Bla. Com. 372; *Anon.*, Owen, 45. But see *Brock* v. *Phillips*, Cro. Eliz. 683.

(*d*) *Doe* d. *Miller* v. *Rogers*, 1 Car. & K. 390.

(*e*) *Jevens* v. *Harridge*, 1 Saund. Rep. 6; and see the notes.

(*f*) *Wootton* v. *Steffenoni*, 12 Mees. & Wels. 129.

(*g*) *Theobalds* v. *Duffoy*, 9 Mod. 102. But see *Doe* d. *Miller* v. *Rogers*, 1 Car. & Kir. 390.

(*h*) *Jevens* v. *Harridge*, 1 Saund. Rep. 6.

(*i*) *Lapierre* v. *M'Intosh*, 9 Ad. & El. 857; 1 Per. & Dav. 629.

(*k*) *Rex* v. *Eastbourne*, 4 East, 107; 1 Black. Com. 372.

(*l*) *Calvin's case*, 7 Rep. 25 b.

(*m*) 1 Bla. Com. 374; Bendl. 10, pl. 40; 32 Hen. VIII. c. 16, s. 13.

(*n*) Stat. 12 & 13 Will. III. c. 2.

SECT. 8.—*Corporations.*

When Leases may be made by Corporations.

A corporation aggregate may take any chattel, as a lease, &c., in its corporate capacity, which shall go in succession, because it is always in being (*o*). But regularly no chattel shall go in succession in case of a sole corporation; therefore, if a lease for years be made to a bishop and his successors, and the bishop die, it shall not go to his successors, but to his executors (*p*): by custom however it may, as in the instance of the Chamberlain of London (*q*).

Leases by Corporations to their own body.

One individual of a corporation aggregate cannot take a lease from the corporation (*r*). A corporation sole cannot make a lease to himself in his natural capacity (*s*); but there is no objection to such a lease being made in trust for the grantor. Nor can one member of a corporation aggregate make a lease of corporate lands to another member; thus, a dean cannot make a lease to his chapter (*t*), nor vice versâ. But a lease may be made by the dean and chapter to one of the prebendaries, as a prebendary is not an integral part of the body politic (*u*).

Churchwardens and Overseers.

By several statutes, churchwardens and overseers of the poor may, as such, purchase houses for the poor, or contract for their lodgings, although they have not legally any corporate capacity. Churchwardens and overseers are not by the stat. 59 Geo. III. c. 12, s. 17, made a complete body corporate; and therefore it is not necessary in pleading to show the acceptance of a demise to them by an instrument under a common seal; and such a demise to them by their name of office would be good (*x*). Where land was let to the churchwardens and overseers of the poor, jointly with the surveyors of the highways, and their successors, it was held that it was not a case within the statute 59 Geo. III. c. 12, though let at a vestry meeting and for the purposes of the poor, and that therefore the parties were individually liable (*y*).

SECT. 9.—*Assignees of Bankrupts and Agents.*

Leases to Assignees of Bankrupts.

An assignee of a bankrupt cannot become a lessee of the bankrupt's estate; if therefore instead of selling the estate he take a lease of it, he will be accountable for all the profits, and must sustain the loss, if any (*z*).

Leases to Agents.

With respect to agents and other persons whose duties are parti-

(*o*) Bac. Abr. tit. *Corporations*, (E. 4).
(*p*) Co. Litt. 46 b.
(*q*) 2 Bac. Abr. 14.
(*r*) *Salter* v. *Grosvener*, 8 Mod. 303.
(*s*) Ibid.
(*t*) *Salter* v. *Grosvener*, 8 Mod. 303.
(*u*) Ibid.
(*x*) *Smith* v. *Adkins*, 8 Mees. & Wels. 362; 1 Dowl. N. S. 129. See also *Goulds·worth* v. *Knights*, 11 Mees. & Wels. 337, and ante, p. 9.
(*y*) *Uthwatt* v. *Elkins*, 13 Mees. & Wels. 772.
(*z*) *Ex parte Hughes*, 6 Ves. 617; *Ex parte Lyon*, 6 Ves. 617.

cularly the object of equitable jurisdiction, the Courts of Equity view with considerable jealousy contracts entered into by them for leases. It is incumbent on a person in the situation of an agent to show that the transaction is perfectly fair and reasonable, and that a just consideration has been given by him for a lease obtained from his principal (*a*). The same observation also applies to persons in the situation of debtor and creditor, attorney and client, and mortgagor and mortgagee.

(*a*) *Kingsland* (*Lord*) v. *Barnewell*, 4 Bro. Parl. Cases, 154.

CHAPTER III.

OF WHAT TERMS MAY BE GRANTED.

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SECT. 1.—*Corporeal Hereditaments.*

Leases of Corporeal Hereditaments.

CORPOREAL hereditaments (*a*) consist wholly of substantial and permanent objects. When leases for years began to be looked upon as a fixed and permanent interest, and the lessees were sufficiently enabled to defend themselves and their possessions against the acts and encroachments as well of the lessor as of strangers, men found it their interest to improve and encourage this sort of property, and therefore extended it to all sorts of interests and possessions whatsoever (*b*). Leases for life, or for years, or from year to year, may be made of anything corporeal or incorporeal which lies in livery or grant (*c*) (*d*). Where there is a demise of premises, and an entire rent reserved, if any part of the premises cannot be legally demised, the whole is void (*e*).

Leases of Chattels.

Goods and chattels may also be let for years, though the interest of the lessee therein differs from the interest which he has in lands. If a man lease for years a stock of live cattle, such lease is good, and the lessee shall have the use and profits of them during the term; but he cannot destroy, kill, sell or give them away without, it seems, being liable to an action of trespass (*f*). The lessor, however, has not any reversion in them, as in the case of lands, to grant over to another either during the term or after, till the lessee has re-delivered them to

(*a*) With respect to the import of the word "hereditament," Lord Kenyon was astonished that any doubt should ever have been entertained about it; it was not, he observed, so strong a word as "tenement;" but was merely a description of the thing itself, and not the quality of it or interest in it; *Doe* d. *Small* v. *Allen*, 8 Term Rep. 503. This accords with the difference taken between the two words "hæreditas" and "hæreditamentum;" for the word hæreditas" imports the estate which a man has in the land; "hæreditamentum" the land itself which may be inherited, and therefore cannot be applied to the estate in the land; *Hopewell* v. *Ackland*, 1 Comyn, Rep. 167. *Holt*, C. J., however, says the word "hæreditament" implies a fee, which is consonant to Sir *Edward Coke's* exposition of the word, which he says is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be inherited, be it corporeal or incorporeal, real, personal or mixed; *Smyth* v. *Tyndale*, Holt, 236; Co. Litt. 19, 20; 2 Black. Com. 17; Shep. Touch. 91.

(*b*) Bac. Abr. tit. *Leases*, (A).

(*c*) Shep. Touch. 268.

(*d*) See post, Chap. IV., Sect. 14, for a definition and explanation of livery of seisin.

(*e*) *Doe* d. *Griffith* v. *Lloyd*, 3 Esp. 78.

(*f*) Ibid.; Litt. s. 71.

him; for the lessor has only a possibility of property in case they all outlive the term; for if any of them die during the term, the lessor cannot have them again after the term; and during the term he has nothing to do with them, and consequently of such as die, the property vests absolutely in the lessee. So, whether they live or die, yet all the young ones coming of them, as lambs, calves, &c. belong absolutely to the lessee as profits arising and severed from the principal, since otherwise the lessee would pay his rent for nothing; and therefore this differs from a lease of dead goods and chattels, for there, if anything be added for the repairing, mending or improving thereof, the lessor shall have the improvements and additions, together with the principal, after the lease ended, because they cannot be severed without destroying or spoiling the principal (*g*).

Sect. 2.—*Advowsons.*

Leases of Incorporeal Hereditaments generally.

An incorporeal hereditament is a ri[illegible]suing out of a thing corporate (whether real or personal[illegible] [illegible]cerning, or annexed to, or exercisable within the same (*h*). [illegible]ncorporeal hereditaments are, generally speaking, capable of being demised; but such demise must be by deed, for they lie in grant and not livery. Incorporeal hereditaments are principally these; viz. advowsons; tithes and tolls; commons and estovers; ways; offices; franchises; corrodies and pensions; and annuities (*i*).

Leases of Advowsons.

Although it has been said that an advowson cannot properly be the subject of a demise, on the ground that as no profit is permitted to accrue, no rent can be reserved, nor any services performed to the proprietor (*k*); yet this does not seem to be quite correct; for a lease may be made, not only of lands, but of all other hereditaments (*l*), such as advowsons, tithes, offices not concerning the administration of justice, and the like (*m*); and there is no doubt (says Mr. Wooddeson) but that the lessee of tithes, advowsons, or any incorporeal hereditament, would be liable to an action of debt for the rent agreed upon (*n*). So where a lessee for years of an advowson was presented to the advowson by the lessor, it was adjudged to be a surrender of his term (*o*). Thus it seems clear that an advowson may be the subject of a demise; and although L. C. Talbot doubted whether the word "tenements," which had been said to carry an advowson in a will, extended to

(*g*) Bac. Abr. tit. *Leases*, (A); *Collins* v. *Harding*, Cro. Eliz. 606. Where furniture or goods are let with a house, it is usual to have a schedule thereof made upon the lease, and a covenant to re-deliver at the end of the term.

(*h*) Co. Litt. 19 b, 20 a.

(*i*) *Rex* v. *Alresford*, 1 Term Rep. 358; *Musgrave* v. *Cave*, Willes, 323; 1 Inst. 9.

(*k*) Com. Dig. tit. *Advowson*, (C 2).

(*l*) Bac. Abr. tit. *Leases*, (A).

(*m*) 2 Cruise, ss. 22, 24; *Bouchier* v. *Morgan*, 2 Anstr. 404; *Cox* v. *Brain*, 6 Taunt. 95.

(*n*) 2 Woodd. 69.

(*o*) *Gybson* v. *Searls*, Cro. Jac. 84.

incorporeal inheritances, yet it appears to be the better opinion, that as lands and houses are tenements, so is an advowson a tenement (*p*).

SECT. 3.—*Tithes and Tolls.*

Leases of Tithes.

A parson may grant his tithes for years (*q*), so he may lease them for so long a term as he shall continue parson (*r*); and, although it has been said that no rent can issue out of tithes (*s*), yet the better opinion seems to be that rent may be reserved on a lease for years of tithes (*t*); and that the parson may demise them without any rent, if he pleases (*u*). Leases of tithes must be by instrument under seal, as incorporeal hereditaments only lie in grant (*x*). By the statute 5 Geo. III. c. 17, intituled "An Act to confirm all Leases already made by Archbishops and Bishops, and other Ecclesiastical Persons, of Tithes and other Incorporeal Hereditaments, for one, two or three Life or Lives, or twenty-one Years; and to enable them to grant such Leases, and to bring Actions of Debt for the recovery of Rents reserved and in Arrear on Leases for Life or Lives," any other person or persons, having any spiritual or ecclesiastical promotions, are enabled to grant such leases of tithes, tolls or other incorporeal inheritances, which shall be "as good and effectual in law against such archbishop, bishop, masters and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and other persons so granting the same, and their successors and every of them, to all intents and purposes, as any lease or leases already made or to be made by any such archbishop, &c." by virtue of the stat. 32 Hen. VIII. c. 28, or any other statute then in being; and actions of debt may be brought by such lessors for rent in arrear, as in the case of any other landlord or lessor. Under the settlement of an estate with a power to the tenant in possession to let all or any part of the premises, so as the usual rents be reserved, a lease of tithes which had never been let before was held void (*y*). By the Tithe Commutation Act, 6 & 7 Will. IV. c. 71, the lessees of tithes commuted to rent-charges may surrender and avoid their leases, on certain terms, as to compensation and apportionment of rent, to be settled by the commissioners.

Leases of Tolls.

Tolls may be let or mortgaged (*z*).

(*p*) *Kensey* v. *Langham*, Cas. Temp. Talbot, 144; Co. Litt. 19, 20; 2 Black. Com. 17; *Robinson* v. *Tongue*, 3 P. Wms. 461.

(*q*) Shep. Touch. 241. See further as to Tithes, post, Book II., Chap. VII., Sect. 5.

(*r*) *Brewer* v. *Hill*, 2 Anst. 413.

(*s*) Co. Litt. 47 a.

(*t*) *Talentine* v. *Denton*, Cro. Jac. 111; *Rickman* v. *Garth*, Cro. Jac. 173. See however the preamble of the 5 Geo. III. c. 17.

(*u*) *Walker* v. *Wakeman*, 1 Ventr. 294; 2 Lev. 150; *S. C.* nom. *Wakeman* v. *Walker*, 3 Keb. 597.

(*x*) *Gardiner* v. *Williamson*, 2 Barn. & Adol. 336.

(*y*) *Pomery* v. *Partington*, 3 Term Rep. 665.

(*z*) *Fairtitle* d. *Mytton* v. *Gilbert*, 2 Term Rep. 169.

SECT. 4.—*Commons and Estovers.*

Leases of Commons.

Rights of common may be demised (*a*). With respect to commons, the stat. 13 Geo. III. c. 81, s. 15, empowers the lord of any manor, with the consent of three-fourths of the persons having right of common upon the wastes and commons within the manor, at any time to demise or lease, for any term or number of years not exceeding four years, any part of such waste and commons, not exceeding a twelfth part thereof, for the best and most improved yearly rent that can by public auction be got for the same; and directs that the clear net-rents shall be applied to drain, fence, and otherwise improve the residue of the waste and commons. Where the lord of the manor conveys away a part of the wastes to a third person, though the right of ownership of the soil changes hands, the right of common still subsists in the commoners as well over that part of the wastes that the lord has conveyed away, as over that part which he retains in his own hands (*b*). A common will not pass without express words (*c*).

Leases of Estovers.

Estovers may also be leased; the grantee, therefore, of house-bote, or hay-bote, may let it to another (*d*). A grant of common, or of estovers to be burned on land leased, will not pass without express words, because they are profits à prendre in another soil, and are not of necessity, as a way (*e*).

SECT. 5.—*Ways.*

Leases of Ways.

A right of way is demisable with the land (*f*); and the lessee shall have all the ways, easements, &c. which the lessor had (*g*). By a lease of land, a way will pass without being expressed in the deed (*h*).

SECT. 6.—*Offices.*

Leases of Offices and Dignities.

Buying or selling offices that touch the administration of justice or the revenue is prohibited by stat. 5 & 6 Edw. VI. c. 16; but such offices as only require common skill and diligence may be granted for years, because they may be executed by deputies without any inconvenience to the public. An office may be granted by way of lease by deed (*i*), provided no inconvenience or injury to the public is likely to ensue; and it may be granted in fee tail, for life, or years, or at

(*a*) *Sury* v. *Brown*, Latch. 99.
(*b*) *Benson* v. *Chester*, 8 Term Rep. 396, 401.
(*c*) *Clarke* v. *Cogge*, Cro. Jac. 170, 190.
(*d*) Shep. Touch. 222; Bac. Abr. tit. *Leases*, (A).
(*e*) *Clarke* v. *Cogge*, Cro. Jac. 170, 190.
(*f*) *Osborne* v. *Wise*, 7 C. & P. 761.
(*g*) *Staples* v. *Haydon*, 6 Mod. 3, 149; *Clarke* v. *Cogge*, Cro. Jac. 170, 190; *Howton* v. *Fearson*, 8 Term Rep. 50, 56.
(*h*) *Clarke* v. *Cogge*, Cro. Jac. 170, 190. See post, Book II., Chap. VII., Sect 2, (e), as to private ways.
(*i*) *West* v. *Sutton*, 2 Ld. Raym. 853; 6 Mod. 57.

will (*k*); but an office to which a trust is annexed, or which concerns the administration of justice, cannot be granted for years, for then it would go to the executor, or administrator, or ordinary, and might be seized upon outlawry, &c.: therefore the office of Marshal of the Queen's Bench cannot be granted for years, because it is an office of trust and daily attendance; and such a termor of years may die intestate, and then it would be in suspense until administration is granted, which is the act of another Court (*l*). Nor can a grant for years absolutely be made of the offices of chirographer, clerk of the pipe, of the king's silver in the Exchequer, or of the crown remembrancer, and similar offices in several Courts of justice (*m*). It has, however, been held, that a lease thereof for years during the life of the grantee is good; for thereby the danger of the office going to executors is avoided. Where the right of appointing to an office is in the crown, it is usually exercised by means of letters-patent; where in a subject the appointment ought regularly to be made by an instrument under his seal (*n*). In one case, it appeared that the dean and chapter of Westminster made a lease for years of the Gate-House Prison, and the lessee had committed several offences which amounted to a forfeiture, for which the office was seized; but no objection was made to its being let for years. There seems to be a difference, however, between the two cases; the first, namely, that of the Marshal of the Queen's Bench (*o*) (*p*), was a grant from the crown, in whom all offices in relation to the administration of justice are originally and inherently lodged, and, therefore, for the crown to grant out such office for years may be liable to the objections before mentioned; but in the latter case, namely, that of the Gate-House Prison, the dean and chapter were the immediate grantees of the crown, and they had the office to them and their successors for ever in fee, and were perpetual gaolers themselves, and answerable to the crown notwithstanding any lease over to another; and, therefore, they always took security of such under-lessee for their own indemnity. Offices requiring merely common diligence and capable of being executed by deputy without any inconvenience to the public, may be leased for years; and therefore a lease for years may be granted of the offices of postmaster-general (*q*), king's printer (*r*), warden of ports and havens (*s*), gunfounder (*t*), park-keeper (*u*), gauger (*x*), aulnager (*y*), garbler of spices and registrar of policies in London (*z*), and, as it would seem,

(*k*) Com. Dig. tit. *Officer*, (B 7, &c.).
(*l*) *Rex* v. *Lenthall*, 3 Mod. 145.
(*m*) *Reynel's case*, 9 Rep. 97 b; *Meade* v. *Lenthall*, Cro. Car. 587.
(*n*) Bac. Abr. tit. *Offices*, (E), (L).
(*o*) *West* v. *Sutton*, 6 Mod. 57; 2 Lord Raym. 853; Bac. Abr. tit. *Leases*, (A).
(*p*) This office has been regulated by the statutes 27 Geo. II. c. 17, and 5 & 6 Vict. c. 22.
(*q*) *Veale* v. *Priour*, Hardr. 352.
(*r*) Ibid.
(*s*) Ibid. 354.
(*t*) Ibid.
(*u*) *Zouch* v. *Moore*, 2 Rol. Rep. 274.
(*x*) Hardr. 354.
(*y*) Ibid.
(*z*) Ibid.

such as are merely ministered in courts of justice, as surveyor of the green wax, sealer of writs and subpœnas (*a*). Where one made a grant for years of the stewardship of a court-leet and court-baron, it was held void as to the court-leet, that being a judicial office, but good as to the court-baron, that being only ministerial, and the suitors judges thereof; but the grant appearing afterwards to be for years determinable upon the death of the lessee, it was held good for both, because there was no danger of its coming to executors or administrators (*b*). Dignities and honours cannot be granted for years (*c*).

To what Extent.

An office that may be granted at all, may generally be granted also in reversion; but it cannot be granted *as* a reversion and *by the name* of a reversion, for there is no reversion of an office, unless it be an office of inheritance; yet it may well be granted in reversion, to hold after the death of the grantee for life (*d*). If an office be granted in reversion, the grantee, upon the death or forfeiture of the former officer, must discharge his duty at his peril, without notice given to him of the vacancy (*e*). If an office be granted durante bene placito, it shall not be determined at the will of the party, but only at the will of the king; and therefore the party may surrender, and if forfeited, it shall be found by inquisition; and till a surrender or forfeiture he continues officer.

Assignment of Offices.

An office in fee, granted by a subject generally, may be assigned, though it be an office of trust; for "heir" includes assigns: so an office granted to one and his assigns may be assigned: but an office of trust cannot be assigned without the assent of him who granted the office. There may be a covenant to stand seised of an office to the use of another (*f*).

SECT. 7.—*Franchises, Corrodies, Pensions and Government Duties.*

Leases of Franchises.

Franchises may be demised (*g*), except indeed in some few particular cases, as where the franchise is a personal immunity, &c.; thus a fair or market, either with or without the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like, may be demised. A franchise granted to one cannot be bestowed on another to the prejudice of a former grant (*h*). Every fair is a market, but every market is not a fair (*i*).

Leases of Corrodies and Pensions.

A corrody is a right of sustenance, originating in the endowment of lands: in lieu of which, especially when due from ecclesiastical persons, a pension or sum of money was sometimes substituted; and these were chargeable on the person of the owner of the inheritance

(*a*) Bac. Abr. tit. *Offices*, (H).
(*b*) *Howard* v. *Wood*, T. Jones, 126; 2 Lev. 245; 2 Show. 21.
(*c*) Bac. Abr. tit. *Leases*, (A).
(*d*) *Young* v. *Stoell*, Cro. Car. 279.
(*e*) Com. Dig. tit. *Officer*, (B 14).
(*f*) Com. Dig. tit. *Officer*, (C).
(*g*) *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875.
(*h*) 2 Roll. Abr. 191.
(*i*) 2 Inst. 221, 406.

in respect thereof (*k*). A corrody was either certain or uncertain, and might not only be for life or years, but in fee. If one had a corrody, for life, he might let it to another, or to the grantor himself (*l*).

Leases of Government Duties.

Occasionally, also, acts of parliament empower the officers of government to grant leases of the duties thereby imposed; as the act, 12 Car. II. c. 23, s. 27, respecting the duties of excise upon ale, beer, &c.; also c. 25, s. 3, of the same reign, with respect to wine licences; and by 27 Geo. III. c. 26, the Lords of the Treasury are empowered to let to farm for any term, not exceeding three years, the duty upon post-horses.

SECT. 8.—*Annuities.*

Leases of Annuities.

An annuity is an annual sum of money granted to another in fee, for life, or years, which charges the person of the grantor only; or it may be due by prescription, which always implies a grant. Such annuity may be demised by way of assignment (*m*). Rents may also be granted by way of lease (*n*).

SECT. 9.—*Other Incorporeal Hereditaments.*

Leases of Incorporeal Hereditaments.

A demise of an incorporeal hereditament can only be valid by deed. A demise by parol of a right of hunting and shooting together with a messuage is therefore void. But where occupation and enjoyment have taken place under such demise, compensation may be recovered in respect thereof. Where there was an agreement in writing, but not under seal, to let a messuage, together with full and free and exclusive licence and leave to hunt, hawk, course, shoot and sport over a manor, and the tenant entered and was possessed during the term, it was held, on demurrer to a plea in assumpsit on the agreement for the rent, that not being by deed the agreement was void, because an incorporeal hereditament was agreed to be let; and that the plaintiff was not entitled to recover in respect of the entry on and possession of the premises let to the defendant, of which he had taken possession, as it did not appear that he had had a single hour's occupation or enjoyment of the premises (*o*).

(*k*) 2 Bla. Com. 40; Bac. on Eng. Gov. b. i. c. lxvi.

(*l*) Bac. Abr. tit. *Leases*, (A); *R.* v. *Nicholson*, 12 East, 330; *Peter* v. *Kendal*, 6 B. & C. 703; *Beere* v. *Windebanke*, Sider. 81.

(*m*) Co. Litt. 144b; Com. Dig. tit. *Annuity*, (A 1).

(*n*) Bac. Abr. tit. *Leases*; *Thomas* v. *Fredericks*, 10 Q. B. 775; Co. Litt. 144b; Com. Dig. tit. *Annuity*, (A 1), (E).

(*o*) *Bird* v. *Higginson*, 2 Ad. & El. 696; 6 Ad. & El. 824; 4 Nev. & M. 505; 1 Har. & Wol. 61.

CHAPTER IV.

THE INSTRUMENT OF DEMISE.

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BOOK I.
CHAPTER IV.
SECT. 1.

SECT. 1.—*Leases generally.*

(a) *Description of.*

Generally.

A LEASE is a contract between parties, by which the one conveys any lands or tenements to the other for life, for years, or at will, but always for a less term than the party conveying himself has in the premises: for if it be for the whole interest, it is more properly an assignment than a lease (*a*). It is usually made in consideration of rent, or some other annual recompense rendered to the party conveying the premises,—who is called the lessor or landlord,—by the party to whom they are conveyed or let, who is called the lessee or tenant (*b*).

By an indenture between two shareholders in a building society and the trustees thereof, it was recited, that the shareholders were entitled to a certain sum out of the funds in respect of their shares, and that for security of the payments to become due from them in respect of

(*a*) See post, Chap. VI., Sect. 3, (a), p. 186.

(*b*) 2 Black. Com. 317; Shep. Touch. 266.

their shares, the shareholders had agreed to execute the assurance thereby made; the shareholders conveyed premises to the trustees upon trust to permit the shareholders to receive the rents until their default in payment of their contributions, with power to the then and future trustees to appoint a receiver of the rents in case of default and a power of sale. The shareholders also agreed to become tenants to the then and future trustees, henceforth during their will, at the yearly rent of 200*l.*, payable on the usual quarter days. This indenture was held not to operate as a demise at the yearly rent of 200*l.*(*c*). In a lease granted in consideration of a premium, the consideration must be expressed in the lease, otherwise the amount paid may be recovered back (*d*).

Leases for Years.

A lease for years is a contract for the possession of lands or tenements for some determinable number of years, agreed upon between the lessor and the lessee. If the lease be but for half a year, or a quarter, or any less time, the lessee is considered as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term of which the law in this case takes notice (*e*). Every estate which must expire at a period of years certain or prefixed, by whatever words created, is an estate for years (*f*); therefore this estate is frequently called a term, terminus, because its duration or continuance is bounded, limited and determined; but the word "term" not only signifies the limitation of time, but also the estate and interest which passes for that period (*g*).

General Requisites.

The several requisites necessary to be attended to are concisely stated by a learned writer in the following manner:—"Regularly, these things must concur in the making of every good lease. 1. There must be a lessor, who is able to make the lease. 2. There must be a lessee, who is capable of taking the thing demised. 3. There must be a thing demised, which is demisable. 4. If the thing demised be not grantable without a deed, or the party demising be not able to grant without a deed, the lease must be made by deed; and if so, then there must be a sufficient description of the person of the lessor, the lessee, and the thing demised; and all necessary circumstances, as sealing, delivery, &c. must be observed. 5. If it be a lease for years, it must have a certain commencement, at least when it takes effect in interest or possession, and a certain determination, either by an express enumeration of years, or by reference to a certainty that is expressed, or by reducing it to a certainty upon some contingent event, which must happen before the death of the lessor or lessee. 6. There must be all needful ceremonies, as livery of seisin, attorn-

(*c*) *Walker* v. *Giles*, 6 C. B. Rep. 662; and see *Pinhorn* v. *Souster*, 8 Exch. Rep. 763.

(*d*) 48 Geo. III. c. 149; 55 Geo. III. c. 184; *Gingell* v. *Perkins*, 5 Exch. Rep. 720.

(*e*) 1 Black. Com. 140.

(*f*) Com. Dig. tit. *Estates*, (G. 1); Litt. 58.

(*g*) 2 Black. Com. 143; Shep. Touch. 267.

ment and the like, in all cases where they are requisite. 7. There must be an acceptance of the thing demised, and of the estate by the lessee (*h*).

(b) *By what made.*

How made generally.

With respect to the mode by which a lease of corporeal hereditaments may be made—it may be in all cases by deed, and in some cases by writing without deed (*i*); and also by verbal contract of demise, where followed by entry of the lessee. Incorporeal hereditaments must be demised by deed (*k*). By statute 29 Car. II. c. 3, commonly called the Statute of Frauds and Perjuries, several things must be evidenced by writing, of which, before then, verbal evidence would have been sufficient. That statute enacts, sect. 1, "that all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates to the contrary notwithstanding:" excepting, nevertheless, sect. 2, "all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised." Sect. 4 enacts, "that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing

29 Car. II. c. 3, ss. 1, 2, 4.

(*h*) Shep. Touch. 267. The statute 29 Car. II. c. 7, which avoids all contracts made by persons in the exercise of their ordinary calling on a Sunday, would probably be held to extend to contracts for the occupation of houses or land entered into by persons in the situation of house or land agents; for the statute has been held to apply to private as well as to public conduct; *Fennell* v. *Ridler*, 5 Barn. & Cress. 406; 8 Dowl. & Ryl. 204; *Bloxome* v. *Williams*, 3 Barn. & Cress. 232; 5 Dowl. & Ry. 82; 1 Car. & Pay. 294.

(*i*) By the repealed statute 7 & 8 Vict. c. 76, s. 4, any instrument in writing, not being a deed, was not valid as a lease, but operated as an agreement only (post, Sect. 16), though a person in possession under such an instrument might, from payment of rent or other circumstances, become tenant from year to year (post, Chap. V., Sect. 1). This statute came into operation on the 1st January, 1845, and was repealed from the 1st October in the same year. It has been held that by the terms of a document signed during the period this statute was in force, the tenancy might be construed to be a quarterly tenancy; *Bird* v. *Defonvielle*, 2 Car. & Kir. 415.

(*k*) *Wood* v. *Leadbitter*, 13 Mees. & Wels. 839; *Mayfield* v. *Robinson*, 7 Q. B. Rep. 486. Quære, whether a custom to demise, by parol, an incorporeal hereditament (for instance, a right of common) can be supported at law; *Lathbury* v. *Arnold*, 1 Bing. 217. And see *Rex* v. *Lane*, 1 Dowl. & Ry. 76.

Construction of the Statute of Frauds.

and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The meaning of the Statute of Frauds, requiring, as above stated, that certain leases should be in writing and signed by the parties making them, was, that such agreement should not operate to create a term; for the first section, as construed by the second, is meant to vacate verbal leases conveying a greater interest in land than for three years, and whereon a rent is reserved (*l*). But notwithstanding the 1st and 2nd sections, a verbal lease for more than three years may create a tenancy from year to year; the intention of those sections being satisfied by its not operating as a term (*m*) (*n*). If a landlord make a verbal lease for seven years, though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects as to the rent, the time of the year when the tenant is to quit, &c. (*o*). Contracts for the letting of realty are within the 4th section of the Statute of Frauds (*p*), and if followed by entry of the tenant may be enforced (*q*); and the effect of the 1st, 2nd and 4th sections of the Statute of Frauds, so far as they apply to verbal leases not exceeding three years, is to make them valid, and whatever remedies can be had upon them in their character of leases may be resorted to, but they do not confer the right to sue the lessee for damages for not taking possession (*r*). The result of the cases seems to be, that verbal leases exceeding three years are not valid so far as regards the duration of the term, the right of the lessor to sue the lessee for not entering, and vice versâ the right of the lessee to sue the lessor for not allowing him to enter; but where an entry has actually taken place, such lease will be valid as regards all other stipulations which are consistent with a tenancy from year to year (*s*). The same principle holds in other respects; for example, tithes will not pass without deed; but if a party makes a verbal contract for them and retains them, he is bound to pay for them. A right of way or a right of sporting can be granted only

(*l*) *Crosby* v. *Wadsworth*, 6 East, 602.

(*m*) *Clayton* v. *Blakey*, 8 Term Rep. 3; *S. P. Doe* d. *Rigg* v. *Bell*, 5 Term Rep. 471; *Goodtitle* d. *Gallaway* v. *Herbert*, 4 Term Rep. 680. And see *Doe* v. *Weller*, 7 Term Rep. 478; *Roe* v. *Rees*, 2 Black. 1171; *Doidge* v. *Bowers*, 2 Mees. & Wels. 365; *Dean* v. *Fearnside*, 1 Wils. 176; *Goodtitle* v. *Herbert*, 4 Term Rep. 680.

(*n*) An indorsement on the draft of a lease, signed by the lessee, and stating that as it would be inconvenient for him to fulfil his agreement, he wished the lessor to dispose of the premises, was held by Lord Ellenborough to satisfy the Statute of Frauds; *Shippey* v. *Denison*, 5 Esp. 191. Where one made his will in this manner:—"I have made a lease to J. S. for the term of twenty-one years, paying but 20*s*. rent," it was held a good lease or demise by will for twenty-one years; and that the word "have" should be taken in the present tense, as the word *dedi* is in a deed of feoffment, to comply with the intent of the testator; Bac. Abr. *Leases*, p. 163.

(*o*) *Doe* d. *Rigge* v. *Bell*, 5 Term Rep. 471; *Doe* d. *Bromfield* v. *Smith*, 6 East, 530; *Doe* d. *Tilt* v. *Stratton*, 4 Bing. 446.

(*p*) As to other cases within this section, see post, Chap. VI., Sect. 11, (a).

(*q*) *Inman* v. *Stamp*, 1 Stark. 12.

(*r*) *Edge* v. *Strafford*, 1 Cro. & Jer. 398.

(*s*) *Lee* v. *Smith*, 9 Exch. Rep. 662; *Malins* v. *Freeman*, 4 Bing. N. C. 395; *Lincoln College case*, 3 Rep. 59 b.

by an instrument under seal; but if a man has used and enjoyed such rights, and an action is brought against him to recover compensation for such enjoyment, he cannot set up as a defence that the rights in question have not been granted under seal. The distinction is between compelling a party to pay damages for the non-performance of such agreements, and making him pay for the enjoyment he may have had under them (*t*). An agreement for a lease which is void by the 4th section of the Statute of Frauds in not being in writing and signed, if followed by entry and payment of rent, may make a good demise under the 2nd section, and such a demise may be as special in its stipulations as a written lease (*u*). A verbal lease for three years to commence in futuro is not warranted by the 1st and 2nd sections (*x*): but a verbal lease for a year and a half, to commence after the expiration of a lease which wants a year of expiring, is a good lease, for it does not exceed three years from the making (*y*). If land be leased for a year, and so from year to year so long as both parties shall agree, this is a lease for two years certain; and if the lessee hold on after two years, he is a lessee for a year certain; and his lease is not determinable till that year be ended; for his holding on is an agreement to the original contract: and such executory contract is not void by the Statute of Frauds, for there is no term for above two years ever subsisting at the same time (*z*).

8 & 9 Vict. c. 106, s. 3.

By statute 8 & 9 Vict. c. 106 (*a*), it is enacted, sect. 3, "that a lease required by law to be in writing of any tenements or hereditaments made after the 1st day of October, 1845, shall be void at law unless made by deed." The effect of this statute is, that an instrument which purports to let premises for a period of more than three years, and which, therefore, is void as a lease in not being sealed, is still good as an agreement, and the tenant who enters under it becomes tenant from year to year according to its terms, so far as those terms are applicable to a tenancy from year to year (*b*). But he may during such period be turned out of possession by the same notice to quit that would be valid in the case of a yearly tenancy, and he is bound to quit at the expiration of the period without a previous notice to quit (*c*). Since the passing of the 8 & 9 Vict. c. 106, "leases required by law to be in writing" (by sect. 3), that is, leases for a longer period than three years made after the 1st of October, 1845, if not made by deed, are void at law as to the duration of the term, and the lessee is

(*t*) *Bird* v. *Higginson*, 2 A. & E. 702; *Thomas* v. *Fredericks*, 10 Q. B. 775; *Chanter* v. *Dewhurst*, 12 M. & W. 823; *Fishmongers' Company* v. *Robertson*, 6 Scott, N. R. 56.

(*u*) *Lord Bolton* v. *Tomlin*, 5 Ad. & El. 856.

(*x*) *Rawlins* v. *Turner*, 12 Mod. 610; 2 Ld. Raym. 736.

(*y*) Bull. N. P. 177; *Ryley* v. *Hicks*, 1 Stra. 651.

(*z*) Bull. N. P. 84; *Agard* v. *King*, Cro. Eliz. 775; *Legg* v. *Strudwick*, 2 Salk. 414; *Harris* v. *Evans*, 1 Wils. 262.

(*a*) Repealing the statute 7 & 8 Vict. c. 76; see ante, 58, n. (*i*).

(*b*) *Heard* v. *Camplin*, 15 Law Times, 437.

(*c*) *Tress* v. *Savage*, 23 Law Journ., Exch., 339.

not liable to pay damages for not taking possession (*d*); but if he enters and has the use and enjoyment of the premises, he is liable for the payment of the rent agreed upon, and is subject to such of the other terms and stipulations entered into by him as are incident to a yearly tenancy. He would be bound, for instance, by an agreement to repair, to quit at a certain notice, or not to take successive crops (*e*). The effect of this statute is not to put an end to verbal leases, which remain as at common law, but merely to superadd to leases required by the Statute of Frauds to be in writing, that is, leases for a longer period than three years, the necessity of their being by deed. Other leases may be made by deed, or writing without deed, as by a series of letters (*f*), or by verbal contract, if followed by entry, at the option of the parties.

Leases by Indenture.

First then of leases by deed. A deed is a writing sealed and delivered by the parties, and is either an indenture or a deed-poll. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each formerly was cut or indented (originally in acute angles, instar dentium, like the teeth of a saw, but latterly in a waving line) on the top or side, to tally or correspond with the other, which deed so made is called an indenture (*g*). It was formerly laid down that if a deed begun "This indenture witnesseth," &c., and the parchment or paper was not indented, it was not an indenture, because the words could not make it indented; but that if the deed was actually indented, though there were no words of indenture in the deed, yet it was an indenture in law; for it might be an indenture without words, but not by words without indenting (*h*). This distinction, however, is now immaterial, the statute 8 & 9 Vict. c. 106, s. 5, having enacted, "that a deed executed after the 1st October, 1845, purporting to be an indenture, shall have the effect of an indenture, although not actually indented." All the parts of an indenture make but one deed, and each part is of as great force and effect as all the parts together; so they are esteemed the mutual acts of the respective parties, each of whom may be bound by either part of the same, for the words of the indenture are the words of each party (*i*) (*k*). When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts:*

(*d*) *Inman* v. *Stamp*, 1 Stark. 12; *Edge* v. *Strafford*, 1 Cro. & Jer. 391.

(*e*) *Doe* d. *Rigge* v. *Bell*, 5 Term Rep. 472; *Richardson* v. *Gifford*, 1 A. & E. 52; 3 N. & M. 325; *Doe* d. *Thompson* v. *Amey*, 12 A. & E. 479; *Pistor* v. *Cater*, 9 Mees. & Wels. 315; *Doe* v. *Browne*, 8 East, 165; *Cooch* v. *Goodman*, 2 Q. B. Rep. 580; 2 G. & Dav. 164.

(*f*) *Chapman* v. *Black*, 4 Bing. N. C. 187; 5 Scott, 515.

(*g*) Style, 459; 1 Inst. 171; 2 Black. Com. 295.

(*h*) Co. Litt. 229.

(*i*) Plowd. 134, 421; Litt. 370.

(*k*) A deed inter partes is only available between those who are parties to it; *Barford* v. *Stuckey*, 8 Bing. 225; 8 Moore, 88. And see 5 Moore, 23.

of late, however, it is most frequent for all parties to execute every part, which renders them all originals (*l*).

Leases by Deed-poll.

As every lease is presumed to be by deed till the contrary be shown, so every deed that is pleaded shall be intended to be a deed-poll, unless it be alleged to be indented (*m*): whenever therefore a lease is by indenture, it must be so alleged in pleading (*n*). A lease by deed, like any other deed, must be written or printed; but it may be in any character or language: it cannot be exemplified upon wood, leather, cloth, or the like, but only upon parchment or paper; for the writing or printing upon them can be least vitiated, altered, or corrupted. It must also have the regular stamps imposed on it by statute for the increase of the public revenue (*o*).

Effect of the Loss of a Lease.

The estate of the lessee is not determined by the loss of the lease, so that the existence of the term can be proved; for the estate is derived from the lessor, and not from the lease otherwise than as it shows the intention of the parties, which is not altered by the loss of the instrument of demise (*p*) (*q*). Where no counterpart can be found the landlord is entitled to inspect and take a copy of the lease (*r*). Under an agreement that the lessor would, at the request and costs of the lessee, grant a lease, the lessor is not entitled to charge the tenant with the expense of a counterpart (*s*).

(c) *Form of Instrument.*

Stat. 8 & 9 Vict. c. 124.

An attempt has lately been made by the legislature to simplify the forms of leases, and accordingly the statute 8 & 9 Vict. c. 124 (*t*), gives a form of an ordinary lease of a house, which may be adopted if parties desire it. There seems however little, if any, advantage to be gained, and some risk to be incurred, by adopting that form even where applicable.

What Words operate to demise generally.

The usual words by which a lease is made are, "demise, grant and to farm let;" but whatsoever words amount to be a grant are sufficient to make a lease (*u*); and it may be laid down for a rule—that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it, for

(*l*) 2 Black. Com. 296.

(*m*) *Rex* v. *Little Dean* (*Inhabitants*), 1 Stra. 555.

(*n*) *Spark* v. *Spark*, Cro. Eliz. 658.

(*o*) 2 Black. Com. 297. See post, Sect. 10, in this chapter.

(*p*) *Read* v. *Brookman*, 3 Term Rep. 151.

(*q*) In taking a house or premises, the lessee should inquire whether the lessor holds also for a term; if so, he should carefully examine the lease, as he may possibly find, when too late, that he is tied down by such restrictions as will render the property unfit for his purposes, or be likely to involve him in unforeseen difficulties; he may be restrained from making convenient alterations, or be compelled to submit to other inconveniences, which were never contemplated by him. It becomes him also to see that the rent reserved in the original lease and all taxes have been paid up to the time at which he takes possession: for if they have not, he will be obliged to pay all arrears, and can recover them only by having recourse to the last tenant, who perhaps may not be found, or, if found, may be unable to reimburse him.

(*r*) *Doe* v. *Slight*, 1 Dowl. 163.

(*s*) *Jennings* v. *Turner*, 8 Car. & P. 61.

(*t*) See the statute and the form, post, Book IV., Chap. I., Sect. 1.

(*u*) Co. Litt. 45; 2 Black. Com. 318.

any determinate time, whether they run in the form of a licence, covenant or agreement—are of themselves sufficient; and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose: for a lease for years being no other than a contract for the possession and profits of the lands on the one side, and a recompense of rent or other income on the other,—if the words made use of are sufficient to prove such a contract, in whatsoever form they are introduced, or howsoever variously applicable,—the law calls in the intent of the parties, and models and governs the words accordingly (*x*). Where the owner in fee of premises demised them for a term of 999 years, and afterwards released to the lessee the reversion in fee; and the latter, by indenture reciting the demise, did "grant, bargain, sell, assign and set over" the premises for the residue of the term of 999 years, Lord Ellenborough held that there was a resuscitation of the term by virtue of these words (*y*). The plaintiff in consideration of 530*l.* to be paid by A. demised to him premises for 55 years at the yearly rent of 84*l.*, and subject to covenants to repair, &c. The consideration not having been paid, A. assigned to the plaintiff the residue of the term then unexpired, subject to the rents and covenants, and with a power of sale. In pursuance of that power the plaintiff, in consideration of 500*l.* "bargained, sold, assigned, and transferred and set over" to the defendant the said premises, to hold "for the residue of the *term* of 55 years," subject to the yearly rent of 84*l.*, and the covenants contained in the lease to A.; and the defendant covenanted to pay the rent and perform the covenants, the defendant having entered on the premises. It was held, that although the mortgage by A. to the plaintiff operated as a merger of the term originally granted, yet the assignment by the plaintiff to the defendant created a new lease for the residue of the unexpired term, and consequently the defendant was liable on the covenants (*z*). Although no specific words are necessary to create a lease, yet there must be words used which show an intention to demise: therefore, where a lessee of tithes agreed with the owner of lands, for certain collateral considerations, not to take tithes in kind from the tenants of the lands for twelve years, but to accept a reasonable composition not exceeding 3*s.* 6*d.* per acre, it was adjudged to be no lease: for, 1st, the rent affected to be reserved is uncertain; for under this agreement it is at the option of the party either to pay tithes in kind, or to tender the reasonable value of the tithes, which may be under 3*s.* 6*d.* per acre; 2ndly, the owner of the lands, the person with whom the agreement is made, is neither to enjoy any thing nor pay any rent; it cannot therefore be a demise to him: it can at the utmost amount to no more than a mere covenant with the one

(*x*) Bac. Abr. tit. *Leases*, (K).
(*y*) *Denn* d. *Wilkins* v. *Kemeys*, 9 East, 366.
(*z*) *Cottee* v. *Richardson*, 7 Exch. Rep. 148.

that another shall enjoy, and creates no lease to either (*a*). Where, on the letting of land to a tenant, a memorandum was drawn up, the terms of which were, that he should on a future day bring a surety and sign the agreement, neither of which he ever did; it was held, that the memorandum was a mere unaccepted proposal, and did not operate as a lease (*b*). By an agreement bearing even date with a lease, it was agreed that the lessor should manage the farm leased for the lessee; the lessee giving 12*s.* a week to the lessor, and "allowing him and his family to reside and have the use of the dwelling-house and furniture free of rent;" held, this was not a lease (*c*). Where a contract was made between *A.* and *B.*, that *B.* should receive certain sums of money from *A.*, and should build certain houses on *A.*'s land, and procure tenants for the same at a given rate, and himself pay the rent till he procured the tenants from a certain day, it was held that no tenancy was created between *A.* and *B.* (*d*).

Particular Words which have been decided upon.

The word "*dedi*" is said to be a sufficient word to make a lease for years (*e*): so a "licence" to inhabit or enjoy amounts to a lease (*f*); for it is a certain present interest, and ought to be pleaded as a lease, and if it be so pleaded and traversed, the lessee may give the licence in evidence to prove it (*g*). The words "covenant, grant and agree" that *A.* shall have the lands for so many years, enure as a lease for years (*h*); so the word "covenant" will make a lease, though the words "grant and agree" be omitted (*i*). So a covenant "to stand seised," if made by the owner, or a covenant for quiet enjoyment (*k*), is a lease (*l*): for a covenant together with an entry amounts to a lease; but a covenant merely does not vest the estate in the lessee, but only gives him a right to enter and possess it; and therefore the estate is not vested in him till actual entry (*m*). In one case it is said, that, although a grant "to have and to hold" land for years is a good lease, yet a grant to "enjoy" lands in the same manner is but a covenant; but unless it be with reference to a stranger, it is conceived that this opinion is erroneous, if the case itself be rightly reported (*n*).

(d) *Construction of Instrument.*

General Rules for the Construction of Leases by Deed.

Deeds—including of course leases by deed—being the highest description of private written documents, are themselves the best evi-

(*a*) *Brewer* v. *Hill*, 2 Anst. 413.
(*b*) *Doe* d. *Bingham* v. *Cartwright*, 3 Barn. & Ald. 326.
(*c*) *Doe* d. *Hughes* v. *Derry*, 9 Car. & P. 494. And see *Mayew* v. *Suttle*, 2 Law Times, where a party was held to occupy not as tenant but as servant.
(*d*) *Taylor* v. *Jackson*, 2 Car. & Kir. 22.
(*e*) Co. Litt. 301 b; *Right* d. *Green* v. *Proctor*, 4 Burr. 2209.
(*f*) *Hall* v. *Seabright*, 1 Mod. 14.
(*g*) *Anon.*, 11 Mod. 42; 1 Lord Raym. 404; Bac. Abr. tit. *Leases*, (K).
(*h*) *Whitlock* v. *Horton*, Cro. Jac. 91.
(*i*) *Richards* v. *Sely*, 2 Mod. 80.
(*k*) *Doe* d. *Pritchard* v. *Dodd*, 2 Nev. & Man. 838; 5 Barn. & Adol. 689.
(*l*) *Right* d. *Bassett* v. *Thomas*, 3 Burr. 1441, 1446; 1 Wm. Black. 446.
(*m*) *Copley* v. *Hepworth*, 12 Mod. 1; Co. Litt. 37.
(*n*) *Evans* v. *Thomas*, Cro. Jac. 172; see post, Sect. 16.

dence of the facts which they contain, the circumstances which they relate, and their makers' intentions. In their construction, regard must be had to all their parts; and general words may be restrained by particular recitals. If a deed operates in two ways, the one consistent with the intent of the party, and the other repugnant to it, the Courts will put such a construction on it as to give effect to such intent (*o*); for deeds must be construed so as to operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall in another (*p*). Where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it be introduced, such lease must be construed as if that word were inserted, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it (*q*). An instrument of demise was produced in evidence, by which the plaintiff agreed to let for the term of one year fully to be complete and ended; most of the subsequent stipulations in the lease were wholly inapplicable to a tenancy determinable by a notice to quit; the document appeared on the face of it to have originally contained words creating a tenancy from year to year, which were struck out, and the above words as to the term only remained; it was held, that the words struck out might be looked at to show what the intention of the parties was; that the tenancy was for a single year only; and that the terms inapplicable to such a tenancy must be considered as expunged, or as only applicable in case the tenancy should continue (*r*). A sweeping clause at the end of a very particular specification will not pass any property of a different nature from that particularly set forth (*s*).

Rule and Exceptions respecting the Admission of Parol Evidence to vary or alter Deeds.

The general rule with regard to the admission of parol evidence to explain the meaning, or to add to, vary or alter, the express terms of a deed, is, that it shall not be admitted, except—1st, where, although the deed is clearly enough expressed, some ambiguity arises from extrinsic circumstances; 2ndly, where the language of a charter or deed has become obscure, and the construction doubtful from antiquity; 3rdly, where the grant appears uncertain, owing to a want of acquaintance with the grantor's estate; 4thly, where it is important to show a different consideration consistent with but not repugnant to that stated in the deed itself; 5thly, where it becomes necessary to show a different time of delivery from that at which the deed purports to have been made; 6thly, where it is sought to prove a customary right not expressed in the deed, but which is not inconsistent with any of its

(*o*) *Solly* v. *Forbes*, 4 Moore, 448. And see *Hotham* v. *East India Company*, 1 Term Rep. 638.

(*p*) *Goodtitle* d. *Edwards* v. *Bailey*, Cowp. 600.

(*q*) *Wight* v. *Dickson*, 1 Dow, 141, 147.

(*r*) *Strickland* v. *Maxwell*, 2 Cromp. & Mees. 539; 4 Tyr. 346.

(*s*) *Anon.*, Lofft, 398. See further as to the construction of covenants, exceptions and provisoes, post, Sects. 5 and 7, and Chap. VII., Sect. 5, (b).

stipulations; or, lastly, where fraud or illegality in the formation of the deed is relied on to avoid it. If a clause in a deed be so ambiguously or defectively expressed, that a court of justice cannot, even by reference to the context, collect the meaning of the parties, it will be void on account of uncertainty.

Cases illustrative of the First Exception as to Ambiguity.

The following decisions may be usefully stated as examples and illustrations of the first exception to the rule which prohibits the introduction of parol evidence. Where a party granted a manor by a particular name, and he had two manors of that name, parol evidence was admitted to show which of them he meant; and where there was a demise of premises in Westminster, late in the occupation of *A.*, particularly describing them, part of which was a yard, parol evidence was received to show that a cellar situated under that yard, but which was then in the occupation of *B.*, another tenant of the lessor, was not intended to pass (*t*). Evidence of usage was received to show that a room which had not been occupied with a certain messuage did not pass under a demise of that messuage, together with all the rooms, chambers and appurtenances thereunto belonging (*u*). Where a lease grants a right of way, evidence may be received of the state of the premises at the time of granting the lease, and then the judge will put a construction on the lease as to the line along which the way granted runs; but if it is uncertain on the words which of two ways is intended, parol evidence may be given to show which the grantor meant (*x*). Where an expression used in a written instrument has a technical meaning, parol evidence is admissible to show that it has been used in that sense, and not in its ordinary meaning in common parlance, although that may be perfectly clear and unambiguous in itself; therefore, where a lessee of a coal mine covenanted to get the whole of the mines "not deeper than or below the *level* of the bottom of the mine" at a particular point, it was held that parol evidence of the understanding amongst miners was admissible to show that the word "level" had a particular technical meaning different from its ordinary signification of "horizontal line." It might be questionable whether a previous agreement between the parties for a lease of the same mine, and for which the lease in question was substituted, was also admissible in evidence for the same purpose (*y*). Again, where in a lease inter alia of a rabbit warren, the lessee covenanted that on the expiration of the term he would leave on the warren 10,000 rabbits, the lessor paying for them 60*l.* per thousand, it was held that parol evidence was admissible to show that by the custom of the country where the lease was made, the word "thousand," as it applied to rabbits, denoted twelve hundred (*z*). Where the lessee of a

(*t*) *Doe* d. *Freeland* v. *Burt*, 1 Term Rep. 701.

(*u*) *Kerslake* v. *White*, 2 Stark. 508.

(*x*) *Osborne* v. *Wise*, 7 Car. & P. 761.

(*y*) *Clayton* v. *Gregson*, 5 Ad. & El. 302; 1 Har. & Wol. 159; 4 Nev. & Man. 602; 6 Nev. & Man. 694. See also *Shore* v. *Wilson*, 9 Cl. & Fin. 365.

(*z*) *Smith* v. *Wilson*, 3 Barn. & Adol. 728.

coal mine covenanted to pay a certain share of all such sums of money as the coals should sell for at the pit's mouth, evidence of the lessee's having accounted with the lessor, and paid him the share of the money produced by the sale of coals elsewhere, was not considered admissible to explain the intention of the parties (*a*). Where a lessee made an agreement for a lease, and the under-lessee contracted to erect a shop front to the house; in ejectment for a forfeiture for not erecting the shop front, it was held that the original lease by which a penalty was imposed, if the lessee allowed a trade to be carried on upon the premises, was not admissible in evidence for the defendant, to explain the meaning of the words "shop front" in the agreement (*b*). Where *A.* being tenant to *B.*, under a lease containing covenants, by which the former was bound to fetch seventy-five bushels of coals yearly, and deliver them at the mansion-house of the latter, and also to supply him with as much good wheat as he should want in his family at *5s.* per bushel, it was agreed between them that the lease should be surrendered up, and a new one granted, omitting the above covenants; and a new lease was accordingly executed, and at the same time an agreement entered into whereby *A.* agreed with *B.* that he would fetch and bring to the dwelling-house of *B.*, his heirs and assigns, seventy-five bushels of coals yearly, for twelve years (the term of the new lease), and yearly supply *B.*, his heirs and assigns, with as much good wheat as he shall want in his family at *5s.* per bushel; it was held, upon *B.*'s having parted with his reversion in the farm, and also quitted the mansion-house in which he resided at the time when the agreement was made, that the agreement being entire, must receive one uniform construction: and as it was clearly local in respect of the delivery of coals, it could not be deemed personal with respect to the wheat; and that no parol evidence could be admitted to explain the agreement, there being no latent ambiguity (*c*). Since the passing of the 24 Geo. II. c. 23, for altering the style, a lease of lands by *deed*, to hold from the feast of *St. Michael*, must, unless there be a custom to the contrary, as in Kent (*d*), be taken to mean *New Michaelmas*, and cannot be shown by extrinsic evidence to refer to a holding from *Old Michaelmas*, unless there be such custom, or a reference in the lease to a prior holding from Old Michaelmas (*e*). So in a record *Martinmas* means New Martinmas (*f*). But this rule has been held to relate only to leases by deed; for in a lease by parol made to commence at Lady-

(*a*) *Clifton* v. *Walmsley*, 5 Term Rep. 564; *S. P. Gerard* v. *Clifton* (in error), 7 Term Rep. 676; 1 Bos. & Pul. 524.

(*b*) *Doe* d. *Nash* v. *Birch*, 1 M. & Wels. 402; Tyr. & Gr. 769.

(*c*) *Coker* v. *Guy*, 2 Bos. & Pul. 565.

(*d*) *Furley* d. *Mayor, &c. of Canterbury* v. *Wood*, 1 Esp. 198.

(*e*) *Doe* d. *Spicer* v. *Lea*, 11 East, 312; *Doe* d. *Hall* v. *Benson*, 4 B. & Ald. 588; *Denn* d. *Peters* v. *Hopkinson*, 3 D. & Ry. 507; *Smith* v. *Walton*, 8 Bing. 235; 1 M. & Sc. 380.

(*f*) *Smith* v. *Walton*, 8 Bing. 235.

Day, evidence is admissible to prove that by the custom of the county Old Lady-Day was intended (*g*). If there be any ambiguity or contradiction in expressing the time of the commencement of the second lease, the lease shall be construed beneficially for the lessee, on the principle that every man's grant shall be taken most strongly against himself. Thus where a termor granted all his estate and interest to another, habendum to the grantee and his assigns immediately after the death of the grantor, the habendum was held void, and the premises of the grant good, to make the entire term pass to the grantee immediately (*h*). A lessor leased for thirty-one years, and four years after the beginning of that term made a new lease in these words:—"Know that I—the aforesaid thirty years being completed—have demised and granted all the premises, &c. to hold from the day of making these presents, the term aforesaid being finished, until, &c.:" and the question being whether this lease were to begin in computation from the making of the new lease, or from the ending of the old one, the court held that it should begin to take effect in possession at the end of the former term, and not before; for otherwise the lessee would only have a lease for four years, which did not seem to be the intention of the parties; and every grant is to be construed most strongly for the grantee (*i*). A lessee for 100 years made a lease for forty-five years to *B.*, if he should so long live; and afterwards leased the same lands to *C.*, habendum after the term of *B.* for twenty-three years, to be accounted from the date of these presents; and the question was, if the latter lease should be said to begin presently, or after the term of *B.* It was held, that the lease to *C.* should not be accounted from the time of the date, but from the end of the term of *B.*; because by the first words it is a good lease to begin after the term of *B.*, and it shall not be made void by any subsequent words. And Coke, J., said, "that if the limitation be not certain when the term should begin, it shall be taken most beneficially for the lessee (*k*).

Cases illustrative of the other Exceptions.

Where a man granted an estate for life, without saying whether it was for his own life or for that of the grantee, parol evidence was received to show what interest he had in the estate: for if he was tenant in fee, it was considered that the grantee should take an estate for his own life; but that if the grantor himself was a tenant for life only, the grantee would take an estate for the grantor's life only (*l*). If property has been released by deed, a parol agreement between the parties to apportion the rent of the current quarter between them, is inadmissible in evidence, being in contradiction of the deed (*m*). The

(*g*) *Doe* d. *Hall* v. *Benson*, 4 B. & Ald. 588; *Furley* d. *Mayor, &c. of Canterbury* v. *Wood*, 1 Esp. 198; Runn. Eject. 112; *Denn* d. *Peters* v. *Hopkinson*, 3 D. & R. 507.

(*h*) *Lilley* v. *Whitney*, Dyer, 272a.

(*i*) *Anon.*, Dyer, 261b, pl. 28.

(*k*) *Seaman's case*, Godb. 166.

(*l*) *Smith* v. *Doe* d. *Jersey* (*Earl*), 2 Bro. & Bing. 551; 3 Moore, 339; 7 Price, 281; 2 Biigh, 290.

(*m*) *Flinn* v. *Calow*, 1 Man. & Gr. 589.

express terms of a lease cannot be controlled by the custom of the country; yet if the lease be entirely silent as to the time of quitting, evidence of the custom of the country may be given to fix the time (*n*). Although no right to an away-going crop is reserved in a lease, if there are no covenants which either in express terms or by implication of law *exclude* such right, the lessee may produce parol evidence to show that he is entitled to such away-going crop by the custom of the country. So evidence of custom for an away-going tenant to provide work and labour, tillage and sowing, and all materials for the same in his away-going year, the landlord making him a reasonable compensation, has been received, although there was an express written agreement between the parties, but which was not *inconsistent* with such custom (*o*).

SECT. 2.—*Date, Parties and Premises.*

General Description of the Parts of a Lease by Deed.

A lease by deed usually consists of the following parts; viz. 1. What is usually called the *Premises*, which contains a statement of the date, the parties, and the parcels demised: 2. The *Habendum*, or that part which fixes the duration of the term: 3. The *Reddendum*, or reservation of rent: 4. The Covenants: and, lastly, any exception, proviso, or condition there may be to the contract.

The Premises in a Lease.

The PREMISES in a lease are all the parts which precede the *habendum*. The office of this part of the lease is rightly to name the lessor and lessee; to state the consideration; to set forth with certainty the thing demised, either by express words, or by that which by reference may be reduced to a certainty: and to state the exception or thing excepted, if there be any. The recitals also, if any are necessary, are generally contained in this part of the deed (*p*). With respect to the date, it may be observed, that a lease cannot be post dated, although it may be ante dated as far back as the parties please (*q*). The consideration also must be either good—as natural affection,—or valuable—as money and the like,—being usually in leases for years the annual rent (*r*).

What are proper Words to pass Property in Leases generally.

With respect to the proper mode of describing in leases the lands, tenements or other property to be demised, it may be remarked, in the words of the writer of the Commentaries on the Laws of England,—"that corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only; for *land* comprehends, in its legal

(*n*) *Webb* v. *Plummer*, 2 Barn. & Ald. 746.

(*o*) *Senior* v. *Armytage* (*Bart.*), Holt, 197.

(*p*) Where the recitals in a lease stated that a sum of money which was in part to be given for fixtures, was part of the consideration for the lease, it was held that whether the lessee would or would not be estopped by it, he was not bound to execute such a lease. *Vonhollen* v. *Knowles*, 12 Mee. & W. 602.

(*q*) See further as to the date, post, Sect. 3, (c), p. 76.

(*r*) Shep. Touch. 75; Co. Litt. 64.

signification, any ground, soil, or earth whatsoever; so the word 'land' includes, not only the face of the earth, but every thing under it or over it; and therefore if a man grant all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows: not but that the particular names of the things are equally sufficient to pass them, except in the instance of water, by a grant of which nothing passes but a right of fishing: and to recover the land at the bottom of which, it must be called so many 'acres of land covered with water.' But the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of (though, indeed, by the name of a castle one or more manors may be conveyed; and è converso, by the name of the manor a castle may pass); but by the name of land, which is nomen generalissimum, everything terrestrial will pass (*s*)." The expressions "arable land, meadow or pasture land," are specific descriptions of land, and are confined to land of that particular species; and in general, where meadow or pasture land is named, it must be understood of ancient meadow or pasture (*t*). If a man grant so many acres of land, it has been said that it must be measured according to the custom of the country (*u*). The words "more or less," which are usually used, must be confined to a reasonable quantity; in one case it was held that they could not include so large an excess as thirty acres (*x*).

Where the Description is untrue, or Part is severed.

If the thing described be sufficiently ascertained, it is sufficient, though all the particulars are not true; as if a man demise his meadows in *B.* and *D.*, containing ten acres, whereas they contain twenty acres, all the meadows pass (*y*). Whatever constitutes the essence of the thing granted, or is parcel of it, will pass with it, although it be accidently severed at the time of the lease; therefore, by the lease of a mill, a millstone passes, though severed at the time; so by the lease of a house, the doors, window sashes, locks, keys, &c. pass as parcel of it, although by accident they may not be in their proper places when the lease is made (*z*).

Particular Instances which have been adjudged.

A man may demise his farm, which may comprehend a messuage and much land, meadow, pasture, wood, &c. thereunto belonging, or therewith used; for the word "farm" properly signifies a capital or principal messuage, and a quantity of land thereunto appertaining (*a*). So by the name of a messuage, he may pass a house, a curtilage, a garden, an orchard, a dove-house, a shop or a mill, as parcel of the

(*s*) 2 Black. Com. 18.
(*t*) *Tresham* v. *Lamb*, 2 Brownl. 46; *Gunning* v. *Gunning*, 2 Show. 8.
(*u*) 6 Co. Rep. 67 a.
(*x*) *Day* v. *Fin*, Owen, 133. And see *Cross* v. *Eglin*, 2 Barn. & Adol. 106.
(*y*) Com. Dig. tit. *Fait*, (E 4).
(*z*) As to the estoppel on a tenant by the description of fields as "meadows" in his lease, see *Skipworth* v. *Green*, 1 Stra. 610; post, Book I., Chap. IV., Sect. 19.
(*a*) Shep. Touch. 93.

same: the like of a cottage, a toft, a chamber, a cellar, &c. Yet these may pass by their own single names also, as "of one messuage, one curtilage, &c. (*b*)." Under a lease of all that part of the park called *B.* situate and being in the county of *O.*, and now in the occupation of *S.*, lying within certain specified abuttals, with all houses, &c. belonging thereto, and which are now in the occupation of *S.*, a house on a part which is within the abuttals, but not in the occupation of *S.*, will pass (*c*). By a lease of all that part of the townland of *B.*, containing 509 acres, arable, meadow and pasture, bounded by certain boundaries, it was held that 400 acres of bog and land reclaimed from bog within the boundaries, also passed (*d*). If garden ground be let for years, and the lessee demise part of the term to an undertenant, who builds on it, by a grant of the garden ground, the buildings thereon will pass (*e*). It would appear that a lease of "the issues and profits" of land would pass the land itself; for to have the issues and profits is the same thing as to have the land itself (*f*); and it has been held, that if a grant be made of a boilery of salt, the land passes, for that is the whole profit (*g*). If in a lease, the demised land be mentioned and described as meadow land, no other evidence is necessary to prove that it was meadow land at the commencement of the term (*h*). By the grant of a forest, park, chase or warren in the soil of the grantor, the soil as well as the privilege passes; but it is otherwise if the soil be another's (*i*): and a sheepwalk or a foldcourse may include the soil by the custom of the country (*k*). In a parish settlement case, it was held that the lease of a fishery of a pond, with the spear sedge and the flags and rushes growing in and about the same, passed the soil (*l*). If a lease of a ferry describes it as a ferry both ways across a river, whereas it is but one way only, yet it will pass (*m*). Where an annual sum was payable as tenants' damages, besides a way-leave rent for a coal railway passing through a farm, it was left to the jury to say whether the land covered by the railway passed by the agreement of letting to the tenant, because if it did the tenant, and not the landlord, was entitled to the sum payable as tenants' damages (*n*). A devise of a house and garden described the premises by boundaries which strictly would include a portion of a piece of ground at the back and adjoining the garden, which was laid out as a common walk for a row of houses; it was held, that this portion of the common walk was included in the premises demised, though by the lease a right was granted to the lessee of the use of the whole of the common walk (*o*).

(*b*) Shep. Touch. 12.
(*c*) *Doe* d. *Smith* v. *Galloway*, 5 Barn. & Adol. 43; 2 Nev. & Man. 241.
(*d*) *Jack* v. *Mc.Intyre*, 12 Cl. & Fin. 151.
(*e*) *Burton* v. *Brown*, Cro. Jac. 648.
(*f*) *Parker* v. *Plumber*, Cro. Eliz. 190.
(*g*) Co. Litt. 4 b.
(*h*) *Birch* v. *Stevenson*, 3 Taunt. 469.
(*i*) *Sir R. Cromwell's case*, Dyer, 169 b.
(*k*) *Huddlestone* v. *Woodroffe*, 2 Roll. Rep. 61.
(*l*) *Rex* v. *Old Alresford* (*Inhab.*), 1 Term Rep. 358.
(*m*) *Pim* v. *Curell*, 6 Mees. & Wels. 234.
(*n*) *Wilson* v. *Anderson*, 1 Car. & Kir. 544.
(*o*) *Curling* v. *Mills*, 6 Man. & Gr. 173.

[illegible] appurtenances" will pass the [illegible] tenement, and gardens, but not [illegible] though occupied with the [illegible] "appurtenances" will not [illegible] of the house, although [illegible] it was held, that a grant [illegible] would pass land [illegible] however, be over-[illegible] which the house [illegible] the thing claimed as [illegible] from evidence: thus [illegible] all that are called [illegible] Black-acre passes with it; [illegible] is always matter of [illegible] are in the occu-[illegible] of which was a yard, [illegible] which was then [illegible] or though prima facie [illegible] yet that might [illegible] under a demise of [illegible] with the appurtenances [illegible] occupied together as [illegible] therefore such a demise [illegible] part of the mes-[illegible] by means of a wooden [illegible] many years previously [illegible] together with all ways [illegible] a right of [illegible] upon proof [illegible] was granted (t); [illegible] and the ways [illegible] it was held [illegible] would not pass by [illegible] land cannot [illegible] in the proper sense of the word; nor [illegible] because the term [illegible] corporeal to corporeal [illegible] in which the law permits such an union; [illegible] land may be appurtenant to a messuage in common parlance, as [illegible] usually occupied with it (x).

(q) [illegible] v. Rutherford, Cro. Car. 17.
(r) [illegible] v. Lake, Cro. Car. 169.
(s) [illegible] v. Hart, 1 Term Rep. [illegible]
(t) [illegible] v. White, 9 Mark. 508.
(u) [illegible] v. Lucas, 6 Barn. & Ald. [illegible] Barn. & Ryl. 600. But see Morris v. Edgington, 3 Taunt. 24; Crisp v. Price, 5 Taunt. 548; Wilson v. Begbie, 5 Man. & Ryl. 448.
(x) Harding v. Wilson, 2 Barn. & Cres. 96; 3 Dowl. & Ryl. 287.
(x) Wilmore v. Cain, Cro. Eliz. 918; Anon., Moore, 221; Cro. Eliz. 16.

Leases of Parts of a House.

It may be necessary, however, to put a different construction on leases made in towns and on those made in the country. In the metropolis, different persons have several freehold over the same spot (as in the case of the inns of courts and chambers), where different parts of the same house are let out to different people: it would therefore be very extraordinary to contend, that if a person purchased a set of chambers, then leased them, and afterwards purchased another set under them, the after-purchased chambers would pass under the lease. The respective apartments of a house may be, and frequently are, let to several and distinct individuals, which tenancies are termed lodgings, and the tenants thereof lodgers: respecting which we shall observe more at large hereafter (*y*).

SECT. 3.—*Term granted.*

(a) *The Habendum.*

Office and Use of the Habendum.

The habendum is that part of the lease which begins with "to have and to hold," and properly succeeds the premises: its office is to name the lessee and to limit with certainty the estate; it may also abridge or alter the generality of the premises (*z*); in short, it fixes the quality and quantity of the estate, and ascertains the meaning of the premises, but cannot contradict or destroy them (*a*): but its operation as a grant is merely prospective from the time of the execution of the lease (*b*). A lease to one for life, habendum to his three sons successively, but omitting to mention the sons in the premises of the deed, was held to be for the life of the father only, and that the sons should not take in possession, or by way of remainder: for it being limited to the father for his life, that was a greater estate than for the lives of others; and the three sons were named as persons to have an estate, and not to make a limitation of an estate (*c*) (*d*). By a lease reciting that *A.*, one of the lessors, was an original lessee for the term of his natural life, and that *B.* the other, was a person to whom *A.* had granted a lease for a term of years certain, seven of which would remain unexpired on the 29th of September following the date of the lease, *A.* and *B.* demised to the lessee, from the said 29th day of September, for and during the two several terms thereinbefore mentioned (the rent to be paid to both the lessors and their respective executors), if the lessee should so long live, and the term and

(*y*) Post, Chap. V., Sect. 2.

(*z*) Shep. Touch. 75; Com. Dig. tit. *Fait*, (E 9).

(*a*) *Cockin* v. *Heathcote*, Lofft. 190; *Doe* d. *Timmis* v. *Steele*, 4 Q. B. Rep. 663; 3 Gale & Dav. 622.

(*b*) *Shaw* v. *Kay*, 1 Exch. Rep. 412, citing *Eyre*, C. J., in *Wyburd* v. *Tuck*, 1 Bos. & Pul. 464.

(*c*) *Windsmore* v. *Hubbard*, Cro. Eliz. 57.

(*d*) The word "term" in a covenant in a lease may signify either the time or the estate granted; *Evans* v. *Vaughan*, 4 Barn. & Cress. 261; 6 Dowl. & Ryl. 349. And see *Wright* d. *Plowden* v. *Cartwright*, 1 Burr. 282; 1 Ld. Ken. 529; *Green* v. *Edwards*, Cro. Eliz. 216; *Cottee* v. *Richardson*, 7 Exch. Rep. 151.

estate of the original lessee should so long continue: under the lease there was subscribed a memorandum, providing that the rent reserved should be paid during the first seven years to the intermediate lessee, and afterwards to the original lessee, during the term of thirty years, if his interest should so long continue; and that the new lessee, his executors, administrators and assigns, should have liberty to quit a part of the premises at any time during the term, upon giving twelve months' notice: held, that the lease and memorandum must be taken together, and construed as one entire instrument; and that the intention of the parties expressed by both, was to extend the habendum beyond the term of the life of the lessee, and give him a lease for thirty-seven years, determinable on the death of the lessor (*e*). Where a term was made to commence from the Nativity of our Lord, without saying the *feast* of the Nativity, the lease was held by Twysden, J., to be void (*f*). And where a lease was made on the 10th of October, habendum from the 20th day of November (not saying in what year) for five years, the court held that the lease was void for uncertainty (*g*). But where a lease was made for years, to begin at the feast of our Lady Mary without expressing what feast, whether of the Annunciation, Purification, &c.), Anderson, C. J., held the lease to be good, and that the lessee by his entry might determine at which of the said feasts the term should begin. But Periam, J., doubted (*h*). The tenendum was formerly used to denote the lord of whom, and the tenure by which, the estate was to be holden, which, although it has long been unnecessary, is retained merely by custom.

(b) *Terms for Life.*

Leases for Lives how made generally.

An estate for life may be created by deed, either by express limitation or by a grant in general terms. Thus a grant by *A.* to *B.* of the manor of Dale gives to *B.* an estate for his life (*i*). This, however, would be otherwise if a contrary intention could be collected from the terms of the deed (*k*). If lands be demised by a tenant in fee to a man generally, without denoting the quantity of estate intended to be given, and livery of seisin be made upon it, such demise shall be an estate to the lessee for his own life, for his life is greater in consideration of law than another's life; and if he lease to the reversioner for his life, he shall have it again after the death of the reversioner, for it was not a surrender: but if such a lease be made by tenant in tail, it shall be for the life of the lessor; for that is all he can lawfully grant, unless he lease according to the stat. 32 Hen. VIII. c. 28 (*l*). But it having been decided that a conveyance in fee by a tenant in tail will

(*e*) *Weak* d. *Taylor* v. *Escott*, 9 Price, 595. 2 Keb. 656; the reporter adds a *quære*. It is not likely that in modern times such a decision would be upheld.

(*f*) *Foote* v. *Berkeley*, 1 Sid. 461; *S. C.*

(*g*) *Anon.*, 1 Mod. 180.

(*h*) *Anon.*, 1 Leon. 227; and see post, p. 77.

(*i*) Co. Litt. 42a, 183a.

(*k*) *Doe* d. *Pritchard* v. *Dodd*, 5 B. & Adol. 689.

(*l*) Co. Litt. 42a.

carry a base fee, and that the estate will continue until avoided by entry of the issue in tail (*m*), it would probably be now held that an unlimited grant by tenant in tail would be a grant for the life of the grantee, if not sooner determined by the entry of the issue. Estates for life granted absolutely, will, generally speaking, endure as long as the life for which they are granted (*n*): but there are some estates for life which may determine upon future contingencies, before the life for which they are granted expires; as where a lease is to a man quamdiu se bene gesserit; to a woman durante viduitate or dum sola; to husband and wife during coverture; to *A.*, as long as he inhabits, or pays such rent, or till he be preferred to such a benefice, or till out of the profits he has paid 100*l.* or other sum, or during his exile, if he be absent from his country voluntarily, and not by edict:—in these and such like cases, the duration of the estate depends merely upon the condition (*o*). But the estate is as perfect an estate for life until the event take place, as if it had been granted absolutely. Where *A.* demises to *B.* for the term of *his* natural life, the demise is primâ facie for the life of *B.*; but where *A.* demised to *B.* his executors and administrators, for the term of *his* natural life, and the lease contained a covenant by *A.* for the quiet enjoyment of the premises by *B.*, his executors, &c., during the natural life of *B.*, it was held that the word "his" in the demising clause must be referred to *A.*, the grantor, and not to *B.*, though his name was the last antecedent (*p*). Where a person demised land for the lives of two persons named, and the life of a granddaughter of a third person, who then was not born; it was held that the lease was good for the lives of the two persons named only (*q*). Where a person devises lands to his executors for payment of his debts, and until his debts are paid, although the determination of such estate be uncertain, yet it is not an estate for life; for if it were, it must determine at the death of the executors, which would frustrate the intention of the testator, for all the debts might not then be paid: the law, therefore, gives the executors a chattel interest, which will go to their executors, and continue until all the testator's debts are paid, and the freehold and inheritance will descend in the meantime to the heir; but if a limitation of this kind were made by deed, it is a freehold conditional (*r*). A lease for years, if the lessee so long live, with a remainder to another for the residue of the term, must be construed to give the remainder-man a power to enjoy during all the residue of the years to come (*s*). Where an agreement for a

(*m*) *Machell* v. *Clark*, 2 Raym. 778.
(*n*) 2 Black. Com. 121.
(*o*) Co. Litt. 42 a.
(*p*) *Doe* d. *Pritchard* v. *Dodd*, 5 Barn. & Adol. 689; 2 Nev. & Man. 838.
(*q*) *Doe* d. *Pemberton* v. *Edwards*, 1 Mees. & W. 553; 2 Gale, 137; Tyr. & Gr. 1006.
(*r*) Co. Inst. 42 a; 8 Co. Rep. 81 b, 96 a; *Carter* v. *Barnardiston*, 4 P. Wms. 509. And see *Greenwood* v. *Tyler*, Cro. Jac. 563; *Owen* v. *Aprees*, Cro. Car. 94; *Mellows* v. *May*, Cro. Eliz. 873.
(*s*) *Wright* d. *Plowden* v. *Cartwright*, 1 Burr. 282; 1 Ld. Ken. 529; Shep. Touch. 272.

lease was made, by which "*A.* agreed to let her house to *B.* during her life, supposing it to be occupied by *B.* or a tenant agreeable to *A.*;" and "a clause was to be added in the lease," to give *A.*'s son an option to possess the house when of age: it was held, that it only enured for the joint lives of *A.* and *B.* (*t*).

Commencement of Leases for Lives.

At common law a lease for life of anything whatsoever, whether it lie in livery or in grant, if it be in esse before, cannot begin at a day to come, for an estate of freehold cannot commence in futuro (*u*); therefore, if a lease be made to hold to the lessee for life from Michaelmas next, or after the death of the lessor, or after the death of *J. S.*, this lease would not be good at common law (*x*). A lease for lives, to begin from the day of the date thereof, with seisin delivered afterwards, is good, and shall not be said to convey a freehold to commence in futuro (*y*): so a lease to hold to the lessee for his life, which term shall begin after the determination of a previous term for three lives, is good (*z*) (*a*). Leases for lives can only take effect by livery of seisin, covenant to stand seised, or such other conveyance as is required for the transfer of freehold estates (*b*). But, although the above rule prevails at common law as to leases in futuro, a very different rule of law prevails in cases of limitations taking effect under the Statute of Uses, or as devises or trusts; in all which cases estates for life may be made to commence in futuro, by way of springing or future use within the prescribed limits; viz., a life or lives in being and twenty-one years afterwards, the use or trust in the meantime resulting to the grantor, or the heir of the devisor. A tenant in tail, after possibility of issue extinct, has an estate for life only (*c*).

(c) *Commencement of Terms for Years.*

What Certainty is requisite in stating the Commencement.

As a lease for years is a mere chattel, it may be made to commence either presently or at a future period, at a day to come, as at *Michaelmas* next, or at three or ten years after, or after the death of the lessor, or of *J. S.*; and when it is to commence in futuro, it is called an interesse termini, or future interest (*d*). All leases for years, whether they begin in præsenti or in futuro, must be certain: that is, they must have a certain beginning and a certain ending, and so the continuance of the term must be certain; otherwise they are not good (*e*). Unless the time of the commencement of the lease be stated it cannot

(*t*) *Doe* d. *Bromfield* v. *Smith*, 6 East, 530; 2 Smith, 570.

(*u*) Shep. Touch. 272; 2 Black. Com. 144, 314.

(*x*) "From" may, however, mean either inclusive or exclusive, according to the subject-matter; *Pugh* v. *Leeds* (*Duke*), Cowp. 714, 725; *Ackland* v. *Lutley*, 9 Ad. & El. 879; 1 Per. & Dav. 636.

(*y*) *Freeman* d. *Vernon* v. *West*, 2 Wils. 165.

(*z*) *Underhay* v. *Underhay*, Cro. Eliz. 296.

(*a*) As to livery of seisin, see post, Sect. 14.

(*b*) Shep. Touch. 210.

(*c*) *Lewis Bowle's case*, 11 Rep. 79 b; *Williams* v. *Williams*, 12 East, 209; *Platt* v. *Bowles*, 2 M. & Sel. 65.

(*d*) Shep. Touch. 273; and see post, Sect. 14.

(*e*) 2 Black. Com. 144; Shep. Touch. 267, 272.

be known when the rent is to become due or when the landlord is entitled to distrain for it. But, though the commencement of a term must be fixed with certainty, it will be sufficient if it be so fixed when the lease is to take effect in interest or possession; for until that time it may depend upon an uncertainty, viz. either a possible contingency, which is to precede the interest or possession, or upon a limitation or condition subsequent; but where it is to be reduced to a certainty upon a precedent contingency, such contingency must happen in the lives of the parties (*f*).

Commencement on the Determination of prior Lease.

A lease to commence after the determination of a prior lease shall begin presently, if the previous lease be void at law: so a lease intended to commence in futuro, which misrecites the prior lease on which it depends in a material point, shall begin immediately (*g*). But if the new lease had misrecited a lease to *A.*, and had then been made for twenty-one years, to commence after the expiration of the term of *A.*, the misrecital would be unimportant, and the new lease would begin from the determination of *A.*'s term (*h*). A lease to commence ad festum Annunciationis, after the determination of a former lease, is as good as if it had been a festo, &c. (*i*).

Commencement from the Date of the Lease.

With regard to the date of a lease, it was formerly held that a lease to commence à datu included the day of the date, but that à die datus excluded the day (*k*); but it is now considered that the words "from the day of the date" mean either *inclusive* or *exclusive*, according to the context and subject-matter; and the Court will construe them so as to effectuate the intention of the parties (*l*). In one case, where the plaintiff in ejectment declared upon a lease for years, to hold from the sealing and delivery, and alleged that the sealing and delivery was on the 1st of May, and laid his demise on the same day; and it was moved in arrest of judgment, that the ejectment could not be supposed to have happened the same day, for the lease did not begin until the next day; the Court disallowed the exception; for the beginning of the lease is presently upon the sealing and delivery (*m*). The words "day of the date" in general mean the "day of the execution of the deed (*n*)." A lease "from the day of the date," and "from henceforth," is the same thing (*o*). As to an impossible or uncertain date,

(*f*) Shep. Touch. 272, 273; *Doe* d. *Hall* v. *Richardson*, 3 Term Rep. 462.

(*g*) Co. Litt. 46 b.

(*h*) Per Keeling and Twisden, Js., in *Poole* v. *Berkeley*, 1 Lev. 235; and see *Woodhouse's case*, Dyer, 93 b.

(*i*) *Miller* v. *Maynwaring*, Cro. Car. 397; *Lloyd* v. *Gregory*, Cro. Car. 502; *Bishop of Bath's case*, 6 Rep. 35. And according to one case, though the new lease expired before the old one, so that the lessee could never lawfully enter, yet he would be bound to pay rent for the whole of his term. See Bac. Abr. tit. *Leases*, (L 1); but see *Anon.*, Dyer, 261 b; and *Seaman's case*, Godb. 166.

(*k*) *Haths* v. *Ash*, 2 Salk. 413; 1 Ld. Raym. 84; *Macdonnel* v. *Weldon*, Stra. 550. And see *Anon.*, Lofft, 275; *Cornish* v. *Cawsey*, Rol. Abr. 850, pl. 12.

(*l*) *Pugh* v. *Leeds* (*Duke*), Cowp. 714. So where a lease for years is to commence from the 25th of March then next, and the 25th of March was made one of the days on which rent was to be paid, it was held that the term did not end until the last moment of the 25th of March; *Ackland* v. *Lutley*, 9 Ad. & El. 879; 1 Per. & D. 636.

(*m*) Bac. Abr. tit. *Leases*, (L 1).

(*n*) *Underhill* v. *Horwood*, 10 Ves. 209.

(*o*) *Llewellyn* v. *Williams*, Cro. Jac. 258.

there appears to have been this distinction taken in the books, viz., that if a lease be made to begin from an impossible date, as from the 30th of February, or the 32nd of April, or from the Nativity of our Lord, not saying from the *feast* of the Nativity, especially if it be by deed, it shall take effect from the delivery (*p*); so if the lease be dated and is to commence from the "making hereof," or "from henceforth (*q*)," or from the executing of a former lease, and no such lease in fact exist, or if the prior lease be void in law (*r*); but where the limitation is uncertain, as a lease made the 10th day of October, to hold from the 20th day of November, without saying what November is meant, the lease is thereby vitiated, because the limitation is part of the agreement, and the Court cannot determine it, not knowing the terms of the contract (*s*). We have seen that where a deed has no date, or an impossible date, as the 30th of February, and in the deed reference is made to the date, that word must be construed "delivery;" but if it have a sensible date, the word *date* occurring in other parts of the deed means the day of the date and not of the delivery; and, therefore, in covenant on an indenture of lease dated the 24th day of December, 1822, whereby the defendant agreed, within twenty-four calendar months then next after the date of the indenture, to procure a certain thing to be done: it was held, that the deed took effect from the day of the date, and that the twenty-four calendar months reckoned from the date (*t*). Where a lease was dated 25th March, 1783, habendum "from the 13th March *now last past*," and it was proved that the deed was not executed until some time after the date, it was held that the term commenced on the 25th March, 1783, and not on the 25th March, 1782 (*u*). A deed having been made in the month of August in a leap year, the words "the 29th February then next ensuing" were construed to mean the 29th February in the next leap year (*x*).

Commencement with Reference to Entry.

In general the lease will be considered to commence from the day of the tenant's entering, and not with reference to any particular quarter-day (*y*). But where a tenant entered in the middle of a quarter, and afterwards paid for that time to the beginning of a succeeding regular quarter, from which time he paid half-yearly, his tenancy was held to commence from the quarter succeeding his entering (*z*). Where, however, the tenant entered in the middle of a quarter, upon an agreement to pay rent "quarterly and for the half-quarter," the jury, under the judge's direction, found that the tenancy commenced from the

(*p*) Co. Litt. 46 b.
(*q*) Ibid.
(*r*) *Miller* v. *Maynwaring*, Cro. Car. 397; *Basset* v. *Lewis*, 1 Lev. 77.
(*s*) Bac. Abr. tit. *Leases*, (L 1); *Anon.*, 1 Mod. 180; and see *Foote* v. *Berkeley*, 1 Sid. 461.
(*t*) *Styles* v. *Wardle*, 4 Barn. & Cres. 908; 7 Dowl. & Ryl. 507.
(*u*) *Steele* v. *Mart*, 4 Barn. & Cres. 272; 6 Dowl. & Ryl. 392.
(*x*) *Chapman* v. *Beecham*, 3 Q. B. Rep. 723; 3 Gale & Dav. 71.
(*y*) *Kemp* v. *Derrett*, 3 Campb. 510.
(*z*) *Doe* d. *Holcombe* v. *Johnson*, 6 Esp. 10.

quarter-day preceding the entry (*a*). A party having taken possession on the 1st of August, and at the Michaelmas following paid the half-quarter's rent, and continued afterwards to pay quarterly on the usual feast days, it was held, that a notice to quit at Michaelmas was sufficient; and that although the landlord had at first given notice expiring with the half-quarter, it was not necessarily to be inferred from that circumstance that the tenancy from year to year commenced on that day (*b*). Where a tenant under a lease continued to hold after the expiration of it as a tenant at will, and assigned it to another, the tenancy of the assignee was held to commence at the day on which the original tenancy commenced under the lease, notwithstanding the assignee came in on a different day (*c*).

Different Computation of Time and Interest.

A lease may commence at one day in point of computation, and at another in point of interest, and it may commence from a day that is past; therefore, a lease "to hold from a day past for fifty years then next ensuing, the said term to commence and begin immediately after the determination of an existing lease in the same premises," was not esteemed uncertain as to its commencement (*d*). So, if a lease bear date 25th day of March, and is delivered on the day of the date, and the habendum is "from and after the day of the date of these presents, for and during the time and term of seven years from henceforth next and immediately following fully to be complete and ended," it begins in computation from the delivery of the deed, which was the day of the date, and in interest the next day after the date, and so all the words will have an operation: for it appears by the words "from and *after* the day of the date," which exclude the day of the date, that the lessee was not to have possession till the next day after the date; but that the seven years were to commence by computation from the delivery, viz. from henceforth, which refers to the limitation of the seven years (*e*).

Leases to commence on the happening of Contingencies.

If when the lease is to take effect in interest or possession the years be certain, it is sufficient, for until that time it may depend upon an uncertainty; either upon a possible contingency precedent to its beginning in possession or interest, or upon a limitation or condition subsequent; but if it is to be reduced to a certainty upon a contingency precedent, the contingency must have happened in the lives of the parties (*f*).

Which have been considered good.

Though there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain, it is sufficient (*g*). Thus if a lease be granted for years after lives in being, though it is

(*a*) *Doe* d. *Wadmore* v. *Selwyn*, Hil. T. 1807, Adams Eject., 3rd edit. 145.
(*b*) *Doe* d. *Savage* v. *Stapleton*, 3 Car. & P. 275.
(*c*) *Doe* d. *Castleton* v. *Samuel*, 5 Esp. 173.
(*d*) *Eays* v. *Donnithorne*, 2 Burr. 1190; *Moore* v. *Musgrove*, Hob. 18; 2 Roll. Abr. 850.
(*e*) *Cornish* v. *Cawsey*, 1 Roll. Abr. 850; Bac. Abr. tit. *Leases*, (L 1).
(*f*) Shep. Touch. 272.
(*g*) Ibid.

uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty, and that is certain which can be rendered so (*h*). So a lease may be granted for a term of years to commence at the determination of a previous term for years which is still subsisting (*i*). If the lease be made to commence from the end and expiration of the previous term, then, if the previous term be surrendered or forfeited, &c., the second term shall commence immediately; but if made to commence after the end and expiration of the twenty-one years aforesaid, then the second term would not commence until after the expiration of the twenty-one years (*j*). Where a lessor let Whiteacre to *A.* for twenty years, and Blackacre to *B.* for forty years, and then demised both to *C.* for a term of years, habendum from the end or determination of the said several demises to *A.* and *B.*, it was held, that as to Whiteacre the term granted to *C.* commenced immediately upon the expiration thereof to *A.*, and was not to be deferred until the expiration of the demise to *B.* (*k*). Where a lease is thus made to *A.*, reciting a former one to *B.*, and demising for a term of years to commence at the determination of *B.*'s lease, if in fact no such lease had been made to *B.*, then *A.*'s term will commence presently (*l*); and the same if the lease be void (*m*). But if there be such a former lease, and it be misrecited in a material part in the second, then the new lease can commence presently only in the enumeration of years, but not in interest until the expiration of the first lease (*n*). In the case of copyholds, if the lord make a grant on demise for years to *A.*, after a grant for life to *B.*, and *B.* die and his wife become entitled to her freebench in the premises for life, the lease to *A.* does not take effect until the death of the widow (*o*). So if *A.* seised of lands in fee grant to *B.* that, when *B.* shall pay to *A.* twenty shillings, from thenceforth he shall hold the land for twenty-one years, and afterwards *B.* pay the twenty shillings: in this case *B.* shall have a good lease for twenty-one years from the date of the payment (*p*). So a lease from the day of the lessor's death until the 1st of May, 1629, was holden to be good for so much of the term as remained after the lessor's death (*q*). If one make a lease to another for so many years as *J. S.* shall name, this at the beginning is uncertain; but when *J. S.* has named the years (in the lifetime of the lessor) this ascertains the commencement and

(*h*) *Goodright* v. *Richardson*, 3 Term Rep. 463; Bac. Abr. tit. *Leases*, (K); Bro. Abr. tit. *Leases*, 71; *Clarke* v. *Sydenham*, Yelv. 85; *S. C.* 1 Brownl. & G. 136.

(*i*) 1 Roll. Abr. 849; Dyer, 261 b, pl. 28; *Lord Paget's case*, 1 Leon. 199.

(*j*) Co. Litt. 45 b; *Wrotesley* v. *Adams*, Dyer, 177, pl. 35; Plowd. 198.

(*k*) *Windham's case*, 5 Co. Rep. 7; Moore, 191; Cro. Eliz. 199; 2 Leon. 105.

(*l*) Bac. Abr. tit. *Lease*, (L 1).

(*m*) Ibid.; Co. Litt. 46 b.

(*n*) Ibid. As to misrecital of date, see *Row* v. *Huntington*, Vaugh. 73; Bac. Abr. tit. *Leases*, (L 1); *Palmer's case*, 4 Co. Rep. 74.

(*o*) *Chantrell* v. *Randall*, 1 Lev. 21; 2 Sid. 165; *Irish* v. *Hook*, Bac. Abr. tit. *Lease*, (L 2).

(*p*) Shep. Touch. 273; Co. Litt. 45 b; 6 Co. Rep. 35 a; 1 Roll. Abr. 849.

(*q*) *Child* v. *Baylie*, Cro. Jac. 459; *Grute* v. *Locroft*, Cro. Eliz. 287; sed vide *Capenhurst* v. *Capenhurst*, Sir T. Raym. 27.

continuance of the lease accordingly: but if the lease had been made for so many years as the executors of the lessor should name, this could not be made good by any nomination, because *to every lease there ought to be a lessor and a lessee;* and here, the nomination which ascertains the commencement not being appointed till after the death of the lessor, makes the lease defective in one of the main parts of it, viz. a lessor, and therefore it is void; which is also the reason that in the first case the nomination ought to be made in the lifetime of the lessor, and not by *J. S.* after his death, for then the lease would be void (*r*). A lease made to another, until a child in its mother's belly shall come to the age of twenty-one years, is not good as a lease for years but at will only (*s*).

(d) *Duration of Terms for Years.*

What Certainty is requisite generally.

The duration of leases for years ought to be ascertained either by the express limitation of the parties at the time of making, or by a reference to some collateral act, which may with equal certainty measure the continuance thereof, otherwise they will be void (*t*). In a recent case, an instrument, by which *A.* agreed to let and *B.* to take certain premises, on the terms that *B.* should pay certain specified sums, varying in amount at the end of every three years up to a specified date, and which provided that from and after that date "*he should pay the clear annual rent of 9l. till the end of the lease,*" without mentioning any period at which the lease was to terminate, was held by Best, C. J., to be good only for the time previous to the date at which the 9*l.* was to commence (*u*). Although a lease for years must have a certain beginning and a certain end, yet the continuance thereof may be uncertain, for the same may cease and revive again in many cases: thus if a tenant in tail make a lease for years, and die without issue, his wife being enceinte with a son, the lease is void against the remainder-man, but after the son be born the lease is good, if it be made according to the statute: so, if tenant in fee simple take a wife, and then make a lease for years, and die, and the wife is endowed; in this case she may avoid the lease, but after her decease the lease shall be in force again (*x*).

Certainty with reference to collateral matters.

If *A.* have a rent of 20*s.* per annum in fee issuing out of land, and he grant the rent to another until he shall have received out of the same rent 21*l.*, the grantee shall have it for twenty-one years (*y*); but if he grant lands of the annual value of 20*s.* until 21*l.* be levied out of

(*r*) Bac. Abr. tit. *Leases*, (L 2); Co. Litt. 45 b; 2 Leon. 86; Plowd. 6, 373, 524.

(*s*) *Say* v. *Smith*, Plowd. 271; *Bishop of Bath's case*, 6 Co. Rep. 35 b; Bac. Abr. tit. *Leases*, (L 3).

(*t*) Bac. Abr. tit. *Leases*, (L 3). If a lease be made for a longer period than the lessor has power to demise, a Court of Equity will establish it to the extent of his term; 2 Lev. 142.

(*u*) *Gwynne* v. *Maynestone*, 8 Car. & Pay. 302.

(*x*) Co. Litt. 46 d; stat. 32 Hen. VIII. c. 28; Shep. Touch. 275; *Peto* v. *Pemberton*, Cro. Car. 101; see post, Chap. VI., Sect. 9, (a).

(*y*) *Bishop of Bath's case*, 6 Co. Rep. 35 b; Co. Litt. 42 a; Plowd. 273.

the issues and profits, this, without livery, would be an estate at will only (z). But if a man grants another a lease of land for ten years, and if at the end of every ten years he shall pay the lessor a certain quantity of tiles, then that he should have a perpetual demise of the land from ten years to ten years continually following; this is a good lease for ten years only, and bad as to the rest for uncertainty (a).

In specifying the Number of Years.

If a man make a lease for years, without saying how many, it shall be a good lease for two years certain; because for more there is no certainty, and for less there can be no sense in the words (b): but if a man lease lands for such a term as both parties shall please, it is but a lease at will; because what that term will be is utterly uncertain, and the pleasure of the parties seems to be limited to attend the continuance as well as the commencement and first fixing thereof (c). A tenancy from year to year is determinable at the end of the first as well as of any subsequent year, unless in creating such tenancy the parties use words showing that they contemplate a tenancy for two years at least, and such a tenancy is not determinable except at the end of a year (d). But a lease for one year, and so on from year to year until the tenancy thereby created should be determined as after mentioned, with a provision that either party might determine the tenancy by three months' notice, creates a tenancy for two years certain (e). A demise for a year, and so from year to year, is a lease for two years certain at least; so, if a parson make a lease for a year, and so from year to year as long as he shall continue parson, or as long as he shall live; this is a lease for two years at least, if he live or continue parson so long (f). So a lease "for the term of six months from the first of January, and so on for six months to six months," until six calendar months' notice is given, the first payment of rent to be on the 1st of July, is a tenancy for twelve months at least, and for calendar, not lunar months (g). In legal proceedings, the word "months" means lunar months, unless the contrary appear to be the meaning, from the subject-matter to which that term is applied (h). If premises are taken "for twelve months certain, and six months'

(z) Ibid.; *Cadee and Oliver's case*, 3 Leon. 157.

(a) *Say* v. *Smith*, Plowd. 271.

(b) *Bishop of Bath's case*, 6 Co. Rep. 35; Bro. Abr. *Lease*, 13.

(c) Bac. Abr. tit. *Leases*, (L 3); *Bishop of Bath's case*, 6 Rep. 35.

(d) *Doe* d. *Clarke* v. *Smaridge*, 7 Q. B. Rep. 957; and *Doe* d. *Plumer* v. *Nainby*, 16 Law J., N. S., Q. B. 303; and see Bac. Abr. tit. *Leases*, (L 3); *Agard* v. *King*, Cro. Eliz. 775; *Legg* v. *Strudwick*, 2 Salk. 414; *Denn* d. *Jacklin* v. *Cartwright*, 4 East, 29, 32; *Harris* v. *Evans*, 1 Wils. 262. In the case of *Legg* v. *Strudwick*, Holt, C. J., held that the tenant could not determine the estate in the middle of the year; and that the expression "for every particular year" does not mean that such a lease operates as a distinct demise for each year separately, but that when any year has commenced, it is good for the whole of that year. *Birch* v. *Wright*, 1 Term Rep. 380.

(e) *Doe* d. *Chadborn* v. *Green*, 9 Ad. & El. 658; 1 Per. & Dav. 454; 2 Will. Wol. & Hod. 122; and see *Doe* d. *Monck* v. *Geekie*, 5 Q. B. Rep. 841.

(f) Bac. Abr. tit. *Leases*, (L 2).

(g) *Reg.* v. *Chawton*, 1 Q. B. Rep. 247; 4 Per. & Dav. 525; Arn. & Hod. 162. As to the rule for construing months to be lunar or calendar, see *Simpson* v. *Margitson*, 11 Q. B. Rep. 23.

(h) *Johnstone* v. *Hudleston*, 4 B. & C. p. 932.

notice to quit afterwards," the tenancy may be determined at the end of the first year by a six months' previous notice to quit (*i*).

Where there is an optional Number of Years fixed.

A lease "for seven, fourteen or twenty-one years, as the lessee shall think proper," upon which the lessee enters and continues in possession, is undoubtedly a good lease for at least seven years, not being void for uncertainty (*k*). A lease made in 1785, for "three, six or nine years, determinable in 1788, 1791 or 1794," is a good lease for nine years, determinable at the end of three or six years (*l*). But the lessee alone has the option to determine such a lease at the earlier periods, on the ground that every doubtful grant must be construed in favour of the grantee (*m*). But if the option be given expressly to both parties, the lease may be determined by either, or by his representative entitled to the reversion or term respectively (*n*); and where the option was given to the parties, their executors and administrators, it was holden that the devisee of the lessor might determine the lease (*o*). But where the lease contained a proviso that if either of the parties, their respective heirs or executors, should wish to put an end to the term at the end of seven or fourteen years, six months' notice in writing should be given under "his or their respective hands," and the lessor died, leaving three executors; it was held, that a notice signed by two of them only, although given on behalf of themselves and the other executors, was not a good notice within the terms of the proviso (*p*). A lease for three, seven or ten years, determinable on notice, stipulated that a quarter's rent should be paid by the tenant on taking possession, the same to be allowed him for the last quarter's rent, "on the determination of the said tenancy;" after a notice to determine the lease at the expiration of the third year had been given, and before its expiration, the parties verbally agreed that the party should continue tenant for another year, no express mention being made of the terms of the tenancy; it was held, that the tenant continued to hold subject to the terms of the original lease, and consequently that the payment on taking possession was applicable to the last quarter of the fourth year (*q*).

Where there is a recurring Number of Years.

If a lease be made for twenty-one years, with a further covenant by the lessor, "that the lessee shall have the same for twenty-one years more after the expiration of the said term, and so from twenty-one years to twenty-one years, until ninety-nine years thence next ensuing shall be complete and ended," the first twenty-one years shall not be

(*i*) *Thompson* v. *Maberley*, 2 Campb. 573.
(*k*) *Ferguson* v. *Cornish*, 2 Burr. 1032.
(*l*) *Goodright* d. *Hall* v. *Richardson*, 3 Term Rep. 462.
(*m*) *Dann* v. *Spurrier*, 3 Bos. & Pul. 399; *Doe* d. *Webb* v. *Dixon*, 9 East, 15; *Price* v. *Dyer*, 17 Ves. jun. 356. The usual form of making such leases at present is to insert the full term in the habendum, and add a proviso at the end for one or either of the parties to put an end to the term at the shorter periods. See the forms, Book IV., Chap. I., Sect. 1 and Sect. 8, (g).
(*n*) *Goodright* v. *Mark*, 4 Mau. & Sel. 30.
(*o*) *Roe* v. *Hayley*, 12 East, 464.
(*p*) *Right* d. *Fisher* v. *Cuthell*, 5 East, 491.
(*q*) *Finch* v. *Miller*, 4 C. B. Rep. 428.

reckoned part of the ninety-nine years (*r*). Where one made a lease for three years, and so from three years to three years until ten years should be expired, it was held to be a lease but for nine years, and that the odd year should be rejected, because that could not come to fall within any three entire years according to the limitation (*s*). Where there was a demise of freehold and copyhold lands at an entire rent, to hold so much as was freehold for twenty-one years and so much as was copyhold for three years, and there was a covenant for renewal of the lease of the copyhold every three years toties quoties during the twenty-one years under the like covenants; and that in the meantime, and until such new leases should be executed, the lessee should hold the said lands, as well copyhold as freehold, &c.; it was held, that this was only a lease of the copyhold for three years, and that the lessor, after the three years, might recover the premises in ejectment against the lessee, there not having been any fresh lease granted (*t*).

Where the Term depends on a Contingency.

Where one made a lease for forty years, "if his wife *or* any of their issue should so long live;" it was adjudged that the lease was not determined by the death of one of them, but should continue till all were dead, by reason of the disjunctive *or*, which goes to and governs the whole limitation: but if the words had been "if his wife *and* issue should so long live," there clearly, by the death of any of them within the forty years, the term had been at an end, by reason of the copulative *and*, which conjoins all together, and makes all their lives jointly the measure of the estate (*u*). If a lease be made to two for years, if they should so long live, it would determine by the death of one of them, because their life is but a collateral condition and limitation of the estate, which therefore is broken when one dies: this differs therefore from a lease to two persons for their lives, for that gives an estate to both for their lives, and both have an estate of freehold therein in their own right; which consequently cannot determine by the death of one of them, for then the other could not be said to have an estate for his life, as the lessor at first gave it (*x*). Where a lease was made for twenty-one years, if the lessee should live so long and continue in the lessor's service; and a question was raised on the lessor's death, whether the term was determined: three of the justices held that the lease continued; for it was not by any laches in the lessee, but the act of God, that he did not serve any longer; but the fourth was strongly against it, because it was a limitation to the estate, that it should not continue longer than he served (*y*). If a lease be made to *J. S.* for twenty years, if the coverture between *A.* and *B.* shall so

(*r*) *Manchester College* v. *Trafford*, 2 Show. 31.

(*s*) Bac. Abr. tit. *Leases*, (L 3); and see Plowd. Rep. 273, 522 a.

(*t*) *Fenny* d. *Eastham* v. *Child*, 2 Maule & Selw. 255; see also post, Chap. VIII., as to renewal of leases.

(*u*) Co. Litt. 225 a; *Lord Vaux's case*, Cro. Eliz. 269.

(*x*) Bac. Abr. tit. *Leases*, (L 4); Roll. Rep. 309.

(*y*) *Wrenford* v. *Gyles*, Cro. Eliz. 643; Noy, 70.

long continue; this is a good lease for twenty years, although the dissolution of the coverture may determine it sooner (z). But a lease to one generally during the coverture of *A.* and *B.* would create but a tenancy at will, by reason of the uncertainty of the duration of the coverture (a). Where a lease for years is made to *A.* and *B.*, if they should so long live; or to *A.*, if he and *B.* should so long live; or if the lessor and lessee, or the lessor and *J. S.* should so long live: in any of these cases, if one die the lease is determined (b). If a lease be made during the minority of *J. S.*, or until *J. S.* shall come to the age of twenty-one years, these are good leases; and if *J. S.* die before he come to his full age, the lease is ended: so, if a man make a lease for twenty-one years, if *J. S.* live so long (c), or if *J. S.* shall continue to be parson of Dale so long; these and such like leases are good (d). If *A.* make a lease to *B.* for so many years as *A.* and *B.* or either of them shall live, not naming any certain number of years; so, if the parson of Dale make a lease of his glebe for so many years as he shall be parson there; this is not certain, neither can it be made so by any means; and yet if a parson shall make a lease from three years to three years, so long as he shall be parson, this is a good lease for six years, if he continue parson so long, and for the residue is void for uncertainty (e).

SECT. 4.—*Reservation.*

What Things are requisite in a Reservation.

The reddendum or reservation of rent (f) is a clause in the lease, whereby the lessor reserves some new thing to himself out of that which he granted before: and this commonly and properly succeeds the habendum, and is usually made by the words "yielding and paying," or similar expressions. In every good reservation these things must always concur:—1. It must be by certain and apt words. Thus a lease for years, reserving rent "after the rate" of 18*l.* a year, is void for uncertainty (g). 2. It must be of some other thing issuing or coming out of the thing granted; and not a part of the thing itself, nor of something issuing out of another thing (h). 3. It must be of such a thing whereunto the grantor may have resort to distrain. 4. It must be made to one of the grantors, and not to a stranger to the deed (i) (k).

(z) *Say* v. *Smith*, Plowd. 273.

(a) Bac. Abr. tit. *Lease*, (L 3).

(b) *Brudnel's case*, 5 Co. Rep. 9 b; *Daniel* v. *Hill*, Cro. Jac. 377; 1 Roll. Rep. 197; *Bailes* v. *Wenman*, 2 Ventr. 74.

(c) *Wright* v. *Cartwright*, 1 Burr. 282.

(d) Bac. Abr. tit. *Leases*, (L 2, 3).

(e) Bac. Abr. tit. *Leases*, (L 3). In all these cases of uncertain leases made with limitations as aforesaid, as until such a thing be done, or so long as such a thing continue, &c. if livery of seisin be made upon them, they may be good leases for life, determinable upon these contingencies, although they cannot be good leases for years.

(f) The subject of reservation of rent will be more fully treated of in the next book. See post, Book II., Chap. I., Sect. 2.

(g) *Parker* v. *Harris*, 4 Mod. 76; 1 Salk. 262.

(h) See *Doe* d. *Douglas* v. *Lock*, 2 Ad. & El. 705; 4 Nev. & Man. 807.

(i) See *Doe* d. *Barber* v. *Lawrence*, 4 Taunt. 23.

(k) See as to the difference between a reservation and an exception, and as to their construction, post, Sect. 7, "*Exceptions.*"

SECT. 5.—*Express Covenants and Agreements.*

(a) *Generally.*

What a Covenant is generally.

A covenant is either expressed or implied—it subsists either in fact or in law. An express covenant, which is of the former description, is the agreement or consent of two or more by deed in writing, sealed and delivered, whereby either of the parties promises the other that something is done already, or shall be done afterwards:—an implied covenant, or a covenant in law, is that which the law implies, though not expressed by words. He who makes the covenant is called the covenantor, and he to whom it is made the covenantee (*l*). A covenant is valid and binding although indorsed on the deed after the signing, but before the sealing and delivery (*m*).

By what Words Covenants may be made.

No particular technical words are requisite towards making a covenant (*n*); for any words or form of expression which import an agreement, or show the party's concurrence in the performance of a future act, or the intention of the parties mutually to contract, will suffice for that purpose (*o*). Thus in the case of a lease of lands, in which are the words "yielding and paying" so much rent, this is an agreement for the payment of rent, which amounts to a covenant, and an action lies for the non-payment; so, if the lease be, yielding such a rent, "free and clear of all manner of taxes, charges and impositions whatsoever," it is a covenant to pay the whole rent discharged of all taxes before or afterwards imposed (*p*) (*q*).

Construction of Covenants.

As to the construction of covenants, all contracts are to be taken according to the intent of the parties, expressed by their own words; and if there be any doubt upon the sense of the words, such construction shall be made as is most strong against the covenantor, lest by the obscure wording of his contract he should find means to evade and elude it (*r*). There is, however, a distinction between implied covenants and express covenants, namely, that the latter are to be taken more strictly (*s*). In one case, where the lessor, after the demise of certain premises, with a portion of an adjoining yard, covenanted that the lessee should have the "use of the pump in the yard jointly with himself whilst the same should remain there, paying half the expenses of the repairs;" the words "whilst," &c. were held to reserve to the lessor a power of removing the pump at his pleasure; and the Court said,

(*l*) Shep. Touch. 160; 2 Black. Com. 304.

(*m*) *Lyburn* v. *Warrington*, 1 Stark. 162.

(*n*) *Stevenson's case*, 1 Leon. 324; 12 East, 182, n.

(*o*) *Bush* v. *Coles*, Carth. 232; *Sampson* v. *Easterby*, 9 B. & C. 505; Roll. Abr. 518; *St. Albans* (*Duke*) v. *Ellis*, 16 East, 352; *Cannock* v. *Jones*, 3 Exch. Rep. 233; *Wood* v. *Copper Miners' Company*, 7 C. B. 906; Com. Dig. tit. *Covenant*, (A 2); *Lant* v. *Morris*, 1 Burr. 287, 290; 1 Esp. N. P. 292; *Chancellor* v. *Poole*, 2 Dougl. 764.

(*p*) *Giles* v. *Hooper*, Carth. 135.

(*q*) See further the next section on implied covenants.

(*r*) Bac. Abr. tit. *Covenant*, (F). See also ante, 64; post, Sect. 7, "*Exceptions*;" and Chap. VII., Sect. 5, (b).

(*s*) *Shubrick* v. *Salmond*, 3 Burr. 1639.

that it was no breach of the covenant, though he removed it without a reasonable cause; and in order to injure the lessee;—but without these words it would have been a breach of covenant to have removed the pump (*t*). Where a covenant is merely negative and passive, some act must be done to constitute a breach: thus, where *A.* covenanted to permit *B.* to sow clover amongst barley sown by *A.*, and he sowed in the last year without giving any notice to *B.*, it was held that there was no breach. In preparing covenants entered into with several persons, it should be made clear whether it is intended to be a separate covenant with each person, as well as a joint covenant with the whole: and whether a covenant be joint or several depends upon the subject-matter of the covenant, and the interest which passes thereby. Where *A.* by lease demised a house and land to *B.* and *C.* for a term of years at 16*l.* per annum, with a covenant by them jointly and severally to pay taxes and rates, &c., but none to pay rent; and *B.* occupied the whole premises, and paid the rent for five years; it was held that the demise being joint, the rent was payable by the two jointly (*u*). The Court will not decide as to the meaning of an insensible proviso for re-entry (*x*). A lessee is not liable for the breach of a covenant committed before the execution of the lease, but subsequently to the day from which by the habendum the term was to commence (*y*).

Liability of the Parties.

As to the extent to which the lessee or his assignee is liable in covenant, there is a considerable difference. The lessee has from his covenant both a privity of contract and of estate; and though he assigns, and thereby destroys the privity of estate, yet the privity of contract continues, and he is liable in covenant notwithstanding the assignment (*z*): but the assignee comes in only in privity of estate, and therefore is liable only while he continues to be in possession and has the legal estate; except in the case of rent, for which, though he assign over, he is liable as to the arrears incurred before the assignment during his enjoyment; and such assignee was made liable in equity, though the privity of estate was destroyed at common law (*a*) (*b*). A covenant may be divisible and follow the land; wherefore an action of covenant will lie against an assignee of part of the thing demised (*c*). If a covenant by two lessees be joint and several, it shall bind the executors of the deceased lessee, even though he died before the term

(*t*) *Rhodes* v. *Bullard*, 7 East, 116; 3 Smith, 173.

(*u*) *Rex* v. *Great Wakering* (*Inhabitants*), 5 Barn. & Adol. 971.

(*x*) *Doe* d. *Wynham* v. *Carew*, 2 Q. B. Rep. 317; 1 Gale & Dav. 640: and see *Doe* d. *Darke* v. *Bowditch*, 8 Q. B. Rep. 973; post.

(*y*) *Shaw* v. *Kay*, 1 Exch. Rep. 412.

(*z*) *Eaton* v. *Jacques*, 1 Dougl. 455; *Chancellor* v. *Poole*, 2 Dougl. 764.

(*a*) Bac. Abr. tit. *Covenant*, (E 4); *Taylor* v. *Shum*, 1 Bos. & Pul. 21; *Stevenson* v. *Lambard*, 2 East, 575; *Stone* v. *Evans*, MS.

(*b*) See further as to the liability of assignees, Chap. VI., Sect. 3, and Book II., Chap. I., Sect. 7.

(*c*) 1 Roll. 522, 1, 5; Jones, 245; *Congham* v. *King*, Cro. Car. 221.

commenced, and the whole term, interest and benefit survived to the other lessee (*d*).

When Covenants are void or nugatory.

A covenant to do a thing which upon the face of it appears to be prejudicial to the public interest, or otherwise contrary to law, is absolutely void; so is a covenant to do a thing which is impossible, if the impossibility exist at the time of making the covenant; but not otherwise (*e*). Where a covenant is founded on a conveyance of an estate which proves to be void, and no estate passes, the covenant is void also: thus, where the conveyance was "a grant of so much of a term as should be unexpired at the death of *A.*," and there was a covenant for quiet enjoyment, and a bond for performance; the conveyance being void on account of the uncertainty of the time when the term was to commence and end, the covenants were adjudged to be void, as they depended on the estate (*f*): but although this is the case with respect to all dependent covenants, it is otherwise of covenants which are independent (*g*). In one case, where it was expressly found that a covenant in a lease, under a power requiring the insertion of "usual covenants," was unusual; and the question was, whether that circumstance avoided the lease itself, or only that particular covenant, it was observed that the party having no power to lease at all, unless in the form prescribed, it became a condition precedent; and it being manifest that the lease was not made pursuant to the power, it was held that the whole lease was void in its creation, and that the reversioner had a right to take advantage of it (*h*). A covenant not to replevy goods distrained until the rent is paid is void (*i*). A covenant with the lessor of premises in a parish to indemnify the parish against any paupers which the covenantor may cause to be settled in it, is valid (*k*). If a lease is made for the express purpose of the premises being used to boil oil and tar, contrary to the provisions of the Building Act, the lessor cannot sue on it for rent (*l*).

(b) *Real or Personal.*

General Rule as to Covenants being Real or Personal.

Covenants are either real or personal; the former are such as are annexed to an estate, or are to be performed on it, and are said to run with the land, so that he who has the one is subject to the other, for which reason warranties were called real covenants: the latter are such whereof some person in particular shall have the benefit, or whereby he shall be charged, as when a man covenants to do any

(*d*) *Enys* v. *Donnithorne*, 2 Burr. 1190, 1197.

(*e*) Shep. Touch. 163.

(*f*) *Capenhurst* v. *Capenhurst*, Sir T. Raym. 27; *Hayne* v. *Maltby*, 3 Term Rep. 438; Co. Litt. 456.

(*g*) *Northcote* v. *Underhill*, 1 Salk. 199; 1 Ld. Raym. 380.

(*h*) *Doe* d. *Ellis* v. *Sandham*, 1 Term Rep. 705, 709. See further as to leases under powers, ante, Chap. I., Sect. 23, p. 38, and post, Sect. 17.

(*i*) 1 Inst. 145 b.

(*k*) *Walsh* v. *Fussell*, 6 Bing. 163; 3 Moore & Pay. 457.

(*l*) *Gas Light Company* v. *Turner*, 7 Scott, 779; 8 Scott, 609; 5 Bing. N. C. 666; 6 Bing. N. C. 324.

personal thing (*m*). If the lessor covenant to pay rent or repair; or if he grant to the lessee so many estovers as will repair, or as he shall burn within his house during the term; these covenants, as belonging to things appurtenant, go with the land, into whosesoever hand it comes (*n*). A covenant which relates to something not in being at the time of the demise, or which is merely personal or collateral to the thing demised, —as to pay a sum of money in gross, to build de novo, or the like,— does not run with the land, and therefore assignees are not bound even though they be expressly named; thus, if a man lease sheep or anything personal, and the lessee covenant for himself and "his assigns" at the end of the term to deliver up the sheep or things so let, or to pay such a price for them; if the lessee assign, this covenant shall not bind the assignee, for it is but a personal contract (*o*). Covenants which run with the land bind those who come in by act of law, such as the personal representatives of the assignee of a lessee, as well as those who come in by act of the parties (*p*); for the personal representatives of a lessee for years are his assignees. If a man covenant for himself only to pay money, build a house, for quiet enjoying, or the like, and he does not say in the covenant "his executors and administrators," yet hereby his executors and administrators are bound and shall be charged (*q*). In preparing covenants which are intended to run with the land, the assignees should always be named as such, for though some covenants will bind them although not named, and others will not bind them although named; yet as there is a middle class, in which assignees are bound if named, but not otherwise, it is prudent to provide for the possibility of a covenant being held to belong to this class (*r*).

What Covenants run with the Land.

Where a covenant is for the benefit of the estate demised, it runs with the land, and will extend to the assignee, though he be not named (*s*): thus a covenant to pay rent (*t*) or taxes, or to repair (*u*), or to leave in repair, must run with the land, for it affects the estate in the hands of any person that has it (*x*); yet if a lessee for years covenants *for himself* to repair the house demised, omitting other words, it seems in this case he is bound to repair only during his life, and his executors and administrators are not bound (*y*). A covenant not to plough runs

(*m*) Bac. Abr. tit. *Covenant*, (E 2, 5); Shep. Touch. 161.

(*n*) *Martyn* v. *Clue*, 22 Law J. 147, Q. B.

(*o*) *Spencer's case*, 5 Rep. 16 b.

(*p*) Esp. N. P. 290.

(*q*) Shep. Touch. 178; *Williams* v. *Burrell*, 1 C. B. Rep. 402.

(*r*) *Spencer's case*, 5 Rep. 16; see post, Book III., Chap. II., Sect. 3.

(*s*) Bac. Abr. tit. *Covenant*, (E 3); *Spencer's case*, 5 Rep. 16.

(*t*) *Parker* v. *Webb*, 3 Salk. 5.

(*u*) *Dean and Chapter of Windsor's case*, 5 Rep. 24; *Conan* v. *Kemise*, W. Jones, 245; *Smith* v. *Arnold*, 3 Salk. 4. But where a lessee agreed to pay, in addition to the rent that had been reserved, ten per cent. on the outlay which the lessor should make in improving the buildings, it was held that this was not a contract running with the land; *Lambert* v. *Norris*, 2 Mees. & Wels. 333; Mur. & Hurl. 29; see also *Hoby* v. *Roebuck*, 7 Taunt. 157; 2 Marsh. 433; and *Donellan* v. *Read*, 3 Barn. & Adol. 899; *Martyn* v. *Clue*, 22 Law J. 147, Q. B.

(*x*) *Buckley* v. *Pirk*, 1 Salk. 317; *Wakefield* v. *Brown*, 9 Q. B. Rep. 209; *Magnay* v. *Edwards*, 13 C. B. 479.

(*y*) Shep. Touch. 178.

with the land, and therefore binds an assignee, although "assigns" are not named in the deed (z): so a covenant to use the land in a husband-like manner, and leave it in like condition, was held to be such a covenant as ran with the land (a): so was a covenant to lay dung on the demised land in each and every year during the continuance of the term (b); but a covenant to pay rent and repair, made with a mortgagor and his assigns, in a lease granted by himself together with the mortgagee, does not run with the land, as it is only collateral to the grantor's interest in the land (c). A lease recited that the lessors were owners subject to a mortgage, the interest on which was payable at a certain place; it then demised the land for a term, the lessee yielding and paying a certain sum at that *place* in part of the interest due on the mortgage, and the lessee covenanted to pay that sum at the *place* and in the manner mentioned: held that this was a covenant in gross to pay an annual sum (d). A covenant that a lessee should reside on the demised premises during the term was held to extend to the assignees, though not named in the covenant (e). So with respect to a covenant not to carry on particular trades; but it has been considered that a covenant by a lessee that he, *his executors and administrators*, shall not assign without license, does not run with the land (f). A covenant by a lessee of tithes for himself and his "assigns" not to let any of the farmers in the parish have any part of the tithes, runs with the tithes, and binds the assignee (g). A covenant to carry all the corn produced on the demised land to the lessor's mill to be ground, is a covenant which runs with the land, of which the assignee of the reversioner of the land demised and of the mill may take advantage; the suit to the mill being likened to rent, and the judgment of the Court proceeding on the unity of the title to the mill and the land demised (h). A covenant for quiet enjoyment runs with the land (i); so with respect to a covenant to produce title-deeds (k), or to make further assurance (l), or to renew the lease (m). So a covenant by a lessee for lives, made in an under-lease, that he will, on either of the cestui que vies dying, apply for and do his utmost endeavours to procure a renewal of the lease for another life, is a covenant which runs with the land, and therefore the assignee of the under-lessee may sue on it (n). A covenant in an under-lease, whereby the lessor covenanted, not naming his assignees, to observe and perform and effectually

(z) *Cockson* v. *Cock*, Cro. Jac. 125.
(a) *Walsh* v. *Watson*, Esp. N. P. 295.
(b) —— v. *Davis*, MS. M. T. 42 Geo. III.
(c) *Webb* v. *Russell*, 3 Term Rep. 393.
(d) *Pargeter* v. *Harris*, 7 Q. B. Rep. 708.
(e) *Tatem* v. *Chaplin*, 2 H. Black. 133.
(f) *Paul* v. *Nurse*, 8 Barn. & Cress. 486; 2 Man. & Ryl. 525.
(g) *Bally* v. *Wells*, 3 Wils. 25. See also *Brewer* v. *Hill*, 2 Anstr. 413.
(h) *Vyvyan* v. *Arthur*, 1 Barn. & Cres. 410; 2 Dowl. & Ryl. 670.
(i) *Lewis* v. *Campbell*, 8 Taunt. 715; 3 Moore, 35, 51; *Campbell* v. *Lewis* (*in error*), *S. C.* 3 Barn. & Ald. 392; *Noke* v. *Awder*, Cro. Eliz. 375, 436.
(k) *Barclay* v. *Raine*, 1 Sim. & Stu. 449.
(l) *Middlemore* v. *Goodhall*, Cro. Car. 503; *S. P. Kingdon* v. *Nottle*, 4 Maule & Sel. 53.
(m) *Istead* v. *Stoneley*, 1 And. 82; *S. P. Brooke* v. *Bulkeley*, 2 Ves. 498.
(n) *Simpson* v. *Clayton*, 6 Scott, 469; 4 Bing. N. C. 758; 1 Arn. 299.

to indemnify the lessee against the covenants in the superior lease, one of which was to build several houses on the land, does not run with the land so as to make the assignee of the covenantor liable (*o*). A covenant to build a new smelting mill in lieu of an old one in a lease of mines, has been considered as a covenant which runs with the land, as it tended to the support and maintenance of the thing demised (*p*). A covenant by a lessor to supply two houses with good water, at a rate therein mentioned for each house, runs with the land; and for a breach of it the assignee of the lessee may maintain an action against the reversioner (*q*); but a covenant by a lessor to pay on a valuation for all trees planted by the lessee, does not run with the land (*r*). Where there was an exception in a lease of an entry, and liberty to wash in the kitchen, and a passage for that purpose; it was held that an action would lie against an assignee for hindering the lessor, because a covenant relating to a way or other profit appurtenant goes with the tenement, and binds the assignee (*s*): but where in a lease of ground, with liberty to make a watercourse and erect a mill, the lessee covenanted for himself, his executors and assigns, not to have persons to work in the mill who were settled in other parishes without a parish certificate, it was held that this covenant did not run with the land, nor bind the assignee of the lessee (*t*). Where the lessees of a theatre by deed agreed to repay money lent to them by the plaintiff on a day certain, and that until payment the plaintiff and such persons as he might appoint should have the free use of two boxes in the theatre, no specific boxes being mentioned, and afterwards assigned their interest in the theatre, it was held that it was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes (*u*). A covenant to insure property within the operation of the old Building Act, 14 Geo. III. c. 78, s. 83, (the bills of mortality,) has been held to be a covenant which runs with the land; because by that act the landlord may have the sum laid out in rebuilding (*x*); and of course a covenant expressly in those terms would be the same; but it would seem that a covenant merely to insure property which is beyond the operation of the act, without any such provision for the application of the money, would be personal only (*y*).

(*o*) *Doughty* v. *Bowman*, 12 Q. B. Rep. 444.

(*p*) *Sampson* v. *Easterby*, 9 Barn. & Cres. 505; 4 Man. & Ryl. 422; *S. C.* in error, nom. *Easterby* v. *Sampson*, 6 Bing. 644; 4 Moore & Payne, 601; 1 Cromp. & Jer. 105. It has been doubted whether a covenant by a purchaser of land not to build except in certain forms is a covenant which runs with the land; *Ex parte Ralph*, 1 De Gex, 219.

(*q*) *Jourdain* v. *Wilson*, 4 Barn. & Ald. 266.

(*r*) *Grey* v. *Cuthbertson*, 2 Chit. 482; 1 Selw. N. P. 498; 4 Dougl. 351.

(*s*) *Coles' case*, 1 Show. 388; 1 Salk. 196; Carth. 323.

(*t*) *Congleton* (*Mayor, &c.*) v. *Pattison*, 10 East, 130. As to a personal covenant not being affected by a surrender of a lease, see *Attorney-General* v. *Cox*, 3 Ho. of Lords, 240; post, Book I., Chap. VII., Sect. 3, (e).

(*u*) *Flight* v. *Glossop*, 2 Scott, 220; 1 Hodges, 263.

(*x*) This provision is not repealed by the new Building Act, 7 & 8 Vict. c. 84.

(*y*) *Vernon* v. *Smith*, 5 Barn. & Ald. 1.

Divisibility of Liability on Covenants.

A covenant may be divisible and follow the land; therefore an action of covenant will lie against an assignee of part of the thing demised (z); thus where one demised two houses, with a covenant on the part of the lessee for himself and his assigns to repair, and the lessee assigned one of them, an action against the assignee for not repairing was held to be maintainable; so in case of eviction the rent may be apportioned as in debt or replevin (a); so, it seems, an action lies by an assignee of part of the estate demised, or the assignees of several parts may join (b). An assignee of five-sixths of an under-lease, who is tenant in common with the assignee of the other sixth, may sue on a covenant by the original lessee to procure a renewal of the original lease (c). The assignee of part of an estate is not liable for rent for the whole (d); but if a lessee grant or assign part of his estate, yet the entire privity of the contract is not at an end, and the lessee would, it seems, remain liable on his covenant to pay the entire rent, for he cannot apportion it (e) (f).

(c) *Dependent or Independent.*

General Rule with respect to such Covenants.

As to what covenants shall be construed to be precedent or not, it has been laid down that the dependence or independence of covenants must be collected from the sense and meaning of the parties; and that in whatever order covenants may stand in a deed, their precedency must depend on the order of time in which the intent of the transaction required their performance (g). No precise technical words therefore are required in a deed to make a stipulation a condition precedent or subsequent; neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed: the merits therefore of a question of this kind must depend on the nature of the contract, and the acts to be performed by the contracting parties, and any subsequent facts disclosed which have happened in consequence of the contract (h). Where a covenant is part only of the consideration on one side it is an independent covenant, and not a condition precedent (i). If one party covenant to do one thing, the other party doing another, it is not a condition precedent, but a mutual covenant (k).

Particular Cases decided respecting Repairs.

A covenant to keep a house in repair, from and after the lessor has repaired it, is conditional; and it cannot be assigned as a breach that it was in good repair at the time of the demise, and that the lessee suffered it to decay; for the lessor must repair before the lessee is

(z) 1 Roll. 522, 1, 5; *Conan* v. *Kemise*, W. Jones, 245; *Congham* v. *King*, Cro. Car. 221.

(a) *Stevenson* v. *Lambard*, 2 East, 575.

(b) Com. Dig. tit. *Covenant*, (B 3).

(c) *Simpson* v. *Clayton*, 4 Bing. N. C. 758; 1 Arn. 299; 6 Scott, 469.

(d) *Holford* v. *Hatch*, 1 Dougl. 183.

(e) *Broom* v. *Hore*, Cro. Eliz. 633; *Arde* v. *Watkin*, Cro. Eliz. 637; *Stevenson* v. *Lambard*, 2 East, 575, 579.

(f) See further as to the liability of assignees, post, Chap. VI., Sect. 3, and Book III., Chap. II., Sect. 3.

(g) *Jones* v. *Barkley*, 2 Dougl. 684.

(h) *Hotham* v. *East India Company*, 1 Term Rep. 645.

(i) *Carpenter* v. *Cresswell*, 4 Bing. 409; 1 Moore & Pay. 66.

(k) *Boone* v. *Eyre*, 2 W. Black. 1312.

liable (*l*). Where the plaintiff let to the defendant a messuage, barn, stable and buildings, and the defendant agreed to repair the said messuage, buildings and premises, the same being first put into repair by the plaintiff: it was held, that the repair by the plaintiff was a condition precedent to the obligation on the defendant to keep in repair; that that condition precedent could not be divided; and that the plaintiff was not entitled to recover for the non-repair of any part of the premises without having first repaired the whole. It is, however, a question whether such a condition might not be divided if it had related to subject-matters clearly distinct in their nature; as if the contract in question had related to two dwelling houses entirely separate from each other (*m*). So if a lessee covenant to repair, "provided always and it is agreed that the lessor shall find great timber," &c., this makes a covenant on the part of the lessor to find great timber by the word "agreed," and it shall not be a qualification of the covenant of the lessee (*n*): but where the words were, "he the said lessor finding, allowing and assigning timber sufficient for such reparations during the said term, to be cut and carried by the lessee;" it was held not to be a covenant to provide timber, but a mere qualification of the covenant to repair (*o*). Where a lessee covenanted to repair a house before the 1st of June, 5,000 slates being found by the lessor towards the repair, and afterwards to keep in repair during the term; it was held, that finding the slates was not a condition precedent to the covenant to keep in repair, but only to the covenant for putting the premises in repair before the 1st of June (*p*). In a farming lease the lessee covenanted with the lessor that the lessee should at all times during the term repair and glaze the windows and also the hedges, &c., when necessary, "the said farmhouse and buildings being previously put in repair and kept in repair by the lessor:" the latter clause was held to amount to an absolute and independent covenant on the part of the lessor to put the premises in repair (*q*). A covenant by the lessor to do certain work, containing at the end the words "and the whole of which is agreed to be left to the superintendence of the lessee and the lessor's son," is neither a condition precedent to, nor concurrent with, the covenant (*r*). The covenant to repair generally, and to repair within three months after notice in writing, are independent covenants (*s*): and where a lessee covenanted to leave premises in repair at the expiration of the term, and also that the lessors might direct the lessee to complete the repairs by giving six months' notice in writing, it was held, that these were two distinct and separate covenants, the

(*l*) See post, Book II., Chap. IV., Sect. 2, (b).
(*m*) *Neale* v. *Ratcliff*, 15 Q. B. Rep. 916.
(*n*) Bac. Abr. tit. *Covenant*, (A).
(*o*) *Thomas* v. *Cadwallader*, Willes, 496.
(*p*) *Mucclestone* v. *Thomas*, Willes, 146.
(*q*) *Cannock* v. *Jones*, 3 Exch. Rep. 233.
(*r*) *Jones* v. *Cannock*, 3 Ho. of Lords Cas. 700; 5 Exch. Rep. 713.
(*s*) *Doe* d. *Morecraft* v. *Meux*, 4 Barn. & Cres. 606; 7 Dowl. & Ryl. 98; 1 Car. & Pay. 346.

former of which was not qualified by the latter (*t*): but where a lease contained a covenant by the lessee to repair the premises at all times (as often as need or occasion should require) and "at farthest within three months after notice," it was held to be one entire covenant, the former part of which was qualified by the latter (*u*). Where there was an agreement that the lessee should spend 200*l.* in repairs, to be inspected and approved of by the lessor, and to be done in a substantial manner, and the lessee was to be allowed to retain the money out of the first year's rent of the premises, it was held that the lessor's approval was not a condition precedent to the lessee retaining the rent (*x*). Where a lessee covenanted to expend a certain sum in substantial and beneficial improvements, under the direction or with the approbation of some competent surveyors to be named by the lessor, the appointment of the surveyors was held to be a condition precedent to the lessee's liability to expend the money (*y*). Where by deed reciting an agreement to let copyhold premises, *A.* covenanted that as soon as he had procured a license from the lord of the manor he would lease them to *B.* for the then residue of a term of years from a certain day, and *B.* covenanted that he would repair during the term so to be granted, it was held that *B.* was liable on this covenant after having occupied the premises for the whole term, though no license had been procured from the lord nor any lease ever made (*z*).

Cases decided respecting other Matters.

Where a lessee covenanted to leave sufficient compost on the soil of the landlord at the end of the term, he the lessee having the yard, barn and a room to lodge in and dress diet; it was held to be a mutual and not a conditional covenant, as it differed from a case where the tenant covenants to repair if the lessor finds sufficient timber; for there the proviso restrains the covenant; but in this case, said Lord Mansfield, there is not the least foundation for such construction (*a*). Where in a lease for seven years, containing the usual covenants that the lessee should pay the rent, keep the premises in repair, &c., there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice, and that then, from and after the expiration of such notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void, it was held, that the payment of rent and performance of the other covenants, were conditions precedent to the lessee's determination of the term at the end of the first three years, and that his merely giving six months' notice, expiring within

(*t*) *Wood* v. *Day*, 7 Taunt. 646; 1 Moore, 389.

(*u*) *Horsefall* v. *Testar*, 7 Taunt. 385; 1 Moore, 89.

(*x*) *Dallman* v. *King*, 4 Bing. N. C. 105; 5 Scott, 382; 3 Hodges, 283.

(*y*) *Coombe* v. *Greene*, 11 Mees. & Wels. 480; 2 Dowl. N. S. 1023; and see *Cannock* v. *Jones*, 3 Exch. Rep. 233; post, 95.

(*z*) *Pistor* v. *Cater*, 9 Mees. & Wels. 315.

(*a*) *Dodd* v. *Innis*, Lofft, 56.

the first three years, was not sufficient for that purpose (*b*). A mining lease contained numerous covenants by the lessees, and also a proviso that if they should desire to quit the premises at the end of the first eight years, and should give eighteen months' notice thereof to the lessor, then, all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been observed and performed, the lease should at the expiration of the eighth year be utterly void; but, nevertheless, without prejudice to any claim or remedy which any of the parties might then be entitled to for breach of any of the covenants; it was held, in error, that the performance of *all* the covenants by the lessees was a condition precedent to their right to determine the lease (*c*). Another Court of Error, however, appears to have entertained a different opinion (*d*). A lease contained a proviso, that if the lessor should give notice for the delivery up of the land to him, the lessee covenanted to surrender it up, and that the lessor might take possession of it, paying the lessee compensation for money expended thereon: it was held, that the proviso did not operate as a mere covenant by the lessee to give up on notice, but expressly gave the lessor power to take possession; and that he might do so without having first paid compensation (*e*). Where *A.* covenanted to pay an annuity to *B.*, who covenanted for the assignment and quiet enjoyment of premises, the entering into which covenants was the consideration, it was held that they were not dependent (*f*). So where it was agreed that the lessor should within eighteen months from the date of the lease build a cattle-shed, the whole to be left to the superintendance of the lessee and her son, it was held that this latter provision was not a condition precedent to or concurrent with the lessor's covenant to build (*g*). On a lease of some coal mines, the lessees covenanted that the lessor should, when he thought fit, employ a fit and proper person to weigh the coals and keep the accounts, the person so weighing and keeping the accounts to be paid by the lessees; but in case such person did not duly attend to his duties, the lessees were authorized to discharge him: held that the appointment of a fit and proper person was a condition precedent to the liability of the lessees to pay the wages, and that therefore they were not bound to pay the wages though they had not dismissed him (*h*). An assignee of a term in coal mines covenanted with the lessee that he would, so long as he should be in receipt of the rents of the premises, pay to the lessors the rent payable by the original lease, and would keep the lessee harmless and indemnified against the rents and covenants of the lease:

(*b*) *Porter* v. *Shephard*, 6 Term Rep. 655.
(*c*) *Friar* v. *Grey*, 5 Exch. Rep. 584.
(*d*) *Grey* v. *Friar*, 15 Q. B. Rep. 901.
(*e*) *Doe* d. *Gardner* v. *Kennard*, 12 Q. B. Rep. 244.
(*f*) *Rose* v. *Poulton*, 2 Bar. & Adol. 822.
(*g*) *Cannock* v. *Jones*, 3 Exch. Rep. 233, affirmed on error in *Jones* v. *Cannock*, 3 Exch. Rep. 713.
(*h*) *Lawton* v. *Sutton*, 9 Mees. & Wels. 795.

it was held that the words "so long as he should be in the receipt of the rents" did not extend to the covenant to indemnify (*i*). A covenant in a farming lease provided that the tenant should consume and convert into manure, and spread on the premises, all the turnips, &c. grown thereon; but that in case he should sell off any part thereof, which he was at liberty to do, then that he should for every ton of vetches, &c., so sold off, bring back and spread thereon one ton of manure within three months after. In an action on this covenant the plaintiff set out the first part only, and assigned for breach that the defendant carried away fourteen acres of turnips, without converting the same into manure and spreading the same: it was held that the covenant was an alternative one, and that the plaintiff should have negatived the bringing back, within the time limited, an equivalent in manure (*k*).

(d) *How Discharged.*

How Covenants are discharged generally.

Covenants cannot be discharged before breach otherwise than by deed; therefore a parol license or agreement, dispensing with or changing the terms of such an obligation, cannot be pleaded in bar to an action of covenant (*l*): for an obligation by deed cannot be altered but by deed (*m*).

When discharged by the Operation of Acts of Parliament.

With respect to the operation of acts of parliament in discharging the obligation of a covenant there is this difference; viz., that where a man covenants not to do an act or thing which it was lawful to do, and an act of parliament is made afterwards and compels him to do it, the statute repeals the covenant; so, if one covenant to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed; but if a man covenant not to do a thing which at the time was unlawful, and an act comes and makes it lawful to do it, such act of parliament does not repeal the covenant (*n*): and if the covenant be to do that which is afterwards made unlawful in part only, it must be performed so far as it continues lawful (*o*). If there be a covenant to do a thing which is unlawful by statute, the covenant will not be made lawful by the repeal of the statute, because the covenant was bad ab initio; although it would be otherwise, if the covenant had been originally lawful, but had been made unlawful by a statute which was itself afterwards repealed (*p*). Though all the rent of the lessee is assigned by act of parliament, if there are no words of discharge, the lessee is still liable to an action of covenant for the rent (*q*). Where by an order, confirmed by act of parliament, an indenture of lease, upon which rent was reserved, was vacated and cancelled, and it was ordered that a stranger should enter

(*i*) *Crossfield* v. *Morrison*, 7 C. B. Rep. 286.
(*k*) *Richards* v. *Bluck*, 6 C. B. Rep. 437; 7 Dowl. & L. 325, *S. C.*
(*l*) *Littler* v. *Holland*, 3 Term Rep. 590.
(*m*) *Thompson* v. *Brown*, 1 Moore, 358.
(*n*) *Brewster* v. *Kitchell*, 1 Salk. 198.
(*o*) 2 Eq. Ca. Abr. 26.
(*p*) *Jacques* v. *Whitby*, 1 H. Black. 65.
(*q*) Bac. Abr. tit. *Covenant*, (E 4, n.)

into the demised lands, and receive the profits; it was considered that the same rent in value, granted by the lessee for the better securing of the rent reserved, was not discharged, though it appeared to be the intention that but one rent should be paid (*r*). Land was demised, the lessee covenanting to build a workhouse on it, and to use the premises for the sole use of the poor of a parish; held, that the mere performance of the covenant was excused by the operation of the Poor Law Amendment Act (*s*). Land was demised to the officers of a parish for erecting a poor house under Gilbert's Act, with a proviso for re-entry, if the parish and all other parishes which might be united should *of themselves discontinue* to adopt the provisions of the act; the other parishes all seceded from the union, after which the Poor Law Commissioners incorporated the particular parish in a union, and ordered the paupers to be removed from the poor house, after which the house was used for persons requiring out-door relief only, and the land was offered for letting; this was held to be no forfeiture (*t*).

SECT. 6.—*Implied Covenants and Agreements.*

Implied Covenants generally.

An implied covenant, or a covenant in law, is that which the law intends and implies, though it be not expressed by words in the deed. These implied covenants are said to be inherent, that is, such as pertain especially to the land; as that the thing itself shall be quietly enjoyed, —shall be kept in reparation, and shall not be aliened,—or to pay rent, —not to cut down timber trees,—or to do waste,—to fence the coppices when they be new cut, and the like (*u*). An implied covenant is in all cases controlled within the limits of an express covenant; for expressum facit cessare tacitum (*x*): caution, therefore, is to be used in introducing into a lease express covenants in certain cases; as the evil intended to be guarded against may frequently be prevented or recompensed in a more *limited* degree by an express than an implied covenant (*y*). A covenant in law shall go to the assignee of the term, and he shall have advantage of it (*z*). Upon an implied covenant, an action of covenant, it has been said, will not lie against an executor (*a*); but it is otherwise on an express covenant (*b*).

(*r*) *Mounson* v. *Redshaw*, 1 Saund. 196.

(*s*) *Doe* d. *Anglesea* (*Marquis*) v. *Rugeley* (*Churchwardens*), 6 Q. B. Rep. 107.

(*t*) *Doe* d. *Lord Grantley* v. *Butcher*, 6 Q. B. Rep. 115, n.

(*u*) Shep. Touch. 161.

(*x*) *Noke's case*, 4 Co. Rep. 80; *S. C* nom. *Nokes* v. *James*, Cro. Eliz. 674; *Gainsford* v. *Griffith*, 1 Saund. 58; *Deering* v. *Farrington*, 1 Mod. 113; 1 Lord Raym. 14, 19.

(*y*) By the statute 8 & 9 Vict. c. 106, s. 4, it is enacted, "that the word 'give' or the word 'grant' in a deed, executed after the 1st October, 1845, shall not imply any covenant in law, in respect of any tenements or hereditaments, except so far as the word 'give' or the word 'grant' may by force of any act of parliament imply a covenant." The repealed statute 7 & 8 Vict. c. 76, s. 6, which operated during the previous part of the same year, 1845, enacted that the word "grant" should not have the effect of creating a covenant by implication, except where by act of parliament it had that effect.

(*z*) Bac. Abr. tit. *Covenant*, (E 5); *Vyvyan* v. *Arthur*, 1 Barn. & Cres. 410; 2 Dowl. & Ryl. 670; *Williams* v. *Burrell*, 1 C. B. Rep. 402.

(*a*) Shep. Touch. 178; *Adams* v. *Gibney*, 6 Bing. 656; 4 Moore & Pay. 491.

(*b*) Shep. Touch. 178; *Williams* v. *Burrell*, 1 C. B. Rep. 402.

Implied Covenant for Quiet Enjoyment.

There is always a covenant for the quiet enjoyment of the lessee implied under the word "demise," or other word by which the term is granted by the lessor, although there is no express covenant for quiet enjoyment, for the law intends a covenant on the part of the lessor, that the lessee shall quietly hold and enjoy the thing demised against all persons having title under the lessor; and hereupon an action of covenant may be brought against him in the reversion (*c*). Under a parol demise an agreement for quiet enjoyment, but not for good title, will be implied by law (*d*). The implied covenant for quiet enjoyment comprehends a covenant by implication that the lease shall be valid, and not void or voidable; for of such there could of course be no enjoyment at all: and this principle is the same as that which respects any conveyance; for where a man undertakes to convey, he undertakes to convey by a good title (*e*). It seems that on such an implied covenant, the lessee may maintain an action against the lessor for not having sufficient power to demise for the whole term, by means of which he was put to the expense of procuring a better title for the whole term (*f*). If the lessor also covenant expressly that the lessee shall enjoy during the term without eviction by the lessor, or any claiming under him; this express covenant qualifies the generality of the implied covenant, and restrains it by the mutual consent of both parties, that it shall not extend farther than the express covenant (*g*).

Implied Covenant to pay Rent.

As in every contract there must be a legal consideration to make it valid, so where the relation of landlord and tenant subsists, some quid pro quo must subsist also; therefore, unless the lease be granted in consideration of a fine or a sum in gross, an implied contract is raised on the part of the tenant that he shall pay an annual rent (*h*).

Implied Covenant to cultivate.

A covenant is implied, on the part of the lessee, that he will use the land demised to him in a husbandlike manner, and not unnecessarily exhaust the soil by neglectful or improper tillage; for the bare relation of landlord and tenant is sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner (*i*). Where a lessee covenanted to plough, sow, manure, and cultivate the demised premises (except the rabbit-warren and sheep-walk) in a due course of husbandry, it was held that it amounted to a covenant *not* to plough the sheep-walk (*k*).

Other implied Covenants.

There is no implied covenant on a lease of a house or of land, that it is reasonably fit for habitation, occupation or cultivation (*l*): and

(*c*) Shep. Touch. 178.

(*d*) *Bandy* v. *Cartwright*, 8 Exch. Rep. 913; *Hancock* v. *Caffyn*, 8 Bing. 366.

(*e*) *St. Albans* (*Duke*) v. *Shore*, 1 H. Black. 270; *Phillips* v. *Fielding*, 2 H. Black. 123.

(*f*) *Fraser* v. *Skey*, 2 Chit. 646.

(*g*) Bac. Abr. tit. *Covenant*, (B); *Nokes* v. *James*, Cro. Eliz. 674; *S. C.* nom. *Noke's case*, 4 Co. Rep. 80. For further particulars respecting the extent of the obligation of such covenants, see post, Book II., Chap. V., Sect. 8.

(*h*) See further as to rent, Book II., Chap. I.

(*i*) *Powley* v. *Walker*, 5 Term Rep. 373.

(*k*) *St. Albans* (*Duke*) v. *Ellis*, 16 East, 352. See further as to cultivation, Book II., Chap. IV., Sect. 4.

(*l*) *Hart* v. *Windsor*, 12 Mees. & Wels. 68; *Sutton* v. *Temple*, 12 Mees. & Wels. 52;

there is no implied covenant on a lease of a house that it will endure during the term (*m*). And if the landlord is bound to do repairs there is no implied condition that if not done the tenant may quit (*n*). Where a lessee covenanted that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and repair of their houses: it was held, that this was an implied covenant also that he would burn lime at all such seasons; and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied (*o*). So a covenant by a lessee to pen and fold his flock of sheep, which he should keep upon the premises, upon such parts where the same had been usually folded, was held to amount by implication to a covenant to keep a flock of sheep (*p*). A landlord having accepted the offer of a tenant, whose term was expiring, to continue tenant, provided he could not find any other tenant at the rent it appeared to him to be worth by a certain day, it was held to be an implied condition, that the tenant should allow persons applying for the farm to go over it, and that, the condition not having been performed, the contract was at an end (*q*). On a demise of a brewery, and the exclusive privilege of supplying ale, it would seem that no covenant can be implied with respect to such a privilege from the word "demise" (*r*). A demise was made of a mansion-house and land, with the sole licence of sporting over all other lands of the lessor's, and he covenanted that if any of his tenants should obstruct the lessee in the enjoyment of his licence, then the lessor would, on the requisition of the lessee, give the tenant notice to quit, and would enforce such notice; it is no breach of this covenant if the lessor subsequently demises some of his lands for a term of years, without any clause to prevent the tenant from obstructing the person having the licence of sporting to enjoy his licence, and without reserving a power to give a notice to quit if he did (*s*). A lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing

overruling *Edwards* v. *Etherington*, Ry. & Mood. 268; 7 Dowl. & Ryl. 117; *Collins* v. *Barrow*, 1 Mood. & Rob. 112; and *Salisbury* v. *Marshall*, 4 Car. & Pay. 65. See further on this subject, post, Book II., Chap. IV., Sect. 2, (a), and Book III., Chap. IV., Sect. 1, (b).

(*m*) *Arden* v. *Pullen*, 10 Mees. & Wels. 321.

(*n*) *Surplice* v. *Farnsworth*, 7 Man. & Gran. 576; 8 Scott, N. R. 307.

(*o*) *Shrewsbury* (*Earl*) v. *Gould*, 2 Barn. & Ald. 487.

(*p*) *Webb* v. *Plummer*, 2 Barn. & Ald. 746.

(*q*) *Doe* d. *Hertford* (*Marquis*) v. *Hunt*, 1 Mees. & Wels. 690; Tyr. & Gr. 1028; 2 Gale, 102.

(*r*) *Hinde* v. *Gray*, 1 Scott, N. R. 123; 1 Man. & Gr. 195.

(*s*) *Newton* v. *Wilmot*, 8 Mees. & Wels. 711. As to an implied covenant to sink a pit or shaft, see *James* v. *Cochrane*, 7 Exch. Rep. 170; 8 id. 556.

Implied Covenants from recitals.

this, the alum would be rendered impossible to be reached; it was held, that the coal pillars could not be removed (*t*).

A recital of an agreement in the beginning of a deed will create a covenant, upon which an action of covenant will lie (*u*); thus, where on the demise of a coal mine it was recited, "that before the sealing of the indenture, it had been agreed that the plaintiff should have the third part dug, &c." on an action of covenant being brought on this, it was objected that there was no covenant that the plaintiff was to have the third part: but *Hale*, C. J., said, a mere recital that before the indenture the parties were agreed, amounts to a covenant: so a recital that "it was agreed to pay 20*l.*" is a covenant; for the indenture confirms the former agreement (*x*). This doctrine of implying a covenant from a mere recital has been recognized in a very strong case, in which it was held, that where a lease of an undivided third part of mines contained merely a recital of an agreement by the lessor for pulling down an old mill and building a larger one, and there was a covenant to keep and leave the new one in repair, but no express covenant to build it, there was an implied covenant to do so from the tenor of the recital (*y*).

Sect. 7.—*Exceptions.*

What Things are necessary to constitute a good exception.

There is this distinction between an exception and a reservation: an exception relates to some existing component part of the thing demised, which is capable of being severed or distinguished from it: a reservation is properly of some right or profit to arise from the subject of the demise, which had previously no separate existence (*z*). A right of way reserved to the lessor by the lease, over the lands demised, is not strictly an exception or a reservation, being neither parcel of the thing demised nor issuing out of it, but is in strictness of law an easement newly created by way of grant from the lessee (*a*). But where a lease was made of lands, except and always reserved out of the demise unto the lessor all timber trees, &c., and also except and reserved all *royalties* whatsoever to the premises belonging, or in anywise appertaining, it was held that this was an exception or reservation, and was not pleadable as a grant (*b*). An exception being the act and words of the lessor, shall be taken strictly against him (*c*). In every good exception these things must always concur: 1, the

(*t*) *Glasgow (Earl)* v. *Hurlet Alum Company*, 3 Ho. of Lords, 25.

(*u*) *Severn* v. *Clark*, 2 Leon. 122; *Hollis* v. *Carr*, 2 Mod. 87; *Saltoun* v. *Houstoun*, 1 Bing. 433; 8 Moore, 546.

(*x*) 1 Esp. N. P. 292; *Barfoot* v. *Freswell*, 3 Keb. 465.

(*y*) *Sampson* v. *Easterby*, 9 Barn. & Cres. 505; 4 Man. & Ryl. 422; *S. C.* in error, nom. *Easterby* v. *Sampson*, 6 Bing. 644; 4 Moore & Pay. 601; 1 Cromp. & Jer. 105; and see *Saltoun* v. *Houstoun*, 1 Bing. 433; 8 Moore, 546.

(*z*) 4 Jarm. Prec. 315, 3rd ed.

(*a*) *Durham and Sunderland Railway Company* v. *Walker*, 2 Q. B. Rep. 940; 2 Gale & Dav. 326.

(*b*) *Pannell* v. *Mill*, 3 C. B. Rep. 625.

(*c*) Shep. Touch. 77.

exception must be by apt words, as "saving and excepting," &c. (*d*); 2, it must be a part of the thing demised, and not of some other thing; 3, it must be part of the thing only, and not all; and not the greater part, or the substance of the thing granted; 4, it must be of such a thing as is severable from the premises demised, and not of an inseparable incident; 5, it must be of such a thing as he who doth except may have, and which properly belongs to him; thus it must be of a particular thing out of a general, and not of a particular thing out of a particular thing; 6, it must be certainly described and set down: therefore, if one demise a manor excepting one acre, without setting forth which or what acre it shall be, the exception is void (*e*).

Construction. Exceptions and Reservations.

A clause in a lease purporting to reserve underwoods and underground produce, enures not as a reservation, but as an exception (*f*). If a man be possessed of a new house and an old house, and make a lease with an exception of the new house for the use of the lessor when he pleases to reside there, and at other times for the use of the lessee, the new house is well excepted; and such exception is not avoided by the words "at all times to be used by the lessee, when the lessor doth not dwell there;" for that sentence does not enure as an exception out of an exception (which sets the matter at large), but only as a declaration of the lessor's intention in making the exception;—the latter words, however, make the lessee tenant at will (*g*). So if a man lease his houses, excepting his new house, *during the term*, this exception is good: but if he except it *during life*, it is void; for the words "during life" qualify the exception, and show his intent that the house shall not be excepted during the whole term, and so it is void. A lease of lands excepted all timber, timber trees and other trees, &c., bushes and thorns, other than such bushes and thorns as should be necessary for the repairs of the fences; the lessee covenanted to keep fences in repair, and the lessor covenanted to find and provide, if growing on the premises, rough timber, stakes and bushes; it was held that the provision as to bushes and thorns necessary for repairs was not an exception out of an exception, but that all trees, bushes and thorns, were excepted out of the demise, whether part of a fence or not, or whether necessary for repairs or not (*h*). An exception of "all the wood" will be an exception of the soil whereon the wood grows (*i*). In like manner, if all the underwood and copse wood be excepted, the land will also be excepted, unless it clearly appear that it was merely the intention of the parties to except only the wood

(*d*) Co. Litt. 47 a.

(*e*) *Dorrell* v. *Collins*, Cro. Eliz. 6.

(*f*) *Doe* d. *Douglas* v. *Lock*, 2 Ad. & El. 705; 4 Nev. & Man. 807. A clause, however, purporting to reserve and except to the lessor the power of hunting, &c. over the demised premises, enures as a grant from the lessee to the lessor of a right or privilege, and not as a reservation or exception.

(*g*) *Cudlip* v. *Rundall*, 3 Salk. 156; 4 Mod. 11; 12 Mod. 15; and see Hob. 170; Dyer, 264 b.

(*h*) *Jenney* v. *Brook* (in error), 6 Q. B. Rep. 323.

(*i*) *Ive* v. *Sams*, Cro. Eliz. 521; *Whistler* v. *Paslow*, Cro. Jac. 487.

itself (*k*). And so of an exception of fruit trees (*l*). But where timber trees are excepted, the soil in which they grow will not be covered by the exception (*m*). Under an exception of "all wood and underwood," trees great and small are generally excepted; but not fruit trees (*n*). A parol demise of land, reserving to the landlord "all the hedges, trees, thorn bushes, fences, with loss and top," operates as a licence to enter the land for the purpose of cutting and carrying away the trees (*o*). Where a lessee for life made a lease for years, excepting the wood, underwood and trees growing upon the land, it was held a good exception, although he had no interest in them but as lessee; because he remained always tenant, and was chargeable in waste—wherefore to prevent it, he might make the exception: but if a lessee for years assign over his term with such an exception, it is a void exception (*p*). An exception of "all trees, woods, coppice-wood grounds, of what kind or growth soever," in a lease, does not extend to apple-trees (*q*); and an exception in a lease of lands in Dorsetshire of "all timber-trees and other trees, but not the annual fruit thereof," does not include apple-trees (*r*). A reservation in a lease of all timber and timber-trees standing, growing or being on the land, or at any time thereafter to stand or grow thereon, with full liberty of ingress, &c., does not apply to trees afterwards planted by the tenant, an act of parliament (*s*) having passed previous to the lease, that all trees planted by tenants should belong to them, unless planted in pursuance of any covenant contained in any lease (*t*). By a lease of a tenement described as containing nineteen acres, "except all timber-trees, wood, underwood, &c.," six acres of the soil, which were then covered with growing wood, are not excepted (*u*). Any one may lease or convey his land, and reserve to himself the right of entering to kill game, without being subject to be sued as a trespasser: but an exception in a deed, made in 1653, of the free liberty of hunting and hawking, will not extend to shooting feathered game with a gun, because guns, not being in common use, could not be in the contemplation of the parties (*v*).

Game.

A demise of lands, excepting and reserving all *royalties*, with a clause for the lessor to be allowed to prosecute actions against persons trespassing for the purpose of hunting, &c., does not amount to a grant by the lessee of a liberty for the lessor to enter for the purpose of

(*k*) *Whistler* v. *Paslow*, Cro. Jac. 487; *Pincomb* v. *Thomas*, Cro. Jac. 524.

(*l*) *Smith* v. *Bole*, Cro. Jac. 458.

(*m*) *Whistler* v. *Paslow*, ibid. 487.

(*n*) *London* v. *Southwell*, Hob. 304.

(*o*) *Hewitt* v. *Isham*, 7 Exch. Rep. 77; *Liford's case*, 11 Rep. 51 b.

(*p*) *Bacon* v. *Gyrling*, Cro. Jac. 296.

(*q*) *London* v. *Southwell*, Hob. 304; *Wyndham* v. *Way*, 4 Taunt. 316.

(*r*) *Bullen* v. *Denning*, 5 Barn. & Cres. 842; 8 Dowl. & Ryl. 657.

(*s*) Stat. 23 & 24 Geo. III. c. 39, Irish.

(*t*) *Galway* v. *Baker* (in error), 7 Clark & Fin. 379; 1 West, Ap. Cas. 467.

(*u*) *Leigh* v. *Heald*, 1 Barn. & Adol. 622; see further as to timber, Book II., Chap. IV., Sect. 6.

(*v*) *Moore* v. *Plymouth* (*Earl*), 7 Taunt. 614; 1 Moore, 346; Shep. Touch. 80.

pursuing, killing and taking birds of warren (*x*). A demise was made of a mansion house and land, with the sole licence of sporting over all other lands of the lessor's, subject to the liberty for each tenant on his *farm* to kill rabbits thereon; this exception extends not only to farms existing at the time of the demise, but also to other lands, as plantations, subsequently let as farms (*y*). Where a lease was made subject to a right of way on foot and for horses, oxen, cattle and sheep, no right of way to lead manure is reserved (*z*). A plea to an action of trespass, stating that the plaintiff was tenant to the defendant of the close, subject to a reservation to him of all pits in the close, with ingress, &c., to cut and carry away peat and turf, is bad on demurrer, for alleging a reservation of what is properly a subject of exception (*a*). Notwithstanding an exception in a lease of certain closes or rooms, which the lessee is not to use, he may pass and repass through them if they are so situated that he cannot otherwise have the complete enjoyment of the lands or premises demised to him (*b*). Where there was a lease of certain lands, together with all houses, water-courses, &c., excepting "a water-course flowing or descending from" a certain spot, through a meadow, it was held in the particular case to be an exception of the water itself, not of the channel through which it flowed (*c*). Where there was a demise of a mill and a stream of water, except so much of the water as should be sufficient for the supply of persons whom the lessor had already contracted with or thereafter should contract to supply, provided that such a quantity should be left as should be sufficient to supply the mill for twelve hours a day; it was held, that this was not an absolute undertaking to supply water to work the mill twelve hours a day, but that it was a demise of the mill as the water was flowing at the time of the demise (*d*).

Other Things.

SECT. 8.—*Provisoes and Conditions.*

Description and Nature of Conditions.

The terms "proviso" and "condition" are synonymous, and signify some quality annexed to a real estate, by virtue of which it may be defeated, enlarged or created upon an uncertain event. Such qualities annexed to personal contracts and agreements are generally called conditions (*e*). A proviso or condition differs from a covenant in this, that the former is in the words of and binding upon both parties, whereas the latter is in the words of the grantor only. It is a rule in provisoes, that where a proviso is, that the lessee shall perform or not perform a thing, and no penalty is annexed to it, that is a condition,

(*x*) *Pannell* v. *Mill*, 3 C. B. Rep. 625.

(*y*) *Newton* v. *Wilmot*, 8 Mees. & Wels. 711; see further as to game, Book II., Chap. VII., Sect. 9.

(*z*) *Brunton* v. *Hall*, 1 Q. B. Rep. 792; 1 Gale & Dav. 207.

(*a*) *Fancy* v. *Scott*, 2 Man. & Ryl. 335.

(*b*) 11 Co. Rep. 52 a.

(*c*) *Doe* d. *Egremont* (*Earl*) v. *Williams*, 11 Q. B. Rep. 688.

(*d*) *Blatchford* v. *Plymouth* (*Mayor*), 3 Bing. N. C. 691; 4 Scott, 429; 3 Hodges, 86.

(*e*) Bac. Abr. tit. *Condition*.

otherwise it would be void; but if a penalty is annexed, it is a covenant (*f*). A condition may be annexed to an estate of inheritance, freehold or for years; or to a grant of tithes by the clergy (*g*).

Conditions precedent or subsequent.

Conditions are either precedent or subsequent. Where a condition must be performed before the estate can commence, it is called a condition precedent;" but where the effect of the condition is either to enlarge or defeat an estate already created, it is then called "a condition subsequent" (*h*).

Construction of Conditions.

Conditions as well as covenants are to be construed according to the real intentions of the parties: but a condition shall not be construed to extend to things of common right; as if the condition be, that one shall enjoy such land immediately upon the grantor's death—here, if the executor take the emblements, the condition does not extend to them (*i*).

By what Instrument they may be made.

A condition may be contained in the same deed or indorsed upon the deed; or may be contained in another deed executed the same day (*k*); thus a condition indorsed upon the back of a lease before the sealing and delivery was held of equal force with a condition within the deed (*l*): but where a man leased for years, rendering rent, and the lessee covenanted to repair, &c., and afterwards the lessor devised to the lessee for more years, yielding the like rent, and under such covenants as were in the first lease, it was considered no condition; for though after the first lease was ended, the lessee would not be bound by the covenants, yet the will expressing that the lessee should have the lands, observing the first covenants, it could not be taken to be a condition by any intent to be collected out of the will (*m*).

By what Words they may be created.

Conditions are most properly created by using the word "condition," or the words "on condition;" but the word commonly and as effectually made use of, is, that of "provided" (*n*). If a proviso or condition have dependence upon another clause of the deed, or if the words of the lessee be to compel the lessor to do something, then it is not a condition, but a covenant only; as if there be in the deed a covenant that the lessee should scour the ditches, and then these words follow, "provided that the lessor shall carry away the earth." If the words run thus: "provided always, and the lessee, &c., doth covenant, &c., that neither he nor his heirs shall do such an act;" this is both a condition and a covenant (*o*): so if the words are "provided always, and it is covenanted and agreed between the parties, that the lessee shall not alien," this is both a condition and a covenant; for it is a condition by force of the proviso, and a covenant by force of the other

(*f*) *Simpson* v. *Titterell*, Cro. Eliz. 242.
(*g*) Com. Dig. tit. *Condition*, (A 7).
(*h*) Cruise's Dig. XII. tit. I. s. 6; 1 Inst. 16 a, 237 a, n. 1.
(*i*) Com. Dig. tit. *Condition*, (E). As to provisoes for re-entry, see post, Chap. VII., Sect. 5, (b).
(*k*) Com. Dig. tit. *Condition*, (A 9).
(*l*) *Griffin* v. *Stanhope*, Cro. Jac. 456.
(*m*) Bac. Abr. tit. *Condition*, (G).
(*n*) Shep. Touch. 122; Co. Litt. 146.
(*o*) Shep. Touch. 122.

words (*p*). Where in an agreement to demise land for a term of years at a certain annual rent, in which there was no clause of re-entry, there was a stipulation "that in case the said lessor should want any part of the said land to build or otherwise, or cause to be built, then the lessee shall give up that part of the said land as should be requested by the lessor, by his making an abatement in proportion to the rent charged; and also to pay for so much of the fence at a fair valuation, as he should have occasion from time to time to take away, by his giving or leaving six months' notice of what he intended to do:" it was held that this was merely a covenant, and not a condition (*q*). But where a proviso in a lease was, that in case the lessor at any time shall be desirous of having any part of the land delivered up to him and shall sign three months' notice, the lessee covenants to give it up, and that the lessor shall and may take peaceable and quiet possession, paying a fair compensation, and the rent being reduced at a certain rate per acre, it was held not to be a covenant merely (*r*). By an agreement, in consideration of the rent and conditions thereinafter mentioned, *A.* was to have, hold and occupy, as on lease, certain premises therein specified, at a certain rent per acre; and it was *stipulated* that no buildings should be included or leased by virtue of the agreement; and it was further *agreed and stipulated*, that *A.* should take, at the rent aforesaid, certain other parcels, as the same might fall in; and lastly, it was *stipulated and conditioned*, that *A.* should not assign, transfer or under-let any of the said lands and premises, otherwise than to his wife, child or children: it was held, that by the last clause a condition was created, for the breach of which the lessor might maintain an ejectment (*s*).

Between what Parties binding.

Estates made by deed to infants and married women upon condition shall bind them, because the charge is on the land (*t*). The heir, though not named, may take advantage of a condition annexed to a real estate: and where the condition of an obligation was to make a lease or pay 100*l.*, the obligee dying, though the election was taken away, it was held, that the executor should have the 100*l.*, agreeably to the rule in cases of heirs (*u*).

Where suspended.

As to what shall be a suspension of a condition,—if a lessee for years had execution by elegit of a moiety of the rent and reversion against the lessor, where the lease was upon condition, this was held a suspension of all the condition during the time of the extent; and that though but a moiety of the rent was extended, yet the entire condition was suspended; and so it was held if a stranger had execution by elegit (*x*).

(*p*) Co. Litt. 103 b.

(*q*) *Doe* d. *Wilson* v. *Phillips*, 2 Bing. 13; and see *Doe* d. *Gardner* v. *Kennard*, 12 Q. B. Rep. 244; 9 Moore, 46; and see *Doe* d. *Wilson* v. *Abel*, 2 Maule & Selw. 541.

(*r*) *Doe* d. *Gardner* v. *Kennard*, 12 Jurist, 821.

(*s*) *Doe* d. *Henniker* v. *Watt*, 8 Barn. & Cres. 308; 1 Man. & Ryl. 694.

(*t*) 2 Danv. 30.

(*u*) *Hodgson* v. *Rawson*, 1 Ves. sen. 47; *Anon.*, 1 Salk. 170.

(*x*) Bac. Abr. tit. *Condition*, (O 3).

SECT. 9.—*Indorsements, Schedules, &c.*

Where Indorsements of variation are made before execution.

Memorandums indorsed upon leases, if made previously to the execution of the lease, are considered in construction and effect as part of the instrument, although they add to or change the provisions of the deed: thus where by a lease lands were demised for twenty-one years, determinable by the lessee at the end of seven or fourteen years, on giving twelve months' notice, and a memorandum was indorsed on the lease before its execution, by which it was agreed that the lessor should have the same option of determining the lease as the lessee had upon a like notice; it was held to form an integral part of the lease (*y*). An indorsement upon a deed shall be taken to be made before the execution of the deed and to be parcel of it (*z*). It was held by Lord *Ellenborough* to be no objection that such an alteration was executed after the deed upon which it was indorsed was signed, if it was before it was sealed and delivered (*a*).

Where made after Execution.

A memorandum indorsed upon an instrument subsequently to its execution, although it refers thereto, is to all intents a new instrument, and must be executed and stamped accordingly.

Indorsement of Schedule.

Where houses are leased together with goods, it is usual to make a schedule thereof, and indorse it on the lease, and also indorse a covenant from the lessee to re-deliver them at the end of the term; for without such a covenant, the lessor can have no other remedy but an action of trover or detinue for them after the lease has determined.

SECT. 10.—*Stamping.*

Amount of stamp duty to be affixed to leases.

The 13 & 14 Vict. c. 97, after reciting that certain stamp duties were granted by 55 Geo. III. c. 184, and other acts of parliament, enacts, that the stamp duties payable under those acts, &c. in respect of the several instruments, matters or things mentioned in the schedule to this act shall cease and be repealed, and that in lieu thereof there shall be imposed certain duties specified in the schedule to the act; viz.:—

Lease or tack of any lands, tenements, hereditaments or heritable subjects granted in consideration of a sum of money by way of fine, premium or grassum paid for the same, without any yearly rent, or with any yearly rent under 20*l.* (*b*)	The same duty as for a conveyance on the sale of lands for a sum of money of the same amount (*c*), *next page.*

(*y*) *Goodright* d. *Nicholls* v. *Mark*, 4 Mau. & Selw. 30.

(*z*) *Brewster* v. *Kidgell*, Carth. 439; *Flint* v. *Brandon*, 1 New Rep. 73.

(*a*) *Lyburn* v. *Warrington*, 1 Stark. 162.

(*b*) The 55 Geo. III. c. 184, Sched. Part I., tit. *Leases*, imposed on leases the following stamps:—

Leases or tacks of any lands, hereditaments or heritable subjects, at a yearly rent, without any sum of money by way of

For the duty thereon see *Conveyance* (c).

(Save and except leases and tacks for a life or lives not exceeding three, or for a term of years determinable

fine, premium or grassum paid for the same.[a]			
Where the yearly rent shall not amount to 20*l.*[b]	1	0	0
Where it amounts			
to 20*l.* and not to 100*l.*	1	10	0
to 100*l.* and not to 200*l.*	2	0	0
to 200*l.* and not to 400*l.*	3	0	0
to 400*l.* and not to 600*l.*	4	0	0
to 600*l.* and not to 800*l.*	5	0	0
to 800*l.* and not to 1000*l.*	6	0	0
to 1000*l.* or upwards	10	0	0
Leases or tacks of any lands, hereditaments or heritable subjects, granted in consideration of a sum of money by way of fine, premium or grassum paid for the same without any yearly rent, or with any yearly rent under 20*l.*[c] — The same duty as for the conveyance on the sale of lands for a sum of money of the same amount.			

(c) Conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, upon the sale of any lands, tenements, rents, annuities or other property, real or personal, heritable or moveable, or of any right, title, interest or claim, in, to, out of or upon any lands, tenements, rents, annuities or other property; that is to say, for and in respect of the principal or only deed, instrument or writing whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons by his, her or their direction:

	£	s.	d.
Where the purchase or consideration money therein or thereupon expressed shall not exceed 25*l.*	0	2	6
And where the same shall exceed			
25*l.* and not exceed 50*l.*	0	5	0
50*l.* and not exceed 75*l.*	0	7	6
75*l.* and not exceed 100*l.*	0	10	0
100*l.* and not exceed 125*l.*	0	12	6
125*l.* and not exceed 150*l.*	0	15	0
150*l.* and not exceed 175*l.*	0	17	6
175*l.* and not exceed 200*l.*	1	0	0
200*l.* and not exceed 225*l.*	1	2	6
225*l.* and not exceed 250*l.*	1	5	0
250*l.* and not exceed 275*l.*	1	7	6
275*l.* and not exceed 300*l.*	1	10	0
300*l.* and not exceed 350*l.*	1	15	0
350*l.* and not exceed 400*l.*	2	0	0
400*l.* and not exceed 450*l.*	2	5	0
450*l.* and not exceed 500*l.*	2	10	0
500*l.* and not exceed 550*l.*	2	15	0
550*l.* and not exceed 600*l.*	3	0	0
And where the purchase or consideration money shall exceed 600*l.*, then for every 100*l.* and also for any fractional part of 100*l.*	0	10	0

And it is hereby directed, that the purchase money or consideration shall be truly expressed and set forth in words at length in or upon every such principal or only deed or instrument of conveyance; and where such consideration shall consist either wholly or in part of any stock or security, the value thereof respectively, to be ascertained as hereinafter mentioned, shall also be truly expressed and set forth in manner aforesaid in or upon every such deed or instrument; and such value shall be deemed and taken to be the purchase or consideration money, or part of the purchase or consideration money, as the case may be, in respect whereof the ad valorem duty shall be charged as aforesaid.

And where the consideration or any part of the consideration shall be any stock in

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[a] It was held on one of the old Stamp Acts, 23 Geo. III. c. 58, that a lease must be stamped as a lease by deed, though it be not by deed; for though not by deed, it fell within the words of the act which required a stamp to leases, enumerated among other specialties. And that the words of that act which impose a stamp duty on "indentures, leases and other deeds," applied to every instrument which operated as a lease, whether it was by deed or not; for the imposition of a duty is a mere matter of positive institution; and as a lease, by whatever means constituted, falls within the words, there is nothing in the nature of the thing to take it out of them; *Goodtitle* d. *Estwicke* v. *Way*, 1 Term. Rep. 735; *Harker* v. *Birkbeck*, 3 Burr. 1563; 1 W. Black. 482.

[b] A lease at an annual rent of 8*l.*, with a covenant that the lessee would expend at least 150*l.* in building a house, is sufficiently stamped with a 1*l.* stamp; *Nicholls* v. *Cross*, 14 Mees. & Wels. 42. A lease reserving 50*l.* yearly rent, with a stipulation that the lessor should insure and the premiums should be added to and paid as rent by the lessee, was held to be well stamped with a 1*l.* 10*s.* stamp, it not being shown that the premiums and rent exceeded 100*l.*; *Wilson* v. *Smith*, 12 Mees. & W. 401; 1 Dow. & Low. 633.

[c] An agreement for the purchase of the herbage of a close for five months for 45*l.*, 10*l.* to be paid down, and a promissory note given for the residue, payable within the five months, and, on failure of doing so, the vendor to be at liberty to relet the premises, is sufficiently stamped with a 1*l.* stamp, under 55 Geo. III. c. 184; *Cattle* v. *Gamble*, 5 Bing. N. C. 46; 6 Scott, 733.

with a life or lives not exceeding three, by whomsoever granted, and leases for a term absolute, not exceeding twenty-one years, granted by ecclesiastical corporations, aggregate or sole, where the duties on such leases and tacks respectively would, under the provisions of this act, amount to 1*l.* 15*s.* or upwards.)

Lease or tack of any lands, tenements, hereditaments or heritable subjects at a yearly rent, without any sum of money by way of fine, premium or grassum paid for the same (*d*);

Where the yearly rent shall not exceed 5*l.*	£0 0 6
And where the same shall exceed 5*l.* and not exceed 10*l.*	0 1 0
And where the same shall exceed 10*l.* and not exceed 15*l.*	0 1 6
And where the same shall exceed 15*l.* and not exceed 20*l.*	0 2 0
And where the same shall exceed 20*l.* and not exceed 25*l.*	0 2 6
And where the same shall exceed 25*l.* and not exceed 50*l.*	0 5 0
And where the same shall exceed 50*l.* and not exceed 75*l.*	0 7 6
And where the same shall exceed 75*l.* and not exceed 100*l.*	0 10 0
And where the same shall exceed 100*l.*, then for every 50*l.* and also for any fractional part of 50*l.* . . .	0 5 0

Lease or tack of any lands, tenements, hereditaments or heritable subjects granted in consideration of a sum of money by way of fine, premium or grassum, and also of a yearly rent amounting to 20*l.* or upwards . . . . . } Both the ad valorem duties payable for a lease in consideration of a fine only, and for a lease in consideration of a rent only of the same amount.

(Save and except the leases and tacks hereinbefore excepted.)

Lease or tack of any mine or minerals or other property of a like nature, either with or without any other lands, tenements, hereditaments or heritable subjects, where any

any of the public funds, or any government debenture or stock of the Bank of England or Bank of Ireland, or any debenture or stock of any corporation, company, society or persons or person, payable only at the will of the debtor, the said duty shall be calculated (taking the same respectively, whether constituting the whole or a part only of such consideration) according to the average selling price thereof respectively on the day or on either of the ten days preceding the day of the date of the deed or instrument of conveyance, or if no sale shall have taken place within such ten days, then according to the average selling price thereof on the day of the last preceding sale; and if such consideration or part of such consideration shall be a mortgage, judgment or bond, or a debenture, the amount whereof shall be recoverable by the holder, or any other security whatsoever, whether payable in money or otherwise then such calculation shall be made according to the sum due thereon for both principal and interest.

(*d*) See ante, note (*b*), p. 106.

portion of the produce of such mines or minerals shall be reserved to be paid in money or kind;

If it shall be stipulated that the value of such portion of the produce shall amount at least to a given sum per annum, or if such value shall be limited not to exceed a given sum per annum, to be specified in such lease or tack, then the said ad valorem duty on leases shall be charged in respect of the highest of such sums so given or limited for any year during the term of such lease or tack.

And where any yearly sum shall be reserved in addition to or together with such produce, relative to the yearly amount or value of which produce there shall be no such stipulation or limitation as aforesaid, the said ad valorem duty shall be charged in respect of such yearly sum.

And where both a certain yearly sum and also such produce relative to the yearly amount or value of which there shall be such stipulation or limitation as aforesaid shall be reserved, the said ad valorem duty shall be charged on the aggregate of such yearly sum, and also the highest yearly amount or value of such produce.

General Regulations as to Leases and Tacks.

Where, in any of the aforesaid several cases of lease or tack, any fine, premium or grassum, or any rent, payable under any lease or tack, shall consist wholly or in part of corn, grain or victual, the value of such corn, grain or victual shall be ascertained or estimated at and after any premanent rate of conversion which the lessee may be specially charged with, or have it in his option to pay; and if no such permanent rate of conversion shall have been stipulated, then in England and Ireland respectively at and after the prices, upon an average of twelve calendar months preceding the first day of January next before the date of such lease or tack, of the average prices of British corn published in the London Gazette in the manner directed by any act in force for the commutation of tithes in England and Wales; and in Scotland at and after the fiars prices of the county in which the lands or any part thereof lie, upon an average of seven years preceding the date of such lease or tack; and such respective values

shall be deemed and taken to be the fine, premium or grassum, or yearly rent or part thereof respectively, as the case may be, in respect whereof the ad valorem duty shall be charged as aforesaid.

And where separate and distinct fines, premiums or grassums shall be paid to several lessors, being joint tenants, tenants in common, or coparceners, in England or Ireland, or proprietors pro indiviso in Scotland, who shall by one and the same deed or instrument jointly or severally demise or lease the lands, tenements, hereditaments or heritable subjects of which they are such joint tenants, tenants in common, or coparceners, in England or Ireland, or proprietors pro indiviso in Scotland, or where separate and distinct rents shall be by one and the same deed or instrument reserved or made payable, or agreed to be reserved or made payable, to the lessor or to several lessors, being such joint tenants, tenants in common, or coparceners, in England or Ireland, or proprietors pro indiviso in Scotland, the ad valorem duties shall be charged in respect of the aggregate amount of such fines, premiums or grassums, and of such rents respectively.

And where any person, having contracted for, but not having obtained, a lease of any lands or other property, shall contract to sell such lands or other property, or any part thereof, or his right or interest therein or thereto, to any other person, and a lease shall accordingly be granted to such other person, the purchase money or consideration which shall be paid or given or agreed to be paid or given to the person immediately selling to such lessee shall be set forth in such lease, and such lease shall be charged as well with the said ad valorem duty on such purchase money or consideration as with the duty on the purchase money or consideration or rent paid or reserved to the lessor.

Lease or tack, of any kind, not otherwise charged . . . 1 15 0

Provided always, that no ad valorem duty shall be chargeable in respect of any penal rent, or increased rent in the nature of a penal rent, reserved in any such lease or tack as aforesaid.

Lease.—Any assignment or surrender of a lease or tack upon any other occasion than a sale or mortgage . . . . . } A duty equal to the ad valorem duty with which a similar lease or tack would be chargeable under this act.

Provided always, that where a similar lease or tack would be chargeable under this act with any stamp duty amounting to 1*l.* 15*s.* or upwards, then such assignment or surrender shall be chargeable only with a duty of 1 15 0

Provided also, that no stamp duty, except the said ad valorem duty, shall be chargeable for or in respect of any lease, whether in possession, reversion or remainder, expressed to be granted in consideration of the surrender of an existing lease and also of a sum of money.

And in all the said several cases of lease or tack see *Progressive Duty* (*d*).

By 13 & 14 Vict. c. 97, s. 10, relief is given in certain cases where leases have been granted without having an ad valorem stamp affixed.

The 17 & 18 Vict. c. 83, s. 22, is as follows:—"And whereas by the said act of the thirteenth and fourteenth years of her majesty and this act respectively (cap. 97), certain ad valorem stamp duties are granted and imposed upon leases or tacks of any lands, tenements, hereditaments or hereditable subjects at a yearly rent, and doubts are entertained whether the said duties extend to any lease or tack for any term or period less than a year: for the removal of such doubts, be it enacted, that where any lease or tack of any lands, tenements, hereditaments or hereditable subjects shall be made for any term or period less than a year, at a rent reserved or payable for the same, such lease or tack shall be chargeable with the same ad valorem duty as a lease or tack at a yearly rent of the same amount as the same so reserved or payable."

Stamp Duty on Leases and Grants from the Crown.

The 55 Geo. III. c. 184, schedule, part 1, title *Grant*, imposes certain stamps upon grants and leases of Crown lands (*e*).

(*d*) Progressive duty; that is to say;—Where any deed or instrument of any description whatever chargeable with any stamp duty either under this schedule or under any other act or acts now in force, together with any schedule, receipt or other matter put or indorsed thereon or annexed thereto, shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, there shall be charged the further progressive duty following; (that is to say,)

Where such deed or instrument shall be chargeable with any ad valorem stamp duty or duties not exceeding in the whole the sum of 10*s.*, a further progressive duty equal to the amount of such ad valorem duty or duties.

And in every other case (except where any other progressive duty is by this schedule expressly charged thereon) a further progressive duty of 10*s.*

Provided always, that nothing herein contained shall extend to charge the said progressive duty in any case in which express provision is made by any such act or acts as aforesaid for charging a certain duty on every skin, sheet or piece of vellum, parchment or paper in or upon which any deed or instrument shall be contained or written, or to charge with progressive duty any description of deed or instrument not chargeable with progressive duty under any act or acts now in force, or to charge any deed or instrument with any higher rate or amount of progressive duty than is now chargeable on a deed or instrument of the like description under any such act or acts as aforesaid.

(*e*) A lease from the Board of Ordnance, which does not require a stamp, but which purports to be stamped, may be received in evidence without a stamp; *Petrie* v. *Lamont*, 1 Car. & Mar. 93.

Stamps on Leases of the King's private Property.

Grants, leases, or conveyances from his Majesty, his heirs or successors, of any lands, tenements or hereditaments, or of any personal estate, being respectively the private property of his Majesty, his heirs or successors, and subject to his or their absolute disposal by virtue of the Act passed in the fortieth year of his Majesty King George the Third's reign, concerning the disposition of certain real and personal property of his Majesty, his heirs or successors . . . . . } The same duty as on a grant, lease or conveyance of the like description from any of his Majesty's subjects.

Amount of Stamp Duty to be affixed to Agreements for Leases.

By the 13 & 14 Vict. c. 97, s. 1, the stamp duties payable under several acts therein recited and any other acts in respect of the instruments, &c., mentioned in the schedule, and wherein other duties are by that act imposed, shall cease and be repealed, and instead thereof there shall be granted the several duties specified in the schedule. By the schedule to that act, title *Agreement*, the following stamps are to be affixed to agreements: under which head will be included instruments which operate as agreements for future leases, but not as absolute demises (*f*). The schedule is as follows: viz.

	Duty.
Agreement, or any minute or memorandum of agreement, made in England or Ireland under hand only, or made in Scotland without any clause of registration (not charged otherwise than under the head *Agreement* in the schedule to the act 55 Geo. III. c. 184, nor expressly exempted from all stamp duty), where the matter thereof shall be of the value of 20*l.*(*g*) or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument, together with every schedule, receipt or other matter put or endorsed thereon or annexed thereto	£0 2 6
And where the same shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words	

(*f*) See post, Sect. 16, p. 130, as to what instruments operate as agreements for leases, and what as actual demises.

(*g*) *Doe* d. *Morgan* v. *Amos*, 2 Man. & Ryl. 180. Where there is nothing on the face of the instrument to show that the value of the subject-matter of the agreement was 20*l.*, it does not require a stamp; *Rex* v. *Enderby* (*Inhabitants*), 2 Barn. & Adol. 205. Therefore an agreement to let premises for a specific term of six months at a sum of 10*l.* does not require a stamp; *Marlow* v. *Thompson*, 1 Dowl., N. S., 575; *Doe* d. *Marlow* v. *Wiggins*, 4 Q. B. Rep. 367; 3 Gale & Dav. 504; see also *Baldwin* v. *Alsager*, 13 Mees. & Wels. 365; *Cox* v. *Bailey*, 6 Scott, N. R. 798; 6 Man. & Gran. 193; *Burton* v. *Reevell*, 16 Mees. & Wels. 307; *Hill* v. *Ramm*, 6 Scott, N. R. 571; 5 Man. & Gran. 789. An agreement on payment of 7*l.* 10*s.* to give up a house and business, and not to carry on the same business within a certain distance, under a forfeiture of 20*l.*, does not require a stamp; *Pemberton* v. *Vaughan*, 16 Law J., N. S., Q. B. 161; 11 Jur. 411. An instrument purporting to be a lease of a ferry for three years at six guineas a year, concluding "be it known also that C. D. (the lessee) has this day bought of A. B. (the lessor) the great ferry boat for 20*l.*," is not a lease, and as an agreement, if the rent alone is considered, is not of the value of 20*l.*; nor can the price of the boat be added, as not ancillary to the contract for letting, but being a separate memorandum of a bygone purchase of goods, and subject to no stamp duty; *Mayfield* v. *Robinson*, 7 Q. B. Rep. 486.

contained therein, over and above the first 1,080 words, a further progressive duty of 0 2 6

The 55 Geo. III. c. 184, schedule, part 1, title *Agreement* (*h*), contains the following proviso:—

Provided always, that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of 1*l.* 15*s.*, although the same shall in the whole contain twice the number of 1,080 words or upwards (*i*).

Memorandums or agreements for granting leases or tacks, at rack-rent, of any messuage, land or tenement, under the yearly rent of 5*l.*, are, by the 55 Geo. III. c. 184, schedule, part 1, *Agreement*, exempted from duty (*k*).

By the same 55 Geo. III. c. 184, schedule, part 1, title *Deeds*, deeds are to have the following stamps, viz.:—

Amount of Stamp Duty on Deeds generally.

Every deed of any kind whatever, not otherwise charged in the same, nor expressly exempted from all stamp duty, shall have affixed to it a duty of (*l*) £1 15 0

(*h*) The 13 & 14 Vict. c. 97, s. 12, contains the terms and conditions on which deeds or instruments may be stamped after execution. An agreement entered into before the 7 & 8 Vict. c. 21, came into operation, but stamped after with a 2*s.* 6*d.* stamp under a penalty, was held to be well stamped; *Deakin* v. *Penniall*, 17 Law J., N. S., Exch., 217.

(*i*) *Quære*, whether an agreement in a series of letters containing less than 1,080 words, under 55 Geo. III. c. 184, requires a stamp of 1*l.* 15*s.*; *Parkins* v. *Moravia*, 1 Car. & Pay. 376. Where the defendant, having purchased the lease of a house at a public auction, afterwards wrote to the auctioneer, requesting him to send the key, and stating that his auctioneer was desirous of taking an inventory of the fixtures; and the auctioneers accordingly met, and disagreeing as to the valuation, appointed an umpire, to whom they inclosed an inventory, stating the fixtures to be the property of the plaintiffs and valued to the defendant; and the umpire made a valuation and appraised the fixtures at a certain sum, and returned the inventory with an appraisement duly stamped; and the defendant, by letter, afterwards requested the plaintiff's auctioneer to remove the fixtures, which was done; and on the following day the defendant wrote to the plaintiff that he would attend at the house and pay them the amount of the fixtures as settled by the appraisers; the first and last letters were signed by the defendant, but the first only was stamped: it was held, that one stamp was sufficient, as it fell within the above proviso; *Hemming* v. *Perry*, 2 Moore & Pay. 375. Where a plaintiff put in a letter with a 30*s.* stamp only to prove an agreement for letting, the defendant cannot put in another letter to explain the terms of the holding without any stamp on it whatever; *Atherstone* v. *Bostock*, 2 Scott, N. R. 637; Drinkw. 96; 2 Man. & Gr. 511.

(*k*) This exemption does not by implication charge agreements with duty where the yearly rent is 5*l.* or upwards; *Mayfield* v. *Robinson*, 7 Q. B. Rep. 486. An agreement for a lease of premises, though under the annual rent of 5*l.*, requires a stamp, if the interest be a beneficial one; as if it be a building lease; *Doe* d. *Hunter* v. *Boulcot*, 2 Esp. 595.

(*l*) An instrument which is sealed, but which merely amounts to an agreement for a lease, requires a 1*l.* 15*s.* stamp, as a deed not otherwise charged; *Clayton* v. *Burtenshaw*, 5 Barn. & Cres. 41; 7 Dowl. & Ryl. 800. Where an indenture stamped as a lease demised to one, and he and another covenanted to pay the rent, it was held, in an action against the latter, that it did not require a deed stamp; *Price* v. *Thomas*, 2 Barn. & Adol. 218. But in an action on the lease of a public house, by which the defendant guaranteed whatever became due from the tenant, not being otherwise party to the covenants, it was held that an agreement stamp, as well as a lease stamp, was required; *Wharton* v. *Walton*, 7 Q. B. Rep. 474. An instrument not under seal, reciting that A. had purchased for the residue of a term four messuages, in one of which B. resided, and agreeing that he should continue to reside there during the residue of A.'s interest, if B. should so long live, at

And where the same, together with any schedule, receipt, or other matter, put or indorsed thereon or annexed thereto, shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein over and above the first 1,080 words a further progressive duty (*m*) of £1 5 0

By the 13 & 14 Vict. c. 97, schedule, title *Schedule*, the following stamps are requisite:—

Amount of Stamp Duty on Schedules, Inventories, &c.

Every schedule, inventory or catalogue (*n*) of any lands, hereditaments or hereditable subjects, or of any furniture, fixtures or other goods or effects; or containing the terms and conditions of any proposed sale, lease or tack; or the conditions and regulations for the cultivation or management of any farm lands or other property leased or agreed to be leased, or containing any other matter or matters of contract or stipulation whatsoever, *which shall be referred to* in or by and be intended to be used or given in evidence as part of or as material to any agreement, lease, tack, bond, deed or other instrument charged with any duty, *but which shall be separate and distinct from* and not indorsed on or annexed to such agreement, lease, tack, bond, deed or other instrument.

Where any such schedule, inventory or catalogue shall be so referred to in or by any such agreement, lease, tack, bond, deed or other instrument chargeable with any stamp duty not exceeding 10*s.*, *exclusive of progressive duty* . . . . . } The same duty (*exclusive of progressive duty*) as shall be so chargeable on such agreement, lease, tack, bond, deed or other instrument.

And where any such schedule, inventory or catalogue shall be referred to in or by any lease, tack, bond, deed or such other instrument as aforesaid, chargeable with any stamp duty exceeding 10*s.*, *exclusive of progressive duty* 0 10 0

And if in any of the said cases such schedule, inventory or catalogue shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein over and above the first 1,080 words . . . . } A further *progressive* duty of the same amount as the duty hereinbefore charged thereon respectively.

the rent of 1*s.*; and by which A. further agreed to assign his interest in the whole of the premises to B. on payment of a certain sum within a stated period, is both a lease and agreement, and requires two stamps; *Lovelock* v. *Franklyn*, 8 Q. B. Rep. 371.

(*m*) See ante, p. 107, note (*c*).

(*n*) Where, by an agreement, land was to be farmed according to covenants contained in an expired lease, it was held not to be a schedule, catalogue or inventory containing the conditions or regulations for managing the farm within these words, and therefore did not require a 25*s.* stamp; *Strutt* v. *Robinson*, 3 Barn. & Adol. 395.

By what the Amount of Stamp is regulated.

The ad valorem stamp duty on a lease is to be regulated by the consideration appearing on the face of it, although it may not be that which is actually paid (*o*); and a lease is not void for omitting to set out truly the whole consideration directly or indirectly paid or agreed to be paid; and consequently such a fact will form no defence in an action of ejectment for a forfeiture (*p*). Where a declaration in assumpsit stated that in consideration that the plaintiff would procure the governors of a charity to grant a lease to the defendant, the latter undertook to pay the plaintiff 170*l.*; and it was proved, that the governors having originally agreed to grant a lease to the plaintiff, he undertook to assign it to the defendant for the consideration mentioned, but that afterwards a lease, to which the plaintiff was a party and assented, was granted immediately by the governors to the defendant; but the consideration to be paid by the defendant to the plaintiff was not mentioned in the lease: it was held, that the lease was not void on account of this omission, the ad valorem duty applying only to considerations passing between the lessor and lessee (*q*). But where a lease had two distinct reservations of rent, one of 370*l.* in respect of house and land, and the other of 50*l.* for furniture and fixtures; it was held that the stamp of 3*l.* was sufficient to cover the former but not for both (*r*). An agreement to give up a house and good will of a business for 7*l.*, and not to open a similar shop within one mile thereof under a forfeiture of 20*l.*, does not require a stamp, as being for a subject-matter of the value of 20*l.* (*s*). A lease for years in consideration of a sum certain and at a pepper-corn rent was held not to require an ad valorem stamp (*t*); and where the plaintiff demised a slate pit at *S.* and stone quarries at *M.* to the defendant under an indenture of lease, to hold the one from Lady-day, 1815, and the other from Michaelmas, 1817, for the several terms of fourteen years from the respective dates thereof, at the yearly rent of 70*l.* for the slate pit and 130*l.* for the quarries; it was held that one ad valorem stamp on the aggregate amount was sufficient, as the letting must be considered as one transaction, there being no evidence of an intent by the parties to defraud the revenue (*u*). Again, where a lease contained a demise of two separate farms, with two habendums differing from each other, a reservation of a separate rent in respect of each farm, and separate covenants, some applying to one farm and some to the other, it was held that one ad valorem stamp for the amount of both rents was sufficient (*x*). So also a lease containing a demise of land

(*o*) *Duck* v. *Braddyll*, M'Clel. 217; 13 Price, 455.

(*p*) *Doe* d. *Kettle* v. *Lewis*, 10 Barn. & Cres. 673; *S. P. Doe* d. *Higginbotham* v. *Hobson*, 3 Dowl. & Ryl. 186.

(*q*) *Boone* v. *Mitchell*, 1 Barn. & Cres. 18.

(*r*) *Coster* v. *Cowling*, 7 Bing. 456; 5 Moore & Pay. 399.

(*s*) *Pemberton* v. *Vaughan*, 10 Q. B. Rep. 87.

(*t*) *Roe* d. *Larkins* v. *Chenhalls*, 4 Maule & Selw. 23.

(*u*) *Boase* v. *Jackson*, 3 Brod. & Bing. 185; 6 Moore, 480.

(*x*) *Blount* v. *Pearman*, 1 Bing. N. C. 408; 1 Scott, 55.

at a certain rent, and of other land at the same rent as was then paid for it, but not describing the amount, is well stamped by one ad valorem stamp, calculated upon the whole amount of rent to be paid for all the lands (*y*). If a contract, which is signed by one party, have, previously to the signature of the other, inserted in it a new stipulation, it is entire, and requires but one stamp (*z*): and where an instrument contained in its general terms a written contract or demise to several different tenants for different estates at different rents, set against each signature, and one stamp only appeared on the paper, the court held, that it was matter of circumstantial evidence to which contract such stamp should be applied (*a*).

Description of Stamp.

If a lease in writing contain a contract for the purchase of goods, it cannot be given in evidence to prove the sale of the goods, unless it have a lease stamp, although there be an agreement stamp (*b*). A bill of exchange, expressing the terms of an agreement between a landlord and in-coming tenant, is not admissible in evidence without an agreement stamp (*c*). The proper stamp must depend on what is the leading character of the instrument; therefore a sufficient lease stamp (1*l.* 10*s.*) was considered sufficient on a lease though the contract was by deed with a covenant to pay rent, which as a deed would require a 1*l.* 15*s.* stamp (*d*). An instrument which was a lease, and by which it was also agreed that the lessee should have a right of purchasing the premises for a certain sum, requires but one stamp as a lease (*e*). It has been held, that an instrument, which was clearly a mere agreement, might be used without having a lease stamp, although in fact no lease had been prepared, and the tenant had occupied during the whole term under the agreement (*f*).

Effect of Alteration of the Deed.

If an instrument, which requires to be stamped previously to its execution, be altered in any material point, even with the consent of the parties, after it has become an available document, it is avoided, unless there be a new stamp affixed: and where the terms of a properly stamped agreement were altered by a subsequent agreement which was not stamped, it was held, that the latter agreement could not be read in evidence, nor could the plaintiff recover on the counts on the first agreement only (*g*): but it would seem, that an agreement for a demise which contained an express provision for giving up a *farm* at Michaelmas, and to which the lessor, with the consent of the lessee, added the words "house and buildings," did not require a new stamp; such alterations being merely an expression of what was before im-

(*y*) *Parry* v. *Deere*, 5 Ad. & El. 551; 2 Har. & Wol. 395; 1 Nev. & Per. 47.

(*z*) *Knight* v. *Crockford*, 1 Esp. 189.

(*a*) *Doe* d. *Copley* (*Bart.*) v. *Day*, 13 East, 241.

(*b*) *Corder* v. *Drakeford*, 3 Taunt. 382; see also *Stone* v. *Rogers*, 2 Mees. & Wels. 443; Mur. & Hurl. 146.

(*c*) *Nicholson* v. *Smith*, 3 Stark. 128.

(*d*) *Pratt* v. *Thomas*, 4 Car. & Pay. 554.

(*e*) *Worthington* v. *Warrington*, 5 C. B. Rep. 636.

(*f*) *Phillipps* v. *Hartley*, 3 Car. & Pay. 121.

(*g*) *Read* v. *Deer*, 7 Barn. & Cres. 261; 2 Car. & Pay. 624.

plied (*h*). An alteration of a lease, to which others beside the lessor and lessee are parties, after the execution of it by such third parties, but before the execution by the lessor and lessee, does not avoid it (*i*).

When a Stamp is necessary in Evidence.

A stamp is only necessary (*k*) where a paper is used as evidence of an agreement directly, and not where it is used incidentally (*l*). The draft of an agreement for letting premises in which alterations were made, and which was finally agreed to by the solicitors on both sides, but was never signed, is not admissible as an express contract, without a stamp (*m*). Where a proposal was made in writing by *A.* to let a piece of land to *B.* on certain terms contained in a written agreement between *B.* and *C.*, and *A.* afterwards agreed, by parol, that *B.* should have the land upon the terms proposed; it was held, in an action for a breach of the agreement, that the original proposal was receivable in evidence without a stamp (*n*). A memorandum which merely recognizes a previous agreement does not require a stamp (*o*). So where, pending a negociation for a tenancy for less than three years, the terms of which were arranged by parol, a memorandum was signed and delivered by the landlord to the tenant, saying he should be happy to allow him to quit on a certain event without notice, it was held this might be given in evidence without a stamp (*p*). A written paper, signed by an auctioneer, and delivered to a bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, was held necessary to be stamped, pursuant to stat. 48 Geo. III. c. 149 (*q*): but a similar paper, not signed by the auctioneer or any of the parties, was not held to be such a minute of the agreement as was required to be stamped by the same statute, nor such a writing as would exclude parol evidence (*r*). If there are two parts of a written agreement, both executed at the same time, but the one stamped and the other unstamped, the unstamped part is receivable as secondary evidence of the contents of the stamped part (*s*). So where the plaintiff put in one part stamped, signed by the defendant only, the latter may put in the other part, although not stamped (*t*). An examined copy produced as secondary evidence of a deed does not

(*h*) *Doe* d. *Waters* v. *Houghton*, 1 Man. & Ryl. 208.

(*i*) *Hall* v. *Chandless*, 4 Bing. 123; 12 Moore, 316.

(*k*) The onus of showing that a deed has not been duly stamped lies on the party impeaching it; and when the attestation clause to a deed stated it to have been "duly stamped," and it appeared to have been stamped, but the stamp itself was obliterated, it was held that the judge might receive it in evidence; *Doe* d. *Fryer* v. *Coombs*, 3 Q. B. Rep. 687; 3 Gale & Dav. 193.

(*l*) *Wheldon* v. *Matthews*, 2 Chit. 399; *Forsyth* v. *Jervis*, 1 Stark. 437.

(*m*) *Chadwicke* v. *Clarke*, 1 C. B. Rep. 700.

(*n*) *Drant* v. *Browne*, 3 Barn. & Cres. 665; 5 Dowl. & Ryl. 582; and see *Edgar* v. *Blicke*, 1 Stark. 464.

(*o*) *Marshall* v. *Powell*, 11 Jur. 61.

(*p*) *Bethell* v. *Blencowe*, 3 Scott, N. R. 568; 3 Man. & Gran. 119.

(*q*) *Ramsbottom* v. *Mortley*, 2 Maule & Selw. 445.

(*r*) *Ramsbottom* v. *Tunbridge*, 5 Maule & Selw. 434.

(*s*) *Walker* v. *Horsefall*, 1 Camp. 501.

(*t*) *Turner* v. *Hardey*, 1 Car. & Mar. 449.

require a stamp (*u*). Where there was a parol agreement to demise certain premises upon the terms and conditions contained in a lease of the same premises, granted by the lessor to another person; it was held, that in an action by the lessor against the lessee for rent and non-repairs, the lease could not be read in evidence unless it was stamped (*x*). Where an instrument stamped with a lease stamp demised certain premises upon the conditions contained in the annexed lease, which was not stamped, it was held that the annexed lease was admissible in evidence without a stamp (*y*). Where premises are held under an unstamped agreement, the landlord cannot prove the demise by parol evidence (*z*); although in general, if the party fail on an agreement inadmissible in evidence for want of the proper stamp, he may succeed notwithstanding on the general counts (*a*). Where an agreement between several parties is offered in evidence, and it is objected to, on the ground that it is not sufficiently stamped, proof of that lies on the party who makes the objection, it being a fact (*b*). An instrument executed during the period that the statute 7 & 8 Vict. c. 76, s. 4, was in force, which, but for that enactment, would have been a lease, requires a stamp as an agreement only (*c*). A memorandum which merely recognizes a previous agreement does not require a stamp (*d*). It may be questioned, whether an instrument of demise in writing of apartments for three months certain requires either an agreement or lease stamp (*e*). Though a parol lease for three years may be good, yet if it be reduced into writing it must be stamped, or it will not be receivable in evidence (*f*). If an interest in land be of the value of 20*l.* an agreement for it requires an agreement stamp (*g*); but where the subject-matter of an agreement is a limited interest worth less than 20*l.* in a thing worth more than 20*l.* the agreement does not require a stamp.

At what time Documents may be stamped.

Agreements within the 7 & 8 Vict. c. 21, may, by sect. 5, be stamped within fourteen days after they are entered into, without payment of any penalty; but after that time 10*l.* penalty must be paid. Other agreements may be stamped within twenty-one days after being entered into, without payment of any penalty (*h*). The 37 Geo. III. c. 136 (*i*), authorizes most instruments which are unstamped or improperly stamped to be stamped on payment of the legal duty and a penalty (*k*).

(*u*) *Braithwaite* v. *Hitchcocke*, 10 Mees. & Wels. 494; 2 Dowl. N. S. 444.

(*x*) *Turner* v. *Power*, 7 Barn. & Cres. 625; 1 Mood. & Malk. 131.

(*y*) *Pearce* v. *Cheslyn*, 4 Ad. & El. 225; 1 Har. & Wol. 768; 5 Nev. & Man. 652; see also *Strutt* v. *Robinson*, 3 Barn. & Ad. 395.

(*z*) *Brewer* v. *Palmer*, 3 Esp. 213.

(*a*) *Harris* v. *Oke*, Bull. N. P. 140.

(*b*) *Waddington* v. *Francis*, 5 Esp. 182.

(*c*) *Burton* v. *Reevell*, 16 Mees. & Wels. 307.

(*d*) *Marshall* v. *Powell*, 11 Jur. 61.

(*e*) *Doe* d. *Phillips* v. *Roe*, 5 Barn. & Ald. 766; 1 Dowl. & Ryl. 433.

(*f*) *Prosser* v. *Phillips*, Bull. N. P. 269.

(*g*) *Emmerson* v. *Heelis*, 2 Taunt. 38.

(*h*) 23 Geo. III. c. 58, s. 5; and see 13 & 14 Vict. c. 97, s. 12.

(*i*) See also 44 Geo. III. c. 98; 48 Geo. III. c. 149; and 55 Geo. III. c. 184.

(*k*) See Chitty's Stamp Laws.

The 37 Geo. III. c. 136, and 44 Geo. III. c. 98, also allows twelve months after the execution of some instruments for them to be stamped, without payment of any penalty. It is sufficient though the instrument be executed before it be stamped, provided that when it is offered in evidence it be stamped with the proper stamp (*l*): and if an instrument has been originally unstamped, but has been stamped on payment of the penalty, it is admissible in evidence, though the receipt for the penalty has been erased; provided it be proved that such receipt has been indorsed on it: it is not necessary to prove the commissioners' signature to such a receipt (*m*). The proper stamp to be applied is that which is necessary at the time the stamp is actually affixed (*n*).

SECT. 11.—*Execution.*

When Signing and Sealing are necessary.

Where a lease is by deed, the respective parties, the lessor and lessee, whose deed it is, should seal, and now in almost every case sign it also: an instrument not under seal is no deed, for a seal is essential to a deed; and a mere piece of wax without any impression will not suffice, for wax without an impression is not a seal (*o*). The use of seals as a mark of authenticity to letters and other instruments in writing is extremely ancient (*p*). One piece of wax may be the seal of several persons, but it must appear by the deed and profess to be the seal of each (*q*). The method of our Saxon ancestors was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross, which custom illiterate persons do for the most part to this day keep up by signing a cross for their mark, when unable to write their names (*r*). This neglect of signing, and custom of resting only on the authority of seals, remained very long amongst us; for it was held in all our books that sealing alone was sufficient to authenticate a deed. The Statute of Frauds, 29 Car. II. c. 3 (*s*), revives the Saxon custom, and expressly directs the signing of many species of instruments; but it has been doubted whether the first section of that statute requires leases by deed to be signed (*t*). Where parties to an indenture, after the words "in witness

(*l*) *Rex* v. *Episcopum*, 1 Stra. 524; *Rex* v. *Reeks*, 2 Stra. 716.

(*m*) *Apothecaries' Company* v. *Fernyhough*, 2 Car. & Pay. 438.

(*n*) *Buckworth* v. *Simpson*, 1 C. M. & R. 834; 1 Gale, 38; 5 Tyr. 344; *Deakin* v. *Penniall*, 17 Law J. (N. S.) Exch. 217. Where an instrument is not required by law to be stamped within a particular time after its execution, the court, upon its being offered in evidence, will not inquire when the stamp was affixed, nor, if a penalty was incurred, whether the proper penalty was paid on the stamping; *Rex* v. *Preston* (*Inhabitants*), 5 Barn. & Adol. 1028; 3 Nev. & Man. 31.

(*o*) 2 Black. Com. 297; 3 Inst. 169.

(*p*) Bac. on Eng. Gov. book i. c. xii.

(*q*) *Cooch* v. *Goodman*, 2 Queen's B. R. 580; 2 Gale & Dav. 159.

(*r*) Lord Hardwicke calls such "*marksmen*," 3 Atk. 369. A deed is well executed by an illiterate person, if it be signed by a third person at his request and in his presence. It is not necessary that the deed should have been previously read over to him, unless he had required it; *Rex* v. *Longnor* (*Inhabitants*), 1 Nev. & Man. 577.

(*s*) Ante, p. 58.

(*t*) *Cooch* v. *Goodman*, 2 Queen's B. Rep. 580; 2 Gale & Dav. 159; *Aveline* v. *Whisson*, 4 Man. & Gran. 801.

whereof," insert a special statement of the execution of the two parts of such deed by them respectively, quære, whether that is a recital in the deed, and estops a party, proved to have executed, from denying the execution by the others (*u*). A lessee entering and holding under a lease not executed by his landlord is not estopped, in an action by the assignee of the lessor, from showing such want of execution by the lessor (*x*). Where a lease for a term, containing a covenant to repair during the term, although executed by the lessee, is not executed by the lessor, the lessee is not bound by the covenant, for the lease being void he has not had the consideration for his covenant (*y*). And it seems that such lessee would not be bound by such a covenant by the fact of his having enjoyed the premises for a period of years equal to those which the term would have comprised, if it had been granted, if he was not bound during its continuance (*z*).

Delivery by the Party executing.

The lease must also be delivered either by the parties themselves or by their attorney authorized by a power, for merely sealing does not make a deed: the delivery is also expressed in their attestation "sealed and *delivered*," for delivery makes it a lease. Almost any manifestation, however, of the party's intention to deliver, if accompanied by an act importing the same, will constitute a delivery. If another person seal the deed, yet if the party deliver it himself, he thereby adopts the sealing, and makes it his own. Every deed shall be intended to be delivered on the day it bears date, unless the contrary be proved (*a*); and if proved, it operates only from the time of execution (*b*): but if the date be false or impossible, the delivery ascertains the time of it (*c*).

Attestation by Witnesses.

The last requisite is the attestation or execution of the lease in the presence of witnesses, though this is necessary rather for the preservation of the evidence, than to constitute the essence of the deed.

SECT. 12.—*Registry.*

Generally.

The registry of deeds has been rendered necessary in particular parts of the kingdom, by certain statutes passed at various periods of time,

(*u*) *Pearse* v. *Morrice*, 2 Ad. & El. 84.

(*x*) *Cardwell* v. *Lucas*, 2 Mees. & Wels. 111; 2 Gale, 203. See also *Soprani* v. *Skurro*, Yelv. 18; and *Rose* v. *Poulton*, 2 Barn. & Adol. 822.

(*y*) Com. Dig. *Covenant* (F); *Soprani* v. *Skurro*, Yelv. 18; *Waller* v. *Dean and Chapter of Norwich*, Owen, 136; *Knipe* v. *Palmer*, 2 Wils. 132; *Pitman* v. *Woodbury*, 3 Exch. Rep. 4.

(*z*) *Pitman* v. *Woodbury*, 3 Exch. Rep. p. 13. In *Cooch* v. *Goodman*, 2 Queen's B. Rep. 599, the Court of Queen's Bench expressed a different opinion; but that opinion was extra-judicial, as is stated in *Pitman* v. *Woodbury*. The same principle also applies where tolls have been claimed by an indenture not executed by the lessor; the lessee in that case, although he has entered, not being liable to be sued on his covenant for payment of rent; *Swatman* v. *Ambler*, 8 Exch. Rep. 72.

(*a*) Co. Litt. 36; 2 Black. Com. 307.

(*b*) See *Cooper* v. *Robinson*, 10 Mees. & Wels. 694.

(*c*) See ante, Sect. 3, (c), pp. 76, 77; and see further as to the delivery of deeds, *Murray* v. *Stair* (*Earl*), 2 Barn. & Cres. 82; 3 Dowl. & Ryl. 278; *Bowker* v. *Burdakin*, 11 Mees. & Wels. 128; *Doe* d. *Garnons* v. *Knight*, 5 Barn. & Cres. 671; 8 Dowl. & Ryl. 348; *Hare* v. *Horton*, 5 Barn. & Adol. 715; 2 Nev. & Man. 428; *Goodright* v. *Gregory*, Lofft, 339; *Goodright* d. *Carter* v. *Straghan*, Cowp. 201; Lofft, 763.

in order to prevent the frauds which were practised by means of secret transfers and prior mortgages. By the several statutes hereafter mentioned, all deeds, conveyances and devises by will shall be void against subsequent purchasers and mortgagees, unless registered before the conveyances under which they claim; also no judgment, statute or recognizance shall bind any land in those counties but from the time a memorial thereof shall be entered at the Register-office. But the acts do not extend to copyhold estates, leases at a rack-rent, or to any leases, not exceeding twenty-one years, where the possession goes with the lease; nor to any chamber in Serjeants' Inn, or the Inns of Court or Chancery. But all other leases by deed for a valuable consideration are subject to the provisions of the above acts; therefore, where lands within a register county are demised by way of mortgage, the lessor to enjoy the same until default in payment of the principal and interest, the lease requires registration (*e*). It seems advisable to register all such leases of copyhold lands as would require registration, provided the lands were freehold (*f*). The mere receipt of rent would not, it seems, be deemed an actual possession and occupation within the registry acts (*g*). It would seem that a lease within the exception of the acts will so continue, notwithstanding it may become a valuable and saleable interest (*h*).

In the West Riding of Yorkshire.

The statute 2 & 3 Ann. c. 4, enacts, that a memorial of all deeds and conveyances made and executed in the West Riding of the county of York, whereby any honours, manors, lands, &c. may be in any way affected in law or equity, may, at the election of the party or parties concerned, be registered in an office to be kept at Wakefield, in the said riding, for that purpose; which memorial must be written and directed to the registrar of the said office; and must be under the hand and seal of some or one of the grantors or grantees, his or their guardians or trustees, attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance; which witness shall, upon oath before the said registrar or his deputy, prove the signing and sealing of the said memorial, and the execution of the deed or conveyance therein mentioned; and that every such memorial shall contain the date of such deed or conveyance, and the names and additions of all the parties thereto, with the places of their abode; and shall also mention the honours, manors, lands, &c. contained in such deed, &c. and the names of the parishes, &c. wherein they are situated; every deed or conveyance that shall, at any time after such memorial is so registered, be made and executed of the honours, manors, lands, &c. or any part thereof contained in such memorial, shall be adjudged fraudulent and void against any subsequent

(*e*) Rigge on Registration, 88, n. (*o*); Wilson on Registration, 29; Sugd. Ven. & Pur. 11th edit. 981.

(*f*) Sugd. Ven. & Pur. 11th edit. 980.

(*g*) *Fury* v. *Smith*, 1 Huds. & Br. 735, 751.

(*h*) Sugd. Ven. & Pur. 11th edit. 980; Wilson on Registration, 29.

purchaser or mortgagee for valuable consideration; unless such memorial thereof shall be registered as the act requires, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim.

In the East Riding of Yorkshire.

The statute 6 Ann. c. 35, contains provisions of a similar nature with respect to the East Riding of the same county, and the town of Kingston-upon-Hull, and appoints the register-office to be kept at Beverley, in the said riding.

In the North Riding.

The statute 8 Geo. II. c. 6, contains provisions of a similar nature with respect to the north riding of the same county.

In the County of Middlesex.

The statute 7 Ann. c. 20, contains provisions of a similar nature with respect to the county of Middlesex. The Master of the King's Bench is the registrar and he may appoint a deputy, and both of them are to be under the control of the Lord Chancellor, by whom rules may be made for the management of the office, which is to be kept in or near the Inns of Court or Chancery. The registrars are to indorse a certificate on every deed so registered, which certificate shall be allowed as evidence of such registry in all courts of record whatsoever. Upon certificate and proof made to the registrar, that money due on a mortgage entered in the registry has been satisfied, the registrar shall make an entry thereof in the margin against the enrolment. By statute 25 Geo. II. c. 4, the deputy of the chief clerk of the King's Bench is appointed a registrar for Middlesex instead of the chief clerk.

In the Bedford Level.

Leases of lands in the Bedford Level are required, by stat. 15 Car. II. c. 17, to be registered, and they have force only from the time they are registered.

Cases decided upon the Registry Acts.

The intention of these acts plainly is to secure subsequent purchasers and mortgagees against secret conveyances and fraudulent incumbrances. It has been held, on the statute 15 Car. II. c. 17, that a lessee of land in the Bedford Level cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the statute for want of being registered; as the act does not avoid it as between the parties themselves, but only postpones its priority with respect to subsequent incumbrancers registering their titles before (*i*). Registering an assignment is not registering the lease: therefore, where the defendant claimed under a lease made in 1730, which was soon after mortgaged, and in 1731 sold out and out to the defendant; and the original lease was not registered, but the first mortgage of it and the defendant's purchase were: and it not being a lease at rack-rent, the question was, whether this was a registry within the meaning of the 7 Anne, c. 20. Chief Justice *Holt* held it not to be sufficient; for the act says, the deed under which the party claims, with the witnesses' names, shall be registered; and of this a

(*i*) *Hodson* v. *Sharpe*, 10 East, 350. There is also an Irish register act, 6 Anne, c. 2, containing similar regulations.

subsequent purchaser can have no notice by the bare registry of the assignment, and it is also required that the original be produced to an officer (*k*). Where there were two assignments of the same lease of certain premises in Middlesex, and the last executed was registered first: it was held, that at law the deed last registered must be considered as fraudulent and void, under the statute 7 Anne, c. 20, s. 1, although the party claiming under the second assignment knew, when it was executed, of the prior execution of the first assignment (*l*). In registering an assignment of a lease, the parcels ought to be inserted in full, and it is not enough to refer to them as being described in the lease (*m*). A memorial of an assignment of lease indorsed on the lease was tendered for registration to the registrar for Middlesex, under statute 7 Anne, c. 20, in the following form: "An indenture of assignment." Then followed a statement of the date and parties to the assignment, "assigning all that brick messuage," &c. (specifying the premises and giving a full description of them as to locality and occupation), "by the description of the messuage or tenement, out-offices and premises, comprised in and demised by the within-written indenture of lease, with the appurtenances." The memorial did not state the date of the lease itself or the parties to it. It appeared on affidavit, in support of a rule for a mandamus to the Registrar to register this memorial, that the full description of the premises was taken from the lease: it was held, that the memorial did not comply with the requirements of statute 7 Anne, c. 20, s. 6, as it did not show that the premises were described in such manner as the same were expressed in the deed to be registered, or in the lease thereby referred to. It was also held, that where the deed, of which a memorial is to be registered, is indorsed on an earlier deed, it is not sufficient to describe the premises by such memorial in the terms used in the earlier deed, without express reference to it, if the deed to be registered describes the premises simply by reference to the earlier deed (*n*). The inrolment of a lease granted by the Duke of Cornwall is evidence in the same manner as if it had been granted by the crown, when there is no Duke of Cornwall (*o*).

SECT. 13.—*Inspection of Instruments.*

Inspection of Private Instruments.

With regard to private instruments, such as leases and other writings between private parties, where there is only one part in existence, and

(*k*) *Honeycomb* d. *Halpen* v. *Waldron*, 2 Stra. 1064; and see *Fleming* v. *Neville*, Hayes, 23; and *Fury* v. *Smith*, 1 Huds. & Br. 735, 755.

(*l*) *Doe* d. *Robinson* v. *Allsop*, 5 Barn. & Ald. 142.

(*m*) Sugd. Ven. & Pur. 11th edit. 973.

(*n*) *Reg.* v. *Middlesex Registrar*, 15 Queen's B. Rep. 796.

(*o*) *Rowe* v. *Brenton*, 8 Barn. & Cres. 755; 2 Man. & Ryl. 200. With respect to enrolment of leases of lands in the Duchy of Lancaster, see *Kinnersley* v. *Orpe*, 1 Dougl. 56. See also as to registration of conveyances, *Le Neve* v. *Le Neve*, 3 Atk. 651; Ambl. 436; *Hine* v. *Dodd*, 2 Atk. 275; *Jolland* v. *Stanridge*, 3 Ves. jun. 478; *Morecock* v. *Dickens*, Ambl. 678.

it has been even held to be a forfeiture of the power; but Lord *Hale* conceived it was not a forfeiture, because a lease by virtue of a power takes effect out of the settlement that gives the power, and by sealing the lease the power is executed, and then the livery comes too late to affect it. It was not requisite, nor could it be made, where any incorporeal hereditaments were granted for life; nor was it requisite in some cases, where an estate of freehold was made of a corporeal thing; as if a house or land belonged to an office, and the office were granted by deed, the house or land passed as incident thereunto; so if a house or chamber belonged to a corrody: neither was it needful in a grant of trees growing on the grantor's ground; for they would pass without livery of seisin at all. If a man make a lease for years, the lease is perfect by the delivery of the deed without any livery of seisin. Where it is necessary that it should have been made, the Court will presume it to have been made after a lapse of twenty years (*g*).

7 & 8 Vict. c. 76, s. 2; 8 & 9 Vict. c. 106, s. 2.

The law as to livery of seisin, although not abolished, is much altered by the statutes 7 & 8 Vict. c. 76, s. 2, and 8 & 9 Vict. c. 106, s. 2. By the first, which took effect from the 31st day of December, 1844, it is enacted, "that every person may convey by any deed without livery of seisin or enrolment, or a prior lease, all such freehold land as he might before the passing of this act have conveyed by lease and release; and every such conveyance shall take effect as if it had been made by lease and release." This statute is repealed, from the 1st of October, 1845, by the statute 8 & 9 Vict. c. 106, which enacts, s. 2, that after that day "all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery." A learned writer, Mr. Archbold (*h*), appears to think that in leases for lives livery of seisin is still necessary, on the ground that a lease for life does not operate as a "conveyance of the immediate freehold." It would seem, however, that as regards the conveyance of the freehold, a lease for life, reserving rent, stands on the same footing as an absolute grant for life, which clearly amounts to a conveyance of the immediate freehold.

To whom Livery of Seisin may be made.

If a freehold lease be made to two lessees, livery of seisin to one is sufficient (*i*). Where a man makes a lease of land to one for years, with remainder to another in fee or in tail, or for life, livery of seisin must be made to the lessee for years, or else nothing will pass to him in remainder, and yet the lease for years will be good (*k*).

How Livery of Seisin in Deed is made.

Livery of seisin is either in deed or in law. *Livery in deed* is thus performed: the lessor, or his attorney authorized by power of attorney, together with the lessee or his attorney, come to the land or to the

(*g*) *Rees* d. *Chamberlain* v. *Lloyd*, Wight. 123.

(*h*) Land. & Ten. 28.

(*i*) Com. Dig. tit. *Feoffment*, (B 1).

(*k*) Shep. Touch. 210; Com. Dig. tit. *Feoffment*, (B 1).

house, and there in the presence of witnesses declare the contents of the lease on which livery is to be made: then the lessor, if it be of land, delivers to the lessee, all other persons being off the ground, a clod, or turf, or a twig, or bough there growing, with words to this effect:—"I deliver this to you in the name of seisin of all the lands and tenements contained in this deed" (*l*): but if it be of a house, the lessor must take the ring or latch of the door, the house being quite empty, and deliver it to the lessee in the same form; and then the lessee must enter alone, and having shut the door, open it, and let in the others. If the conveyance be of divers lands lying scattered in one and the same county, and then in the lessor's possession, livery of seisin of any parcel in the name of the residue is sufficient for all; but if they be in several counties, it is said there must be as many liveries as there are counties; so if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants; because no livery can be made in this case but by the consent of the particular tenant, and the consent of one will not bind the rest. In all these cases it is prudent and usual to indorse the livery of seisin on the back of the deed, specifying the manner, place and time of making it, together with the names of the witnesses. The assent of a tenant at will is not necessary in order to perfect a livery of seisin (*m*).

Livery in Law.

Livery in law is where the same is not made on the land, but in sight of it only; the lessor saying to the lessee, "I demise, grant, and to farm let such land unto you, enter and take possession." Here if the lessee enter during the life of the lessor, it is a good livery, but not otherwise. This livery in law cannot, however, be given or received by attorney, but only by the parties themselves (*n*).

When Entry of the Lessee is necessary.

Although in leases for years, or other chattel interests, livery of seisin was never necessary; yet instead thereof an actual entry is requisite to vest the estate in the lessee; for to many purposes he is not tenant for years until he enters (*o*). This entry by the tenant himself serves the purpose of notoriety as well as livery of seisin from the grantor could have done, which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. When the lessee therefore has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is possessed, not properly of the land,

(*l*) In making livery of seisin no particular form of words need be observed; *Doe* d. *Barnett* v. *Stock*, Gow, 178. If made under a power of attorney contained in the deed itself, it is not necessary that it should be made on the day of the date of the deed, for the power may be well executed afterwards; *Roe* d. *Heale* v. *Rashleigh*, 3 Barn. & Ald. 156. Livery of seisin is not rendered void by the fact of a child having remained on the premises at the time, even though such child were the descendant of a party having title, unless the child was placed there for the purpose of representing that party; *Doe* d. *Reed* v. *Taylor*, 5 Barn. & Adol. 575; 2 Nev. & Man. 508.

(*m*) *Doe* d. *Hindmarsh* v. *Oliver*, 1 Car. & Kir. 543.

(*n*) 2 Black. Com. 316.

(*o*) 2 Black. Com. 144, 314; Co. Litt. 46 b.

but of the term of years; the possession or seisin of the land remaining still in him who has the freehold. A lessee of a lease in reversion must enter when his lease comes into possession, for if he enter before it will be a disseisin; and no continuance of possession, though after the term actually begins, will purge the disseisin, or alter the estate of the lessee (*p*). It is best in all cases for the lessee to enter as soon as he has the power of doing so; for if the lessor levy a fine before the entry of the lessee, and he does not enter until after five years have elapsed from the time his right accrued, the term will be barred (*q*). Before entry the lessee clearly cannot maintain any possessory action, as trespass or ejectment.

Interesse Termini.

Before entry the lessee has at common law but an interesse termini, an interest of a term, and no possession; and therefore a release which enures by way of enlarging an estate, cannot work without a possession, for before possession there is no reversion; but if a lease be so framed as to be a bargain and sale under the Statute of Uses, the possession is immediately executed in the lessee, so that no entry is necessary (*r*). A release therefore which enures by enlargement cannot work without a possession; but an actual estate in possession is not necessary, for a vested interest suffices for such a release to operate upon. Premises were demised by parol for a year, the lessee accepted the lease, and by virtue of the demise entered upon the demised land; before and at the time of the demise, eight acres included in it had been demised to a third party, in whose possession they were, so that the lessee could not, and did not, enter upon them: it was held that the latter demise was wholly void as to the eight acres, and that the rent was not apportionable, and could not be distrained for, the impediment of the lessee taking possession not being analogous to an eviction by an elder title (*s*). So where the tenant could not obtain possession of part of the premises demised, it was held an action of covenant could not be maintained by the lessor against the lessee for the rent, as in such an action it could not be apportioned (*t*). A lessor may release the rent reserved before entry, in respect of the privity: so the interest which the lessee has before entry is grantable to another; and although the lessor die before the lessee enter, yet the lessee may enter into the lands; so if the lessee die before he enter, yet his executors or administrators may enter, because he presently by the lease has an interest in him: so if it be made to two, and one die before entry, his interest shall survive (*u*). This interesse termini is in the lessee, whether the lease be made to commence immediately or at a future day (*x*).

(*p*) *Alexander* v. *Dyer*, Cro. Eliz. 169.
(*q*) *Saffyn's case*, 5 Co. Rep. 123.
(*r*) 2 Black. Com. 270.
(*s*) *Neale* v. *Mackenzie*, 1 Mees. & Wels. 74; 2 Gale, 174; in error, reversing *S. C.* 2 C. M. & R. 84; 1 Gale, 119; 5 Tyr. 1106.
(*t*) *Holgate* v. *Kay*, 1 Car. & Kir. 341.
(*u*) Co. Litt. 46 b, 270 b.
(*x*) Com. Dig. tit. *Estates*, (G 14).

Effect of Entry in barring Future Interests.

Respecting future interests as to their being barred or destroyed, it has already appeared that all leases for years at common law, when they come in esse, are to be executed by the entry of the lessee; but it has been held, that after the period of expectancy has elapsed, the lessee before entry may grant his term, although the lessor continues in possession, because such lessee's interesse termini was not divested or turned to a right, but continued in him in the same manner as it was at first granted, and in the same manner he transfers it over to another, who by his entry may reduce it into possession whenever he thinks fit (*y*). Where one made a lease for years to begin after the end of a former lease for years then in being, and the first lease having ended before any entry of the second lessee, he in reversion entered and made a feoffment in fee, and levied a fine with proclamations, and five years passed without entry or claim of the second lessee; it was held, that by this fine and nonclaim his term was barred, because after the first lease expired, the second lease was actually then come in esse, and reducible into possession by an entry presently, and then his not entering, which was his own fault and laches, could not stop the operation of the fine from running against him (*z*), but if such fine had been levied during the continuance of the first lease, it was agreed that the operation thereof would not begin to run out against the second lessee till the first lease were determined, because till then the second lease was only an interesse termini, which the second lessee could not reduce into possession by any entry till the first lease had determined.

SECT. 15.—*When void or voidable.*

What is required in Leases by Deed.

A lease by deed requires, 1. Proper parties and a proper subject-matter; 2. To be written or printed on paper or parchment duly stamped; 3. Sufficient and legal words properly disposed; 4. To be read, if desired, before the execution; for not reading a deed to a person in the rough draft, nor in the engrossment before execution, is a badge of fraud; 5. To be sealed, and, by the Statute of Frauds, in many cases, signed also; and 6. To be delivered.

What avoids a Lease.

It may be avoided by matter ex post facto, as 1. By erasure, interlineation, or other alteration in any material part (*a*). If a deed be

(*y*) Bac. Abr. tit. *Leases*, (P); *Sandydale* v. *Cheyney*, Cro. Eliz. 157.

(*z*) *Saffyn* v. *Adams*, Cro. Jac. 60; *Evans* v. *Crocker*, 3 Mod. 198; *Zouch* v. *Thompson*, 1 Lord Raym. 179.

(*a*) 2 Black. Com. 308; *Bennett* v. *Vade*, 2 Atk. 327; *Miller* v. *Maynwaring*, Cro. Car. 399; Bull. N. P. 267; *Rex* v. *Beck*, 2 Stra. 1160. A deed executed with blanks in material parts, whereby it is incapable of having any operation, and afterwards filled up and delivered by another person, in the absence of the party who has executed, and unauthorized by instrument under seal, is invalid; *Hibblewhite* v. *M'Morine*, 6 Mees. & Wels. 200. The addition by a stranger of a seal to an instrument signed only, renders it void; *Davidson* v. *Cooper*, 11 Mees. & Wels. 778; 1 Dow. & Low. 377.

altered by a stranger in a point not material, the deed is not avoided; but it is otherwise if it be altered by a stranger in a point material; for the witnesses cannot prove it to be the act of the party where there is any material difference: an immaterial alteration, however, does not change the deed, and consequently the witnesses may attest it without danger of perjury; but if the deed be altered by the party himself, though in a point not material, yet it avoids it, for the law takes every man's act most strongly against himself. If there be several covenants in a deed, and one of them be altered, this destroys the whole deed, for it cannot be the same, unless every covenant of which it consists be the same also (*b*). 2. By breaking off or defacing the seal, unless indeed it be done by accident; thus on an indenture to lead the use of a common recovery being offered in evidence with the seals torn off, yet it being proved to have been done by a little boy, the indenture was allowed to be read. 3. By delivering it up to be cancelled. 4. By the disagreement of those whose concurrence is necessary in order for the deed to stand; as the husband, where a wife is concerned; an infant, or a person under duress, when those disabilities are removed, and the like. 5. By the judgment or decree of a court of judicature: —this was anciently the province of the Court of Star Chamber, and now is that of the Court of Chancery, and is exercised when it appears that the deed was obtained by fraud, force or other foul practice, or is proved to be an absolute forgery; in any of which cases the deed may be avoided either in part or totally, accordingly as the cause of avoidance is more or less extensive (*c*). Where a lease was granted to a man on his fraudulent representation that he intended to use the premises for carrying on a lawful trade, he intending at the time to use them, and afterwards using them, as a brothel, the representation being collateral to the agreement, was held not to avoid the lease (*d*). In covenant for rent it has been however held a good defence that the premises were demised by the plaintiff to the defendant for the express purpose of being used for boiling oil and tar, contrary to the provisions of the building act (*e*).

Sect. 16.—*Operation as a Lease or an Agreement only.*

General Rule.

Whether an instrument (*f*) shall operate as an actual lease, or only as an agreement for a future lease to be granted, has always been a

(*b*) Where by agreement between plaintiff and defendant, a house, No. 38, was let to the plaintiff, and after the agreement was executed and delivered to the plaintiff the number was altered to 35, but it did not appear by whom, No. 35 being in fact the house let; it was held that the agreement might be given in evidence in an action for an excessive distress, in which the demise was admitted, to show the terms of the holding; *Hutchins* v. *Scott*, 2 Mees. & Wels. 809; Mur. & Hurl. 194.

(*c*) 2 Black. Com. 308.

(*d*) *Ferret* v. *Hill*, 23 Law J., C. P., 185.

(*e*) *Gas Light Company* v. *Turner*, 7 Scott, 779; 8 Scott, 609; 5 Bing. N. C. 666; 6 Bing. N. C. 324.

(*f*) Instruments made on or after the 1st of January, 1845, and previous to the 2nd of October in the same year, are affected by

fruitful subject of litigation, and it is impossible to reconcile all the decisions on the point (*g*). The general rule laid down in the cases is, that it depends upon the intention of the parties, as it is to be collected from the instrument (*h*), and from the nature and condition of the subject-matter (*i*): but the courts have also in some cases looked at the acts of the parties to assist in the construction, where the words of the instrument were ambiguous (*j*). An express proviso that the instrument is not to operate as a present lease, but only as an agreement for a future lease, shows clearly the intention of the parties, notwithstanding the inference which might be drawn from other clauses in the instrument (*k*): but the mere use of the word "agreement" will not make an instrument an agreement for a lease only (*l*).

Intention of the Parties.

Acts of the Parties.

Express Proviso.

Words of present demise, as "doth let" (*m*), "agrees to let" (*n*), "agrees to pay for, &c." (*o*), "doth demise" (*p*), "shall enjoy" (*q*), will make an actual lease; but the use of such words, however strong,

Words of present Demise.

the statute 7 & 8 Vict. c. 76, s. 4, (repealed by the 8 & 9 Vict. c. 106, s. 3, see ante, p. 6,) which enacted, "that no lease in writing shall be valid unless made by deed, and that any agreement in writing to let shall be valid and take effect as an agreement to execute a lease." The effect of this enactment is to render an instrument in writing, which is not a deed, though in its terms an actual present lease, valid as an agreement for a future lease to be granted; and it requires a stamp as an agreement only; *Burton* v. *Reevell*, 16 Mees. & Wels. 307.

(*g*) An agreement to make a lease is a good lease in equity, and a confirmation of such lease by him in remainder is a good lease; *Hamilton* v. *Cardress* (*Lady*), 2 Bro. Parl. Cas. 125. But still agreements should in no case be relied on, for it has been held that the trustee of a term, for the benefit of creditors, not having notice of an agreement for a lease made previous to the grant of the term, may maintain ejectment against the tenant in possession under the agreement, on the ground that the title of the tenant being only a doubtful equity, could not be set up against the legal title of the trustee; *Goodtitle* d. *Estwick* v. *Way*, 1 Term. Rep. 735. If the instrument do not amount to an actual demise, the lessor cannot enforce the payment of his rent by the summary remedy of distress, but is left to his action for use and occupation; *Dunk* v. *Hunter*, 5 Barn. & Ald. 322. See post, Book II., Chap. II., Sect. 2, (a).

(*h*) See particularly *Poole* v. *Bentley*, 12 East, 168; 2 Campb. 286; *Perring* v. *Brooke*, 1 M. & Rob. 510; 7 Car. & P. 360; *Morgan* d. *Dowding* v. *Bissell*, 3 Taunt. 65; *Doe* d. *Jackson* v. *Ashburner*, 5 Term Rep. 163; *Chapman* v. *Bluck*, 5 Scott, 515; 4 Bing. N. C. 187; 1 Arn. 27. See also cases, Nos. 25, 27, 38, 30, 31, 37, 21, 48, post, p. 139, &c.

(*i*) *Doe* d. *Morgan* v. *Powell*, 7 Man. & Gran. 980; 8 Scott, N. R. 687.

(*j*) In *Doe* d. *Pearson* v. *Ries*, 8 Bing. 181; 1 M. & Scott, 264; *Chapman* v. *Bluck*, 4 Bing. N. C. 195; 1 Arn. 35. See also *Doe* d. *Jackson* v. *Ashburner*, 5 Term Rep. 168, per Ashurst, J. But see contra, *Doe* d. *Morgan* v. *Powell*, 7 Man. & Gran. 980; 8 Scott, N. R. 687, and *Alderman* v. *Neate*, 4 Mees. & Wels. 716, per Lord Abinger, C. B. The acts of the parties seem to have had some effect on the decisions in *Baxter* d. *Abrahall* v. *Brown*, 2 W. Black. 973; *Alexander* v. *Bonnin*, 4 Bing. N. C. 799; 6 Scott, 611; 1 Arn. 337; and *Sturgion* v. *Painter*, Bac. Abr. tit. *Leases*, (K); Noy, 128.

(*k*) *Perring* v. *Brooke*, 1 M. & Rob. 510; 7 Car. & Pay. 360.

(*l*) *John* v. *Jenkins*, 1 Cr. & Mees. 233; 3 Tyr. 177; *Browne* v. *Warner*, 14 Ves. 156; *Doe* d. *Morgan* v. *Powell*, 7 Man. & Gran. 980; 8 Scott, N. R. 687.

(*m*) *Harrington* v. *Wise*, Cro. Eliz. 486; Noy, 57; Moore, 459; *Baxter* d. *Abrahall* v. *Brown*, 2 W. Black. 973; *John* v. *Jenkins*, 1 Cromp. & Mees. 227; 3 Tyr. 170.

(*n*) *Staniforth* v. *Fox*, 7 Bing. 590; 5 Moore & Pay, 589; *Doe* d. *Pearson* v. *Ries*, 8 Bing. 178; 1 Moore & Scott, 259; *Doe* d. *Walker* v. *Groves*, 15 East, 244; *Doe* d. *Phillip* v. *Benjamin*, 9 Ad. & El. 644; 1 Per. & Dav. 440; 2 Will. Wol. & Hod. 96; *Morgan* d. *Dowding* v. *Bissell*, 3 Taunt. 65; *Colley* v. *Streeton*, 3 Dow. & Ryl. 522. But "agrees to let and grant a lease," coupled with other words of agreement merely, are at least doubtful; *Doe* d. *Morgan* v. *Powell*, 7 Man. & Gran. 980; 8 Scott, N. R. 687. See also cases, Nos. 21, 22, 26, 32a, 37, 40, 48, post, p. 139, &c.

(*o*) *Wright* v. *Trevezant*, 8 Car. & Pay. 441; Mood. & Malk. 231.

(*p*) *Barry* v. *Nugent*, 5 Term Rep. 165, n.; 3 Dougl. 179.

(*q*) *Drake* v. *Munday*, Cro. Car. 207; W. Jones, 231. But those words are qualified by the addition of such words as—"and I engage to give him a lease;" *Doe* d. *Jackson* v. *Ashburner*, 5 Term Rep. 168.

will not constitute the instrument a lease, if it can be inferred from the language of the rest of the instrument that the parties had it in contemplation to enter into a future lease (*r*).

Clause for a future Lease.

Even a clause for the future execution of a formal lease does not of itself necessarily imply that the instrument must be only an agreement for a lease, if the intention of the parties appear to be otherwise (*s*).

Certainty as to Terms of holding, &c.

Certainty as to the time when the term and rent are to commence (*t*), as to the length of the term (*u*), and as to the amount of the rent (*x*), is necessary in order to make the instrument operate as an actual demise.

Uncertainty.

Uncertainty as to who were to be lessors is a ground for construing an instrument an agreement only (*y*). Uncertainty as to the terms of the holding will generally induce the courts to construe the instrument as a mere agreement for a lease (*z*).

Convenience.

Therefore a document relating to the demise of some mines was held to require a more definite statement of the terms between the parties in order to constitute it an actual demise: and in the same case the convenience of the parties was made partly a ground for construing the document as an agreement only (*a*).

"Usual Covenants."

It was formerly held, that where the holding was to be under "all

(*r*) See cases, Nos. 9, 16, 23, 33, 36, 46, 54, post, p. 136, &c., where the instruments were held to be agreements only.

(*s*) *Poole* v. *Bentley*, 12 East, 168; 2 Campb. 286; *Baxter* d. *Abrahall* v. *Brown*, 2 W. Black. 973; *Barry* v. *Nugent*, 5 Term Rep. 165, n.; 3 Doug. 179; *Doe* d. *Walker* v. *Groves*, 15 East, 244; *Doe* d. *Phillip* v. *Benjamin*, 9 Ad. & El. 644; 1 Per. & Dav. 440; 2 Will. Wol. & Hod. 96; *Alderman* v. *Neate*, 4 Mees. & Wels. 704; 1 Horn. & Hurl. 369; *Chapman* v. *Bluck*, 4 Bing. N. C. 187; 5 Scott, 515; 1 Arn. 27; *Warman* v. *Faithful*, 5 Barn. & Adol. 1042; 3 Nev. & Man. 137. See also cases, Nos. 4, 25, 38, 27, 28, 52, 41, 40, post, p. 136, &c., where, notwithstanding such a clause, the instruments were held to be present leases; and Nos. 23, 33, 1, 10, 15, 16, 18, 20, 24, 28, 29, 34, 35, 36, 42, 43, post, p. 139, &c., where instruments containing such a clause were held agreements only.

(*t*) *Wright* v. *Trevezant*, 3 Car. & Pay. 441; Mood. & Malk. 231; *Doe* d. *Pearson* v. *Ries*, 8 Bing. 178; 1 Moore & Scott, 259; *Staniforth* v. *Fox*, 7 Bing. 590; 5 Moore & Pay. 589; *Doe* d. *Phillip* v. *Benjamin*, 9 Ad. & El. 644; 1 Per. & Dav. 440; 2 Will. Woll. & Hod. 96; *Chapman* v. *Bluck*, 4 Bing. N. C. 187; 5 Scott, 515; 1 Arn. 27; *Warman* v. *Faithful*, 5 Barn. & Ad. 1042; 3 Nev. & Man. 137; *Dunk* v. *Hunter*, 5 Barn. & Ald. 322; *Clayton* v. *Burtenshaw*, 5 Barn. & Cress. 41; 7 Dowl. & Ryl. 800; *Doe* d. *Morgan* v. *Powell*, 8 Scott, N. R. 687; 7 Man. & Gran. 980; *Gore* v. *Lloyd*, 12 Mees. & Wels. 463; *Doe* d. *Wood* v. *Clarke*, 7 Queen's B. Rep. 211. See also cases, Nos. 9, 19, post, p. 136, &c.

(*u*) *Clayton* v. *Burtenshaw*, 5 Barn. & Cress. 41; 7 Dow. & Ryl. 800; *Warman* v. *Faithful*, 5 Barn. & Adol. 1042; 3 Nev. & Man. 137; *Wright* v. *Trevezant*, 3 Car. & Pay. 441; Mood. & Malk. 231; *Gore* v. *Lloyd*, 12 Mees. & Wels. 463. See also *Goodtitle* d. *Estwicke* v. *Way*, 1 Term Rep. 735; *Dunk* v. *Hunter*, 5 Barn. & Ald. 322; and *Browne* v. *Warner*, 14 Ves. 156.

(*x*) *John* v. *Jenkins*, 1 Cr. & Mees. 227; 3 Tyr. 170; *Morgan* d. *Dowding* v. *Bissell*, 3 Taunt. 65; *Chapman* v. *Towner*, 6 Mees. & Wels. 100.

(*y*) *Doe* d. *Bailey* v. *Foster*, 3 Com. B. R. 215.

(*z*) *Doe* d. *Pearson* v. *Ries*, 8 Bing. 178; 1 Moore & Sc. 259; *Alderman* v. *Neale*, 4 Mees. & Wels. 704; 1 Horn. & Hurl. 369; *Doe* d. *Phillip* v. *Benjamin*, 9 Ad. & El. 644; 1 Per. & Dav. 440; 2 Will. Wol. & Hod. 96; *Morgan* d. *Dowding* v. *Bissell*, 3 Taunt. 65; *Doe* d. *Green* v. *Fidler*, Peake, Ad. Ca. 33; *Browne* v. *Warner*, 14 Ves. 35; *Chapman* v. *Towner*, 6 Mees. & Wels. 100; *Jones* v. *Reynolds*, 1 Queen's B. Rep. 506; 1 Gale & Dav. 62; *Doe* d. *Morgan* v. *Powell*, 8 Scott, N. R. 687; 7 Man. & Gran. 980. See also cases, Nos. 4, 17, 19, 22, 25, 39, 40, 41, 48, 52, post, p. 136, &c., where the instruments were held to be present leases, and Nos. 1, 9, 16, 20, 29, 33, 34, 35, 42, 50, post, p. 135, &c., where they were held to be merely agreements, the terms of holding in all of which were mentioned.

(*a*) *Doe* d. *Morgan* v. *Powell*, 8 Scott, N. R. 687; 7 Man. & Gran. 980.

usual covenants," the instrument must be an agreement for a lease merely (*b*); but it has been since held, that, notwithstanding such a clause, the instrument may be sufficiently certain to be an actual lease (*c*).

Instrument to be binding.

Where the instrument has contained a clause to the effect that the instrument shall be binding until a lease is executed, it has in general been held to be an actual lease (*d*). A proviso, giving a right of entry for breach of the terms of holding, seems also to be some slight ground for construing the instrument containing it to be an actual lease (*e*). A clause, giving the landlord power, until a regular lease was executed, to distrain for rent, has been held to be a ground for construing the instrument containing it to be merely an agreement (*f*). Clauses for the tenant to paint every three years, to put the premises into repair (*g*), and to insure the premises (*h*), have been held material to show that the instruments containing them were actual leases. A clause not to commit waste (*i*) does not show an instrument to be a lease, the intention from the other clauses appearing to be to create a mortgage. A clause to enable the tenant to purchase the property, does not appear very material to show the intention of the parties (*k*). An expression that a clause shall be added in the lease for a certain purpose, was held material to show that the instrument was an agreement only (*l*).

Right of Entry.

Distress.

Repairs.

Insurance.

Waste.

Purchase.

Clause to be added.

Acts to be done by Landlord.

Clauses by which certain acts, as procuring additional land, building part of the premises, &c., are to be done by the landlord previous to the commencement of the term, seem material to show the intention of the parties to be to make an agreement for a lease merely (*m*). But clauses by which the tenant is bound to lay out money on the premises

By Tenant.

(*b*) In *Morgan* d. *Dowding* v. *Bissell*, 3 Taunt 65; and per Best, C. J., in *Wright* v. *Trevezant*, 3 Car. & P. 446. See also cases, Nos. 18, 16, 10, 20, 33, 34, post, p. 138, &c., where instruments containing such a clause were held to be agreements only, though not on that account.

(*c*) *Doe* d. *Phillip* v. *Benjamin*, 9 Ad. & El. 644; 1 Per. & Dav. 440; 2 Will. Wol. & Hod. 96; *Alderman* v. *Neate*, 4 Mees. & Wels. 704; 1 Horn. & Hurl. 369. See also cases, Nos. 17, 19, 22, 39, 41, post, p. 138, &c., where such clauses were not objected to.

(*d*) *Doe* d. *Walker* v. *Groves*, 15 East, 244; *Pinero* v. *Judson*, 6 Bing. 206; 3 Moore & Pay. 497; *Poole* v. *Bentley*, 12 East, 168; 2 Campb. 286; *Hancock* v. *Caffyn*, 8 Bing. 358; 1 Moore & Scott, 521; *Wilson* v. *Chisholm*, 4 Car. & Pay. 474. Contrà, *Perring* v. *Brook*, 1 Mood. & Rob. 510; 7 Car. & Pay. 360.

(*e*) *Doe* d. *Green* v. *Fidler*, Peake, Ad. Ca. 33; *Perring* v. *Brook*, 1 Mood. & Rob. 510; 7 Car. & Pay. 360; *Doe* d. *Walker* v. *Groves*, 15 East, 244; *Pinero* v. *Judson*, 6 Bing. 206; 3 Moore & Pay. 497. See also cases, Nos. 17, 19, 20, post, p. 138.

(*f*) *Bicknell* v. *Hood*, 5 Mees. & Wels. 104; 2 Horn. & Hurl. 86; *Doe* d. *Bailey* v. *Foster*, 3 Com. B. Rep. 215. But see *Hancock* v. *Caffyn*, 8 Bing. 358; 1 Moore & Scott, 521.

(*g*) *Pinero* v. *Judson*, 6 Bing. 206; 3 Moore & Pay. 497; *Doe* d. *Pearson* v. *Ries*, 8 Bing. 178; 1 Moore & Scott, 259.

(*h*) *Doe* d. *Pearson* v. *Ries*, 8 Bing. 178; 1 Moore & Scott, 259.

(*i*) *Evans* v. *Thomas*, Cro. Jac. 172.

(*k*) *Dunk* v. *Hunter*, 5 Barn. & Ald. 322; *Alderman* v. *Neate*, 4 Mees. & Wels. 704; 1 Horn. & Hurl. 369; *Chapman* v. *Towner*, 6 Mees. & Wels. 100.

(*l*) *Doe* d. *Bromfield* v. *Smith*, 6 East, 530; 2 Smith, 570. See also *Dunk* v. *Hunter*, 5 Barn. & Ald. 327; and *Curling* v. *Mills*, 6 Man. & Gran. 173; 7 Scott, N. R. 709.

(*m*) *Doe* d. *Jackson* v. *Ashburner*, 5 Term Rep. 163; *Staniforth* v. *Fox*, 7 Bing. 590; 5 Moore & Pay. 589; *Hayward* v. *Haswell*, 6 Ad. & El. 265; 1 Nev. & Per. 411; Will. Wol. & Dav. 158; *Rawson* v. *Eicke*, 7 Ad. & El. 451; 2 Nev. & Per. 423; Will. Wol. & Dav. 675; *John* v. *Jenkins*, 1 Cr. & Mees. 227; 3 Tyr. 170; *Gore* v. *Lloyd*, 12 Mees. & Wels. 463; *Doe* d. *Wood* v. *Clarke*, 7 Queen's B. Rep. 211.

immediately, tend to show the intention to have been to make an actual lease (*n*). But notwithstanding a clause binding the tenant to commence sinking a pit before a certain day, the instrument was held to be an agreement only (*o*). So notwithstanding a clause that upon the tenant putting the premises in repair a lease would be granted, it was held an agreement merely (*p*). A clause that the tenant on entry is to pay a sum of money, seems inconsistent with an actual demise (*q*). An unperformed condition annexed to the agreement will prevent the instrument from being an actual demise (*r*). So a proviso that certain things be done on a plan to be settled (*s*).

Payment of Money.

Condition.

Immediate Possession.

If it appears that the tenant is to have immediate possession of the premises, it will be a ground, though not a conclusive one, for supposing the intention of the parties to have been to create an actual lease (*t*). A considerable interval between the time of making the instrument and the time when it is to commence taking effect, is a ground for construing it to be an agreement for a lease only (*u*): even though the tenant is to have immediate possession (*x*). The mere fact of the tenant being in possession at the time of the execution of the instrument does not appear ever to have been relied on as a means of arriving at the intention of the parties (*y*). The landlord not having power at the time of the execution of the instrument to create a lease has been alone held sufficient ground for deciding it to be an agreement merely (*z*). Where the effect of holding an instrument relating to some copyhold land to be an actual lease, would have been to cause a forfeiture, against which the parties had provided by a particular

Interval before Term commences.

Power to demise.

Forfeiture.

(*n*) *Poole* v. *Bentley*, 12 East, 168; 2 Campb. 286; *Pinero* v. *Judson*, 3 M. & Pay. 497; 6 Bing. 206; *Doe* d. *Pearson* v. *Ries*, 1 M. & Scott, 259; 8 Bing. 178; but see *Alexander* v. *Bonnin*, 4 Bing. N. C. 799; 6 Scott, 611; 1 Arn. 337; *Chapman* v. *Towner*, 6 Mees. & Wels. 100; *Curling* v. *Mills*, 6 Man. & Gran. 173; 7 Scott, N. R. 709; *Tarte* v. *Darby*, 15 Mees. & Wels. 601.

(*o*) *Doe* d. *Morgan* v. *Powell*, 8 Scott, N. R. 687; 7 Man. & Gran. 980.

(*p*) *Doe* d. *Bailey* v. *Foster*, 3 Com. B. Rep. 215.

(*q*) *Dunk* v. *Hunter*, 5 Barn. & Ald. 322; *Chapman* v. *Bluck*, 4 Bing. N. C. 187; 5 Scott, 515; 1 Arn. 27. And see *Brasher* v. *Jackson*, 6 Mees. & Wels. 549.

(*r*) *Chapman* v. *Bluck*, 4 Bing. N. C. 187; 5 Scott, 515; 1 Arn. 27. See also *Doe* d. *Bailey* v. *Foster*, 3 Com. B. Rep. 215; but see *Doe* d. *Green* v. *Fidler*, Peake, Ad. Ca. 33.

(*s*) *Doe* d. *Wood* v. *Clarke*, 7 Queen's B. Rep. 211.

(*t*) *Tempest* v. *Rawling*, 13 East, 18; *Colley* v. *Streeton*, 3 Dowl. & Ryl. 522; *Poole* v. *Bentley*, 12 East, 168; 2 Campb. 286; *Hancock* v. *Caffyn*, 1 M. & Scott, 521; 8 Bing. 358; *Goodtitle* d. *Estwick* v. *Way*, 1 Term Rep. 735; *Bicknell* v. *Hood*, 5 Mees. & Wels. 104; 2 Horn. & Hurl. 86; *Alexander* v. *Bonnin*, 4 Bing. N. C. 799; 6 Scott, 311; 1 Arn. 337; *Dunk* v. *Hunter*, 5 B. & Ald. 322; *Tisdale* v. *Essex*, 3 Bulst. 204; Hob. 34; Moor, 861; 1 Roll. Rep. 397; 1 Brown. & G. 23; *Doe* d. *Walker* v. *Groves*, 15 East, 244; *Brashier* v. *Jackson*, 6 Mees. & Wels. 549; *Doe* d. *Pierson* v. *Ries*, 8 Bing. 178; 1 M. & Scott, 259; *Chapman* v. *Bluck*, 4 Bing. N. C. 187; 5 Scott, 515; 1 Arn. 27; *Curling* v. *Mills*, 7 Scott, N. R. 709; 6 Man. & G. 173; *Tarte* v. *Darby*, 15 Mees. & Wels. 601; *Doe* d. *Morgan* v. *Powell*, 7 Man. & G. 980; 8 Scott, N. R. 687.

(*u*) *Doe* d. *Jackson* v. *Ashburner*, 5 Term Rep. 163; *Tempest* v. *Rawling*, 13 East, 18; *Jones* v. *Reynolds*, 1 Queen's B. Rep. 506; 1 Gale & Dav. 62. See also cases, Nos. 11, 19, 49, 50, post, p. 137, &c.

(*x*) *Colley* v. *Streeton*, 3 Dowl. & Ry. 522.

(*y*) See cases, Nos. 31, 20, 24, 50, post, p. 141, &c.

(*z*) *Hayward* v. *Haswell*, 6 Ad. & Ell. 265; 1 Nev. & Per. 411, Will. Wol. & Dav. 158; *Tisdale* v. *Essex*, 3 Bulst. 204; *Doe* d. *Jackson* v. *Ashburner*, 5 Term Rep. 163. See also *Doe* d. *Coore* v. *Clare*, 2 Term Rep. 739; but see *Barry* v. *Nugent*, 5 Term Rep. 165, n.; 3 Dougl. 179.

clause, it was held to be an agreement merely (*a*); but in another case the court was inclined to hold an instrument relating to copyhold land to be an actual lease, though it would cause a forfeiture (*b*). If the instrument is signed by the tenant only, it cannot be held to be an actual lease (*c*); but the mere absence of words binding the landlord in the body of the instrument, seems immaterial, if it is signed by him (*d*). An instrument by way of mortgage has been held not to be an actual lease (*e*). The absence of the general forms of a lease was in one case relied on partly as showing that the instrument was an agreement merely (*f*). An instrument purporting to be a lease of an *incorporeal* hereditament, but without seal, has been held not to be a lease (*g*). The amount of stamp imposed on the instrument at the time of executing has been held to be some indication of the intention of the parties (*h*).

Signature.

Mortgage.

General Forms.

Incorporeal Hereditaments.

Stamp.

To enable the reader to form a more correct judgment in the application of the rules above laid down, it will be best to state briefly the substance of the cases on the point (*i*).

Cases of the Construction of Instruments.

(1.) An instrument containing a proviso that it shall not operate as a lease or actual demise, is an agreement only, though it seems to contain words of present demise, with clauses to show an actual demise (*k*).

(2.) A lease made before the passing of the Statute of Frauds, in these words, "I will you shall have a lease for twenty-one years of my lands in *D.*, paying ten shillings yearly rent; make a lease in writing, and I will sign it;" was held to be a perfect demise, as the intention of the parties was sufficiently expressed (*l*).

(3.) Where by articles indented and under seal, it was covenanted between the parties that *A.* "doth let" certain lands for a certain term, to begin at the feast of St. Michael next following, provided that *B.* paid a certain rent; and also the said parties covenanted that a lease should be made and sealed according to the effect of the articles upon

(*a*) *Doe* d. *Coore* v. *Clare*, 2 Term Rep. 739. See also *Lady Montague's case*, Cro. Jac. 301; and *Doe* d. *Bailey* v. *Foster*, 3 Com. B. Rep. 215.

(*b*) *Richards* v. *Sely*, 3 Keb. 638; 2 Mod. 80; *Rose* v. *Poulton*, 2 B. & Adol. 828; Com. Dig. *Covenant*, (F).

(*c*) *Clayton* v. *Burtenshaw*, 5 Barn. & Cress. 41; 7 Dowl. & Ry. 800; *Eagleton* v. *Gutteridge*, 11 Mees. & Wels. 465; 2 Dowl. N. S. 1053; *Doe* d. *Marlow* v. *Wiggins*, 4 Queen's B. Rep. 367; 3 Gale & Dav. 504.

(*d*) *Wright* v. *Trevesant*, 3 Car. & Pay. 441; Mood. & Malk. 231. See also *Chapman* v. *Bluck*, 4 Bing. N. C. 187; 5 Scott, 515; 1 Arn. 27; and *Doe* d. *Marlow* v. *Wiggins*, 4 Queen's B. Rep. 367; 3 Gale & Dav. 504.

(*e*) *Evans* v. *Thomas*, Cro. Jac. 172; but see *Richards* v. *Sely*, 3 Keb. 638; 2 Mod. 80.

(*f*) In *Dunk* v. *Hunter*, 5 Bar. & Ald. 322; but see *Doe* d. *Green* v. *Fidler*, Peake, Ad. Ca. 33.

(*g*) *Mayfield* v. *Robinson*, 7 Queen's B. Rep. 486; *Doe* d. *Morgan* v. *Powell*, 7 Man. & G. 980.

(*h*) *Doe* d. *Coore* v. *Clare*, 2 Term Rep. 739; *Doe* d. *Green* v. *Fidler*, Peake, Ad. Ca. 33; but see *Morgan* d. *Dowding* v. *Bissel*, 3 Taunt. 71. It is, however, on an objection to the sufficiency of the stamp that many of the cases on this point have arisen.

(*i*) It is impossible to make a good arrangement of these cases, owing to the variety of the precise grounds on which some have been decided, and the absence of statement of any ground for the decision of others.

(*k*) *Perring* v. *Brook*, 1 Mood. & Rob. 510; 7 Car. & Pay. 360.

(*l*) *Maldon's case*, Cro. Eliz. 33.

the feast of All Saints: it was held to be a good present demise, and that what followed was only for further assurance (*m*).

(4.) Where there was a covenant that *A.* should hold and enjoy certain lands, it was held to be a lease, though there was also a covenant to make a good and perfect demise of the premises, as security for the quiet enjoyment thereof, as his counsel should think fit (*n*).

(5.) Where one made a lease for life, and it was provided, that if the lessee died within sixty years, then his executors and assigns should enjoy the land in his right for so many years as should be behind of the sixty years from the date of the lease: it was held to be only a covenant, and no lease (*o*).

(6.) *A.* covenanted to convey lands by fine or other assurance to *B.*, with a proviso that if *A.* payed 100*l.* at the end of thirteen years, then he might re-enter, and that *B.* should enjoy the land until the end of the thirteen years, and after, for ever, if the 100*l.* were unpaid. *B.* covenanted to pay an annual rent, and that he would not commit waste during the thirteen years: held, that this was not a lease, but merely a covenant (*p*).

(7.) Where there was a deed that a person should "hold and enjoy some copyhold premises from seven years to seven years for and during the term of forty-nine years," with a proviso "that it should be void on payment of so much money," though intended only as a collateral security, the court inclined to hold it a present lease, though it made a forfeiture (*q*).

(8.) A lease of a copyhold for a year, warranted by the custom, and so on from year to year during ten years, is a good lease for ten years; but a lease for a year, with a covenant that the lessee shall enjoy the land from year to year during ten years, is not (*r*).

(9.) An instrument in respect to copyhold premises, on an agreement stamp, reciting that *A.*, in case he should be entitled to certain copyhold premises on the death of *B.*, would immediately demise the same to *C.*, declaring "that he did agree to demise and let the same" for twenty-one years, with a subsequent covenant to procure a licence to let from the lord, operates only as an agreement for a lease (*s*).

(10.) An instrument made on the 23rd of June, between *A.* the agent of the churchwardens of a parish, and *B.*, whereby *A.* agreed, provided the licence of the lord of the manor could be obtained, and upon *B.* putting the premises in repair, that the churchwardens shall grant and execute a lease of copyhold premises, to hold for twenty-one years from Midsummer next, under certain covenants, and all other

(*m*) *Harrington* v. *Wise*, Cro. Eliz. 486; Noy, 57; Moor, 459.

(*n*) *Tisdale* v. *Essex*, 3 Bulst. 204: Hob. 34; Moor, 861; 1 Rol. Rep. 397; 1 Brownl. & G. 23.

(*o*) *Parker* v. *Gravenor*, Dyer, 150 a; Bac. Abr. tit. *Leases*, (K).

(*p*) *Evans* v. *Thomas*, Cro. Jac. 172.

(*q*) *Richards* v. *Sely*, 3 Keb. 638; 2 Mod. 80.

(*r*) *Lady Montague's case*, Cro. Jac. 301.

(*s*) *Doe* d. *Coore* v. *Clare*, 2 Term Rep. 739.

usual covenants, and whereby *B.* agreed to execute a lease, and that until granted the rent should be recoverable by distress or otherwise, as if it had been executed, is an agreement only (*t*).

(11.) Where the lessor by articles covenanted, granted and agreed with the lessee that he should have and enjoy lands for so many years; these words were held to amount to a lease (*u*).

(12.) An agreement made in March, 1783, "that *B.* shall enjoy, and I engage to give him a lease of, &c., from Whitsuntide, 1784," at a fixed rent, with an engagement on the part of the landlord to buy an additional piece of land to be joined to the premises, is merely an agreement (*x*).

(13.) An instrument in this form—"*B.* agrees to become the tenant of *G.* farm, *at the customary time of entry*, under the following conditions, viz. that the sum of 260*l.* annual rent shall be paid *at the usual time* for the farm *as agreed upon*, and *A.* agrees to lay out in improvements and alterations, agreeably to a plan produced, a sum not exceeding 200*l.*, with the understanding that spars for rafters shall be found from the estate, cartage of all materials to be done by *B.*," and signed by both, is an agreement only (*y*).

(14.) An instrument with a date, commencing—"Proposals for letting the farms *M.* and *G.*," then stating generally the terms, but not naming the time when the lease was to commence, and concluding—"agreed to the above rent, provided the house and buildings are put into tenantable repair on a plan to be mutually determined upon and finally settled within one month from the above date," and signed by both parties, after which the tenant entered, is not a present demise (*z*).

(15.) Where articles were drawn between *A.* and *B.* in this manner: Imprimis, *A.* doth demise such a close to *B.* to have it for forty years, and a rent reserved, with a clause of distress, &c.; and afterwards there was written on the same paper a memorandum that the articles were to be ordered by counsel of both parties, according to the due form of law: here, because the intent of both parties appeared by that memorandum, and by a lease actually drawn by counsel, but never sealed (upon some disagreement between the parties), it was held that the articles were not a sufficient lease (*a*).

(16.) A paper containing words of present contract, with an agreement that the lessee shall take possession immediately, and that a lease shall be executed before a certain day, was held, on the authority of the previous case, to be an agreement for a lease only (*b*).

(*t*) *Doe* d. *Bailey* v. *Foster*, 3 Com. B. Rep. 215.

(*u*) *Drake* v. *Munday*, Cro. Car. 207; W. Jones, 231.

(*x*) *Doe* d. *Jackson* v. *Ashburner*, 5 Term Rep. 163.

(*y*) *Gore* v. *Lloyd*, 12 Mees. & Wels. 463.

(*z*) *Doe* d. *Wood* v. *Clarke*, 7 Queen's B. Rep. 211.

(*a*) *Sturgion* v. *Painter*, Bac. Abr. tit. *Leases*, (K); Noy, 128.

(*b*) *Goodtitle* d. *Estwicke* v. *Way*, 1 Term Rep. 735.

(17.) Where *A.* agreed with all necessary speed to grant a lease, and did thereby "let and set" to *B.* all that, &c., to hold for twenty-one years, at a certain annual rent: provided that the lease should be void for non-payment of rent, alienation, &c., and that it should contain usual covenants and certain special ones, in one of which the words "this demise" occurred: it was held, after fourteen years' occupation and acceptance of rent, to be a present demise, with an agreement to execute a more perfect lease in future (*c*).

(18.) By a document, not being a deed, dated 2nd February, *A.* agreed to let and grant a lease to *B.* of the coals, &c. under certain land, with all mines thereunder, at certain royalties per ton, for the term of seventy years from the day of the date of the document; so much royalties as will amount to 50*l.* a year to be paid during the term, which rent is to commence in a year from the time the pit is sunk through the four-foot coal; with power to work the minerals and to deposit rubbish, as is usually granted in leases of a similar nature; nevertheless *B.*, on giving six months' notice, may abandon and quit the same: and *B.* binds himself to commence sinking a pit before the 24th June next: *A.* engages that he has not encumbered the estate to prevent him entering into a lease on the above terms and agreement, which lease is to contain the usual covenants, and as entered into by a third party: *A.* engages to sign a lease upon the said terms as soon as it can be prepared. There was no clause directly giving *B.* the right of access, nor compelling him to sink the pit; and in a subsequent letter *A.* treated the document as a lease: held to be an agreement only (*d*).

(19.) *A.*, being wrongfully dispossessed of premises, executed a deed to the following effect: "Be it remembered that *A.* hath let and by, &c. doth demise to *B.* (the premises) as now held by *W. F.* for twenty-one years, to commence on 1st May or 1st November, whichever first happens after *A.* recovers the said lands from, &c., the said *B.* covenanting on the foregoing conditions to pay to *A.* yearly the sum, &c.; leases with powers of distress, and clauses of re-entry, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as the said *A.* recovers the lands," &c.: it was held that this operated as a present demise (*e*).

(20.) An instrument whereby a person agrees to let certain premises from a day past at a specified rent, containing the terms of the tenancy, and stipulating that the lease should be granted immediately after the supposed lessor should obtain his lease of the same premises, under an agreement previously entered into for that purpose, is only an agreement for a lease (*f*).

(*c*) *Baxter* d. *Abrahall* v. *Brown*, 2 W. Black. 973.

(*d*) *Doe* d. *Morgan* v. *Powell*, 8 Scott, N. R. 687; 7 Man. & G. 980.

(*e*) *Barry* v. *Nugent*, 5 Term Rep. 165, n.; 3 Dougl. 179.

(*f*) *Hayward* v. *Haswell*, 6 Ad. & El. 265; Will. Wol. & Dav. 158; 1 Nev. & Per. 411.

(21.) An agreement on a lease stamp, whereby *A.* agreed to let to *B.* certain premises from Michaelmas next, upon condition that *B.* should paint and whitewash the premises, repair the plastering, and glaze the windows, was held to be an actnal demise (*g*).

(22.) *B.*, in February, wrote to *A.* saying, "You having this day agreed to let, I beg to say that I will take S—— farm for 100*l.* the first year, and after for 110*l.* per annum, payable quarterly, the rent to commence from Michaelmas last, and to be free, &c.; I will engage to take it in the usual way, and to pay the amount of valuation on taking possession, and I will take a lease of twenty-one years at my expense, &c.; to contain the usual covenants, and to be farmed on the four course system, and in the best manner; and the whole subject to your being satisfied as to my responsibility, to ascertain which I refer you to *M.*" *A.* wrote in answer, "*M.*'s letter being satisfactory, I hereby engage to accept you as my tenant, agreeably to the terms of your's." Possession was afterwards given to *B.* on payment of a sum on account of the valuation, and he subsequently consented to pay his rent and to a distress put in; held there was an actual demise (*h*).

(23.) An agreement, by which *A.* agreed to let her house to *B.* "during her life, supposing it to be occupied by *B.*, or a tenant agreeable to *A.*," and containing a stipulation that "a clause was to be added in the lease" for a particular purpose: was held to be only an agreement for a lease, the stipulation clearly showing it to be executory (*i*).

(24.) Where *A.* agreed "that he would by indenture demise to *B.* a house for fourteen years from the 25th day of December then last past, at the yearly rent of 40*l.* payable quarterly; but if *B.* should pay *A.* the sum of 40*l.* before the expiration of the first quarter, which would be at Lady-day then next, in that case the rent should be reduced to the rate of 33*l.* per annum, payable quarterly," it was held, that this was no demise (*k*).

(25.) An instrument under seal, containing no words of present demise, by which *A.* in consideration of the rents, covenants and agreements therein reserved and contained, covenanted to grant and execute a lease of a house, on request of *B.*, habendum for a term of twenty-one years, from a day past, containing a covenant for *B.* to lay out a certain sum of money within the first year, and that the lease should contain a covenant for payment of rent and other covenants; and also a covenant on the part of *A.* for the quiet enjoyment of the premises thereby demised; and also in the event of a lease

(*g*) *Doe* d. *Green* v. *Fidler*, Peake, Ad. Ca. 33.

(*h*) *Chapman* v. *Black*, 4 Bing. N. C. 187; 5 Scott, 515; 1 Arn. 27.

(*i*) *Doe* d. *Bromfield* v. *Smith*, 6 East, 530; 2 Smith, 570; and see 2 Term Rep. 436.

(*k*) *Hegan* v. *Johnson*, 2 Taunt. 148.

being executed, that there should be a proviso empowering *B.* to determine the said tenancy, or the said lease, is a present demise (*l*).

(26.) Where the terms of an instrument were, that one thereby agreed to let, and the other agreed to take lands for sixty-one years, at a certain rent, for building, and the tenant agreed to lay out 2,000*l.*, within four years, in building five or more houses, and when five houses were covered in, the landlord agreed to grant a lease or leases (which might be for the more convenient underletting or assignment of the leases), but that agreement was to be considered binding till one fully prepared could be produced; the instrument was held to operate as a present lease (*m*).

(27.) An agreement, entered into on the 21st of September, in these words—"*A.* agrees to let and *B.* to take a house in its unfinished state for the term of sixty years, being the whole term that *A.* has the same leased to him, at the rent of 525*l.* payable quarterly, the first payment to be made for the half-quarter at Christmas next, *B.* to insure the premises, and to have the benefit of the insurance lately paid; a lease and counterpart to be prepared at the expense of *B.*, and to contain all the clauses, covenants and agreements *A.* entered into in the lease granted to him;" where possession was given immediately afterwards to the tenant, was held to be a lease (*n*).

(28.) The proprietor of a piece of land agreed to grant leases to the defendant of certain houses he was about to build on the land; defendant to hold the land for eighty years; reserving to the landlord a right of way over the streets between the houses; defendant entered, paid rent and built some houses, and obtained the leases as they were built: held that there was only a covenant to demise as to the part to be built upon, but that after entering and payment of rent, the defendant, as to the streets, was tenant from year to year (*o*).

(29.) *A.* by an instrument agreed to execute to *B.* a lease of premises for seven years from the 24th of June next, at a yearly rent of 105*l.*, payable half-yearly, the lease to contain covenants to pay rent and repair; and *B.* agreed to accept the lease and execute a counterpart, and when a certain part of the premises was tenanted to pay an additional rent of 15*l.*; *A.* also agreed to do certain work before the 24th of June; and it was further agreed that by the lease to be granted the rent should be 120*l.*, and that by a separate deed *A.* should return to *B.* 15*l.* out of that rent, and that *B.* should prepare the agreement at his own cost, to be approved by *A.*'s solicitor: held, that this instrument was an agreement for a lease merely (*p*).

(30.) An agreement in the following words was considered an actual

(*l*) *Curling* v. *Mills*, 6 Man. & Gran. 173; 7 Scott, N. R. 709.

(*m*) *Poole* v. *Bentley*, 12 East, 168; 2 Campb. 286.

(*n*) *Doe* d. *Pearson* v. *Ries*, 8 Bing. 178; 1 Moore & Scott, 259.

(*o*) *Alexander* v. *Bonnin*, 4 Bing. N. C. 799; 6 Scott, 611; 1 Arn. 337.

(*p*) *Rawson* v. *Eicke*, 7 Ad. & El. 451; 2 Nev. & Per. 423; Will. Wol. & Dav. 675.

demise:—" *A.* does this day agree to let to *B.* three cottages for ten years; he further agrees to build a brewhouse and make a cellar, at the rent of 35*l.*; he agrees to pay the ground rent, and has this day received 4*l.* from *B.* in earnest" (*q*).

(31.) *B.*, being yearly tenant in possession, in the middle of a half-year, entered into the following memorandum of agreement with *A.*, his landlord; " *A.* agrees to let the farm of —— to *B.* for the term of fourteen years, determinable at the end of seven years, at the option of either party, upon giving twelve months' previous notice, at and for the yearly rent or sum of 20*l.*, payable half-yearly, without any deduction whatever; a lease to be drawn up on the usual terms; and *B.* agrees to take it upon the said terms:" held, that this was an actual lease (*r*).

(32.) An instrument, whereby *A.* " agrees to let" to *B.* certain premises, excepting three pieces of land, to hold from a day past at a specific rent, under all usual covenants and agreements as between landlord and tenant where the premises are situate, with a stipulation for certain acts to be done by both parties, and a clause to allow a proportionate part of rent for the pieces of land excepted, is an agreement only (*s*).

(32 a). An instrument not under seal, whereby *A.* " agrees to hire" of *B.* cottages from a certain day, at a yearly rent, payable quarterly, free from all deductions, or if a quarter's rent be in arrear for fourteen days to quit on notice, and on non-compliance with such notice *B.*'s agent to resume possession, *A.* to preserve the cottages from damage, and to deliver them up in good condition, together with all fixtures, is an agreement, and not a lease (*t*).

(33.) An agreement executed on the 24th November, 1807, setting forth the conditions of letting a farm, and the regulations to be observed by the tenant, that the term was to be from year to year, the lands to be entered upon on the 3rd February, 1808, and the housing on the 12th May, and that a lease was to be made upon these conditions, with all the usual covenants; at the foot of which the tenant wrote, " I agree to take lot 1 (the premises in question), at the rent, &c., subject to the covenants," is an agreement for a lease merely (*u*).

(34.) An instrument, not under seal, whereby *A.* agreed to let, and *B.* to take and rent certain premises, to hold thenceforth for a term of thirty-four years, determinable by either party, on giving twelve months' notice, at the end of the first seven, fourteen or twenty-eight years, at a certain yearly rent, clear of all taxes; and B. bound himself to keep the premises in tenantable repair during the term; with a

(*q*) *Staniforth* v. *Fox*, 7 Bing. 590; 5 Moore & Pay. 589.

(*r*) *Doe* d. *Phillip* v. *Benjamin*, 9 Ad. & El. 644; 1 Per. & Dav. 440; 2 Will. Wol. & Hod. 96.

(*s*) *Morgan* d. *Dowding* v. *Bissell*, 3 Taunt. 65.

(*t*) *Glen* v. *Dungly*, 4 Exch. Rep. 61.

(*u*) *Tempest* v. *Rawling*, 13 East, 18.

further agreement on the part of *A.* to grant a lease thereof on the like terms, with the usual covenants, within three months, was held not to be a lease (*x*).

(35.) An instrument, made on the 2nd of May, whereby *A.* agreed that he would make a good and sufficient lease by indenture of certain premises to *B.* for the term of twenty-one years, to commence the following Michaelmas, to hold at the yearly rent of 45*l.*, payable quarterly, on the four most usual days, the first payment to be on the 29th of September next, to be entered on immediately by *B.*, he paying on the day of the agreement 25*l.* to *A.*; and whereby it was agreed that there should be in the lease covenants for, &c., and that *B.* would accept such lease and execute a counterpart, is an agreement for a lease only (*y*).

(36.) An instrument, made on the 24th of April, by which *A.* agrees to let and *B.* to take a house from the 24th of June next, for twenty-one years, determinable at seven and fourteen years; that the lease to be granted is to contain a covenant by *B.* for the payment of the rent of 35*l.* payable quarterly, to lay out 100*l.* within twelve months on the premises, to keep them in repair, and all other usual covenants in leases of houses in the same town, and that *B.* shall execute a counterpart of lease when tendered to him, is an agreement for a lease only (*z*).

(37.) A written instrument, dated on the 25th of February, by which a person agreed to let premises, to hold them from the 25th of March next for ninety-nine years, at a certain yearly rent, payable half-yearly, containing a stipulation for the execution of a lease before a certain day, and also specific agreements for payment of the rent and for repairing, operates as a present demise (*a*).

(38.) An agreement for a lease, with stipulations for the lessee to commence with laying out a considerable sum on the premises, the lease to contain certain specified covenants, "and in the meantime, and until such lease shall be executed, to pay rent, and to hold the same premises, subject to the covenants above mentioned," was held to amount to an actual demise (*b*).

(39.) An instrument, dated in March, 1798, whereby the landlord agreed to let, and also upon demand to execute to the tenant a lease, of a farm; and the tenant agreed to take, and upon demand to execute a counterpart of, a lease of the said farm, from the 5th of April, 1798, for fifteen years, under a certain yearly rent; which said lease was to contain the usual covenants, and an agreement for re-entry in case of non-payment of rent, and also the further covenants, &c.; and that

(*x*) *Colley* v. *Streeton*, 2 Barn. & Cress. 273; 3 Dowl. & Ryl. 522, *S. C.* (not *S. P.*); and see *Hamerton* v. *Stead*, 3 Barn. & Cres. 478; 5 Dowl. & Ryl. 206.

(*y*) *Brashier* v. *Jackson*, 6 Mees. & Wels. 549.

(*z*) *Chapman* v. *Towner*, 6 Mees. & Wels. 100.

(*a*) *Alderman* v. *Neate*, 4 Mees. & Wels. 704; 1 Horn. & Hurl. 369.

(*b*) *Pinero* v. *Judson*, 6 Bing. 206; 3 Moore & Pay. 497.

the agreement was to bind until the said lease was made and executed, &c.; under which agreement the tenant entered on the 5th of April, 1798; was held to be a present demise (*c*).

(40.) An agreement by which *A.* agrees to let premises to *B.* on lease for a certain term, at a certain rent, "subject to the stipulations and covenants in the original lease under which he holds," and "to keep the stipulations in every respect until the said lease shall be granted, which lease, *when required* by *B.*, is to be prepared by *A.*'s solicitor at *B.*'s expense," is an actual lease (*d*).

(41.) Defendant held premises under a lease from *J.* at a certain rent, and entered into an agreement with another person for the sale of the household furniture for a certain sum, to be paid by instalments, covenanting, on payment of the whole, to demise the premises for twenty-five years, the lease to contain the like covenants on the lessee's part as were contained in the lease from *J.*: and the agreement also contained a covenant that the lessee should in the meantime, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him in case the lease were actually granted, with a power of distress for non-payment of the rent: and the lessee was to be let into immediate possession; the court inclined to hold there was an actual demise (*e*).

(42.) An instrument by which it was agreed to grant a lease of premises, to hold them for a term from a future day, yielding certain rent, payable quarterly, and which indenture of lease was to contain certain covenants, and that until the lease was granted the lessor might distrain for any part of the rent which might become due, is an agreement only (*f*).

(43.) Where there was a memorandum of agreement whereby *A.* agreed to let a house on lease, with a purchasing clause, for twenty-one years, at the net clear rent of 63*l.* per annum; *B.* to enter at any time on or before a particular day, paying the sum of 50*l.* on entry; it was held only to amount to an agreement for a future lease (*g*).

(44.) An instrument without seal, purporting to lease an incorporeal hereditament, a ferry, which can only pass by deed, was held not to require a lease stamp (*h*).

(45.) An instrument, by which *B.* agreed to take of *A.* certain land on certain terms, signed by *B.* alone, there being nothing in it in terms to bind *A.*, is not a lease (*i*).

(46.) Where *B.* by an agreement under seal, signed by *B.* only,

(*c*) *Doe* d. *Walker* v. *Groves*, 15 East, 244.
(*d*) *Wilson* v. *Chisholm*, 4 Car. & Pay. 474.
(*e*) *Hancock* v. *Caffyn*, 8 Bing. 358; 1 Moore & Scott, 521.
(*f*) *Bickwell* v. *Hood*, 5 Mees. & Wels. 104; 2 Horn. & Hurl. 86.
(*g*) *Dunk* v. *Hunter*, 5 Barn. & Ald. 322.
(*h*) *Mayfield* v. *Robinson*, 7 Queen's B. Rep. 486; see also *Doe* d. *Morgan* v. *Powell*, 8 Scott, N. R. 687; 7 Man. & Gran. 980.
(*i*) *Doe* d. *Marlow* v. *Wiggins*, 4 Queen's B. Rep. 367; 3 Gale & Dav. 504.

agreed to take and hire of *A.* a certain house and premises at a certain annual rent; but the instrument contained no words of demise, and there was nothing to show when the instrument was to commence or determine: it was held to be no more than an agreement for a lease (*k*).

(47.) An agreement signed by *A.* and *B.*, by which the latter "agreed to pay" to the former "140*l.* a year, in quarterly payments," for a house, garden, &c., for the term of seven, fourteen or twenty-one years, at the option of the tenant, the rent to commence from the 1st of January, &c., was held to be an actual lease (*l*).

(48.) An instrument whereby *A.* agreed to let premises to *B.* for seven, fourteen or twenty-one years (commencing at Christmas-day then next), at the option of *B.*, at the yearly rent of 24*l.*, payable quarterly, the first payment to be made at the ensuing Lady-day, and whereby *B.* stipulated, if he should be desirous of putting an end to the agreement at either of the terms before specified, to give six months' notice, and that he *B.* should pay all the expenses of preparing a lease for either of the terms above stated, is an actual lease (*m*).

(49.) A document by which *A.* agreed to grant, and *B.* to take a lease of certain premises for a certain term, at a certain yearly rent, was considered merely as an agreement for a lease, although no lease was ever prepared, and *B.* occupied during the whole term under such document, and paid the rent therein specified (*n*).

(50.) Where a landlord and tenant, between whom there was a subsisting tenancy, agreed in writing for a letting upon different terms, the amount of rent to be settled by valuation, and the tenant to find sureties; and the amount was not settled, nor were the sureties given; it was held that the instrument, although it contained words of present demise, did not operate as a lease, nor alter the terms of the existing tenancy (*o*). Where on the letting of land to a tenant a memorandum was drawn up, the terms of which were, that he should on a future day bring a surety and sign the agreement, neither of which he ever did; it was held, that the memorandum was a mere unaccepted proposal, and did not operate as a lease (*p*).

(51.) An instrument in these terms, "I do hereby acknowledge that I am indebted to *A.*, my landlord, in the sum of 22*l.* for arrears of rent for the cottage now in my occupation, and do hereby undertake to pay to the said *A.* the sum of 8*l.* per annum for the said cottage and premises, by quarterly payments, from Michaelmas last," signed by *B.* alone, is not a lease, but is an acknowledgment of tenancy (*q*).

(*k*) *Clayton* v. *Burtenshaw*, 5 Barn. & Cress. 41; 7 Dowl. & Ryl. 800.

(*l*) *Wright* v. *Trevezant*, 3 Car. & Pay. 441; Mood. & Malk. 231.

(*m*) *Warman* v. *Faithful*, 5 Barn. & Adol. 1042; 3 Nev. & Man. 137.

(*n*) *Phillips* v. *Hartley*, 3 Car. & Pay. 121.

(*o*) *John* v. *Jenkins*, 1 Cromp. & Mees. 227; 3 Tyr. 170.

(*p*) *Doe* d. *Bingham* v. *Cartwright*, 3 B. & Ald. 326.

(*q*) *Eagleton* v. *Gutteridge*, 11 Mees. & Wels. 465; 2 Dowl. N. S. 1053.

(52.) *A.* by a lease demised certain premises to *J. W.*, and then by another instrument, which referred to the lease, and recited that it was abandoned, let the same premises to *B.* at a certain rent, upon the conditions contained in the lease, and they bound themselves to execute a similar agreement to the one recited and referred to; it was held that the two together amounted to a lease, on which *A.* might distrain (*r*).

(53.) In October *A.*, *B.* and *C.* entered into an agreement, reciting that *C.* was tenant to *A.* of a house at 25*l.* a year rent, and had agreed to underlet it to *B.* immediately for 20*l.* a year until the following Midsummer, at which time *A.* agreed to exonerate *C.* from his tenancy, on his paying all rent up to that time, and to accept *B.* as tenant from that time; it was then agreed that *C.* should let, and *B.* take the premises immediately until the following Midsummer, and that *B.* should do certain repairs, and that *B.* agreed to take of *A.* the premises from the Midsummer next at the rent of 20*l.*, and to give or take six months' notice of giving up the premises: held, that this was a lease by *A.* to *B.* (*s*).

(54.) Where an instrument was intituled "A memorandum of agreement," and stated that "*A.* doth agree to let, and *B.* doth agree to take," certain premises at 40*l.* rent, and it was further agreed that *A.* should not raise the rent or turn out *B.* so long as the rent was duly paid, and he did not expose to sale any article that should be injurious to *A.* in his business, and that in case of removal *B.* should be at liberty to receive the aforesaid sum of 40*l.* of the next tenant *A.* should accept; it was held in equity by Lord Eldon, that the document was an agreement for a lease only (*t*).

(55.) A letter dated the 21st of February, stating, "I shall be happy to take a lease of your iron ore at a royalty of 1*s.* per ton, and I will engage to work the veins of ironstone, limestone, ore and manganese, in such proportions that the average produce of iron shall not exceed the usual average of the common ores, which I believe to be about 40 per cent., the term to be forty years from the 24th of June next, and the sleeping rent 150*l.* per annum: the relative proportion of the iron ores to be ascertained by a competent person:" to which an answer was returned, "I agree to the terms contained in your letter, and shall be ready to grant a lease conformable thereto," the letter and answer together constitute an agreement for a lease only (*u*).

By an instrument between two parties it was agreed that the one should let certain premises to the other for ten years, and the grantor agreed that his mother, who was the tenant for life in possession (he himself being a remainderman), should make the agreement binding;

(*r*) *Pearce* v. *Cheslyn*, 4 Ad. & El. 225; 5 Nev. & Man. 652; 1 Har. & Wol. 768.

(*s*) *Tarte* v. *Darby*, 15 Mees. & Wels. 601.

(*t*) *Browne* v. *Warner*, 14 Ves. 156; and see *Doe* d. *Warner* v. *Browne*, 8 East, 164.

(*u*) *Jones* v. *Reynolds*, 1 Queen's B. Rep. 506; 1 Gale & Dav. 62.

but with a proviso that if she could not, then the agreement should commence and continue in full force for ten years, commencing from the decease of the tenant for life. This instrument is merely an agreement, and not a lease either of a present or of a reversionary interest (*v*).

Sect. 17.—*Leases under Powers.*

(a) *Generally.*

Construction of Powers.

A power to make leases for years is to be liberally construed (*x*). Every power, in the construction of it, is to be taken with such a restriction, that the estate itself, which is subjected to the power, shall not be destroyed by the exercise of it (*y*). The rules for the construction of powers of leasing have been variously laid down by different judges, who have severally declared that they must be construed strictly (*z*), liberally (*a*), indifferently, without leaning to either side (*b*); equitably in favour of the donee (*c*), favourably for the donee (*d*); strictly for the tenant for life, and liberally for the remainderman (*e*). It seems, however, to be agreed that powers must be construed according to the intention of the parties (*f*).

Requisites of leases under powers.

When powers to lease are given, it is usually required that the best rent shall be reserved which can be obtained; that the leases shall be in possession and not in reversion; that all the usual and proper covenants shall be inserted in the leases; and lastly, that there shall be a proviso for re-entry, in case of forfeiture for any breach of the covenants. The first of these requisites will be considered in the subject of reservation of rent (*g*). The others, in their order, will constitute the subject of this section, after first premising a few observations on leases granted under powers generally; with respect to the sort of lease which may be granted; the persons by whom the power may be executed; and the mode of execution (*h*). Powers to lease for lives or years may be executed by a lease, either absolutely for certain lives, or a certain number of years; or conditionally for a

(*v*) *Doe* d. *Hastings* v. *Waters*, 16 Law Times, Q. B., 213.

(*x*) *Right* d. *Bassett* d. *Thomas*, 3 Burr. 1441; 1 Black. 446.

(*y*) Powell on Powers, 407.

(*z*) *Fitzwilliam's case*, 6 Rep. 32.

(*a*) *Right* d. *Bassett* v. *Thomas*, 1 Black. 446; *Berry* v. *White*, or Bridgm. by Bann. 90.

(*b*) *Goodtitle* d. *Clarges* v. *Funucan*, 2 Dougl. 572; *Doe* d. *Earl of Jersey* v. *Smith*, 7 Price, 313, per Park, J.

(*c*) *Ward* v. *Hartpole*, 3 Bligh, P. C. 470, 485.

(*d*) Or. Bridgm. by Bann. 90, 93.

(*e*) *Orby* v. *Mohun*, Gilb. Eq. Rep. 58; and see *Taylor* d. *Atkyns* v. *Horde*, 4 Burr. 60, 125.

(*f*) 1 Platt on Leases, 397, 398, ed. 1847.

(*g*) See post, Book II., Chap. I., Sect. 2, (e).

(*h*) It may be necessary to state, that the rules of law adopted in cases of ecclesiastical leases (ante, p. 14, and post, p. 159), and of leases made by virtue of the statute 32 Hen. VIII. c. 28, as to leases made by tenant in tail (ante, p. 2, and post, p. 160), apply equally to leases made by virtue of powers in settlements; the authorities therefore decided on the former equally apply to the latter; Powell on Powers, 544; *Goodtitle* d. *Clarges* v. *Funucan*, 2 Dougl. 565. See also ante, Chap. I., Sect. 23, p. 38.

number of years determinable upon a life or lives (*i*); thus where one had power to make leases for the lives of three persons, and he made a lease to them for their three lives, and the life of the longer liver of them, it was held to be sufficient within the power; because for three lives generally, and for three lives and the longer liver of them, is all one, since without such words it would have gone to the survivor (*k*): so, a lease to one for three lives, or to three for their lives, is all one; but a power to make a lease for three lives was held not to be well executed by a lease for ninety-nine years, determinable upon three lives: the reason seems to be, that the estates are different, one being a freehold and the other a chattel (*l*). Where an estate, the greater part of which was in lease, either for years certain not exceeding twenty-one, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "who should be entitled to the freehold of the premises or any part thereof, when he should be in the actual possession of the same, or any part thereof, from time to time, by indenture to make leases of all or any part or parts of the demesne lands, whereof he should be in the actual possession as aforesaid, for any term or number of years, not exceeding twenty-one years, or for the life or lives of any one, two or three person or persons; so as no greater estate than for three lives should be at any one time in being in any part of the premises; and so as the ancient yearly rent, &c., was reserved; it was held, first, that the power only authorized either a chattel lease not exceeding twenty-one years, or a freehold lease not exceeding three lives: and that a lease by a tenant for life for ninety-nine years determinable on lives, as it might exceed twenty-one years, was void at law, and was not even good pro tanto for the twenty-one years (*m*). Where by a marriage settlement the husband had the wife's estate for life, with a power to grant leases for twenty-one years, but no longer; and in breach of the power, he granted a lease to *A.* for ninety-nine years, determinable upon lives; and the wife survived him, and conveyed the fee to *B.*; and in the conveyance was recited the lease to *A.*, who was recognized as being then tenant in possession of the estate, at the yearly rent reserved; on an action of ejectment brought by *B.* against the assignee of the lease, it was held that the lease was void, and the recital only matter of description (*n*). Where by a marriage settlement a power was given to the wife, after the death of her husband, to grant leases for twenty-one years, reserving the best rent, &c., it was held that a lease by the wife to a second husband was not a good execution of the

(*i*) *Commons* v. *Marshall* (*in error*), 6 Bro. Parl. Cas. 168.

(*k*) Bac. Abr. tit. *Leases*, (I 11).

(*l*) *Paine's case*, 8 Co. Rep. 69, 70b; *S. P. Rattle* v. *Popham*, 2 Stra. 992; Bac. Abr. tit. *Leases*, (I 11).

(*m*) *Roe* d. *Brune* v. *Prideaux*, 10 East, 158.

(*n*) *Doe* d. *Biggs* v. *White*, 2 Dowl. & Ryl. 716.

power (*o*). A tenant for life, having power to grant building leases for sixty-one years, reserving the best improved ground rent, granted a lease for that term, which was not expressed to be a building lease, but which contained a covenant by the lessee to keep in repair the premises demised (old houses) or such other "house as should be built during the term:" it was held that this was not a building lease within the power: such a lease being granted by tenant for life, who had a bare naked power without any legal interest, is void, and consequently not capable of being confirmed by the remainderman accepting rent (*p*); but by 12 & 13 Vict. c. 26, such acceptance would amount to a confirmation as against the remainderman. So a power to grant leases "for the purpose of new building or effectually repairing a messuage, is not well executed by a lease containing a covenant *effectually to repair*, as it is not equivalent to a covenant *effectually to rebuild and repair* (*q*). Lands held on a lease for lives, renewable for ever, were settled on one for life, with a power for him and all other persons to whom any use was limited, when in actual possession, to demise for any number of lives or years consistent with their respective interests therein, to commence in possession and not in reversion, reserving the best rents without taking any fine: the tenant for life granted a lease at a farm rent for the lives of three persons named, with a covenant that on the failure of any of the lives, the lessor, his heirs and assigns, would, on payment of five pounds as a fine, add to the time and term of the lease another life from time to time for ever; held that this lease was not warranted by the power (*r*). Under a power to a tenant in possession to let all or any part of the premises, so as the usual rents be reserved, a lease of tithes, which had never been let before, was held void (*s*). A lease under a power to lease in possession or reversion, for one life or for two or three lives, or for any term or number of years determinable upon one life or two or three lives, any part of the premises usually so letten, does not authorize a lease at a single rent of premises under the power, together with other premises to which the power does not extend; but joining different lands in one lease which are all under the power, though they had never before been let by a single demise, is not objectionable (*t*). A power to demise lands or any part of them is not well executed by a demise of part with liberty of shooting over the whole (*u*). If a tenant for life make a lease without taking notice of his power, it shall be an execution of his power to make leases; for otherwise the lease

(*o*) *Doe* d. *Hartridge* v. *Gilbert*, 5 Queen's B. Rep. 423; 1 Gale & Mer. 429.

(*p*) *Jones* d. *Cowper* v. *Verney*, Willes, 169.

(*q*) *Doe* d. *Dymoke* v. *Withers*, 2 Barn. & Adol. 896.

(*r*) *Clarke* v. *Smith*, 9 Cl. & Fin. 126.

(*s*) *Pomeroy* v. *Partington*, 3 Term Rep. 665.

(*t*) *Doe* d. *Egremont* (*Earl*) v. *Stephens*, 6 Queen's B. Rep. 208; see also *Doe* d. *Egremont* (*Earl*) v. *Williams*, 11 Queen's B. Rep. 688.

(*u*) *Dayrell* v. *Hoare*, 12 Ad. & El. 356; 4 Per. & Dav. 114.

shall not have an effectual continuance (*x*). A man having a power may do less than such power enables him to do; or, if he do more, it shall be good to the extent of his power: thus, if a man have power to lease for ten years, and he lease for twenty years, the lease for twenty years shall be good for ten years of the twenty in equity (*y*). A lease for fourteen years is warranted by a power to lease for twenty-one years (*z*).

In whom Powers may vest.

If a power be to a man or his assigns to make leases, &c., it runs with the estate to the assignee in deed or in law. If, therefore, a power be given to a lessee for years and his assigns to make leases for lives, such power goes to his executor, though only an assignee in law, or to the assignee of the executor: but a power to an executor to make leases does not extend to the executor of his executor (*a*). It is no objection to a lease under a power, that "it is in trust for him who executes the power; provided the legal tenant be bound during the term in all requisite covenants and conditions (*b*) (*c*).

Execution of Powers generally.

In general there must be a covenant for payment of rent as well as a reservation of the rent; for under a mere reservation it cannot be payable till entry, and therefore, in fact, may never be payable during the term; besides, if there be no covenant to pay the rent, the lease may be assigned to a succession of beggars (*d*). There must also be a clause of re-entry; else the ground may be unoccupied without any or at least a sufficient distress upon it, so that the remainderman can neither have his rent nor his land (*e*). The want of a counterpart too is unusual, and very prejudicial. If a man, having a power annexed to his estate, charge his estate, and afterwards execute his power, the estate which rises by the execution of the power shall be subject to the charge during the estate: as if a tenant for life, with power to make leases, grant a rent-charge, and afterwards make a lease, the lessee shall take subject to the rent-charge during the life of the lessor (*f*).

(b) *In Possession or Reversion.*

Construction of Powers to grant Leases in Possession or Reversion.

Upon a general power to make leases, without saying more, the law adjudges that the leases ought to be leases in possession, and not leases in reversion, or in futuro; for if upon such power a lease might be made upon a lease, the party might, by making infinite leases, detain those in remainder out of possession for ever; which would be con-

(*x*) 1 Ventr. 228.

(*y*) *London (Mayor)* v. *Tench*, 7 Mod. 173.

(*z*) *Isherwood* v. *Oldknow*, 3 Maule & Sel. 382.

(*a*) *How* v. *Whitfield*, 1 Vent. 340; Sir T. Jones, 110.

(*b*) *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 124.

(*c*) As to the power of trustees to grant leases under the particular words of a will, see *Leigh* v. *Earl of Balcarres*, 6 C. B. Rep. 847.

(*d*) *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 125.

(*e*) *Doe* d. *Douglas* v. *Lock*, 2 Ad. & El. 705; 4 Nev. & M. 807.

(*f*) *Sabbarton* v. *Sabbarton*, Ca. temp. Hard. 415.

trary to the intent of the parties and against reason (*g*): so a general power to make leases for one-and-twenty years does not enable the party to make such a lease in reversion (*h*). So with respect to leases granted under powers (*i*), the lessee must, it should seem, be a person in being at the time when the lease is made; and therefore it has been held, that under a power to make leases to one, two or three persons, the donee of the power cannot make a lease for the life of the first son of *J. S.*, because the person to take under the power ought to be in existence (*k*). A power to trustees "to lease premises for a term not exceeding twenty-one years, and determinable as a former term of ninety-nine years was determinable," was held to authorize a lease in possession only, and not in futuro; and as the trustees had let the premises for ten years determinable as in the original lease, and afterwards relet them for the term of eleven years, before the expiration of the ten years' lease, the second lease was held void, and a bad execution of the power (*l*). A tenant for life, having power to lease for ninety-nine years from the time of executing, so as that such lease or leases be made to take effect in possession, or immediately after the determination of the leases then subsisting, reserving the best and most beneficial yearly rents to be incident to the immediate reversion, in pursuance of one entire bargain, granted, at the same time, in 1787, two leases, one for thirty years, to commence from October, 1791, on the expiration of an existing lease, and the other for sixty-three years from October, 1821; it was held that the second lease was void (*m*).

On what Land they attach.

If there be a power to make leases expressly stated to be in possession, which attaches upon an estate, part of which is in possession and part in reversion at the creation of the power; the donee of the power may immediately make leases in possession of the estate in reversion, as well as of that in possession; for in such case the word

(*g*) *Sheecomb* v. *Hawkins*, Cro. Jac. 318; Yelv. 222; Brownl. 148. The nature of a lease in reversion is this. In the most ample sense, that is said to be a lease in reversion, which has its commencement at a future day, and then it is opposed to a lease in possession, for every lease which is not a lease in possession, in this sense is said to be a lease in reversion. Where mention is made of leases in reversion in a power, it shall be intended of leases to commence after the end of a present interest in being; which is the second notion of a lease in reversion. But as a lease for life cannot be made to commence at a future day, where a power is given to make leases for lives or years in reversion, the expression "lease in reversion" will have a different signification in the same conveyance. Being applied to a lease for life, it shall be intended of a concurrent lease, or a lease of the reversion, viz. a lease of that land which is at the same time under a demise; and then it is not to commence after the end of a demise; but has a present commencement, and is concurrent with the prior demise; but being applied to a lease for years, it shall be intended of a lease which shall take its effect after the expiration or determination of a lease in being; *Loveday* v. *Winter*, 5 Mod. 245, 378; 12 Mod. 148; 1 Comb. 37; 1 Ld. Raym. 267; 2 Salk. 537. The law, therefore, which is founded in reason and common sense, considers "possessory" and "reversionary," according to the natural and ordinary import of those terms (without annexing any artificial idea to them), as including the simple ideas of time present, and time to come; and, consequently, that every subsisting interest, or time not present, is an interest or time to come; Powell on Powers, 434.

(*h*) *Sussex* (*Countess*) v. *Wroth*, Cro. Eliz. 5.

(*i*) See ante, Chap. I., Sect. 23, p. 38.

(*k*) *Snow* v. *Cutler*, Sir T. Raym. 163.

(*l*) *Shaw* v. *Summers*, 3 Moore, 196.

(*m*) *Doe* d. *Sutton* (*Bart.*) v. *Harvey*, 1 Barn. & Cress. 426; 2 Dowl. & Ryl. 589.

"possession" in the power refers to the lease, and not to the land (*n*): but it seems, that if a power enable any one to make leases in reversion as well as in possession, and some parts of the land subject to the power be in possession, and other part of it in reversion, he cannot make a lease in possession and another lease in reversion of the same land; but his power to make leases in reversion will be confined to such land as was not then in possession (*o*).

What is a Lease in Reversion.

Where there is a power to grant leases in possession only, a lease in possession is not contrary to the power, although the estate at the time of granting the lease was held by tenants at will, or from year to year, if, at the time, they receive directions from the grantor of the lease to pay their rent to the lessee (*p*): so where one under a power to lease for twenty-one years in possession, but not in reversion, granted a lease to his only daughter for twenty-one years, "to commence *from* the day of the date;" it was adjudged a good lease, as the word "from" may mean either inclusive or exclusive, according to the context and subject-matter, and the court will construe it so as to effectuate the deeds of parties, and not to destroy them (*q*). Under a power to demise for twenty-one years in possession, and not in reversion, a lease dated in fact on the 17th of February, 1802, to hold from the 25th of March next ensuing the date thereof, is good, if not executed and delivered till after the 25th of March, for it then takes effect as a lease in possession, with reference back to the date actually expressed (*r*): but in another case it was held, that under a power to lease in possession and not in reversion, a lease for years executed the 29th of March to the then tenant in possession, to hold as to the arable land from the 13th of February preceding, and as to the pasture from the 5th of April then next, &c., under a yearly rent payable quarterly on the 10th of July, 10th of October, 10th of January and 10th of April, is void for the whole; though such lease were according to the custom of the country, and the same had been before granted by the person creating the power (*s*).

Effect of Leases in being at the Time of the Execution of the Power.

The circumstance of a second lease for years being granted to the same lessee who holds under a former lease (*t*), to commence after the expiration of such former lease, does not operate to make the latter a continuation of the former lease, where the terms are granted by different deeds; although the residue of the time to come after the former lease, together with the period for which the latter lease is

(*n*) Powell on Powers, 425; Bac. Abr. tit. *Leases*, (I); *Fox* v. *Prickwood*, Cro. Jac. 347.

(*o*) Bac. Abr. tit. *Leases*, (I 11).

(*p*) *Goodtitle* d. *Clarges* v. *Punucan*, 2 Dougl. 565; Bac. Abr. tit. *Leases*, (I 11). *Quære*, if a lease made under such a power, reserving the old rent, but with covenants less advantageous to the reversion than formerly, would not be a fraud on the power, and void.

(*q*) *Pugh* v. *Leeds* (*Duke*), Cowp. 714; 2 Wils. 165. But see *Doe* d. *Bayntum* v. *Watten*, Cowp. 189. Mr. Powell, with great ingenuity, and, as some may perhaps conceive, with success, attempts to controvert the legal propriety of the above adjudication.

(*r*) *Doe* d. *Coxe* v. *Day*, 10 East, 427.

(*s*) *Doe* d. *Allan* v. *Calvert*, 2 East, 376.

(*t*) As to the effect of a new lease operating as a surrender of a former lease, see post, Chap. VII., Sect. 3, (c).

granted, do not in length of time exceed the limits fixed by the power; for the latter will notwithstanding be considered as a reversionary lease, as much as if it had been granted to a reversionary lessee (u). If, however, under a power to demise for fourteen years, a lease be made to hold for seven years, and so from seven years to seven years, it would, it seems, be but a continuance of the former term, and an addition to it, and not a remainder or future interest (x).

Leases in Possession and Reversion.

If a man have power to make leases in possession or reversion, and he make a lease in possession once, he shall never afterwards make a lease in reversion, for he has an election to do the one or the other, but not both. Under a power to lease in possession for lives, or for years determinable on lives, a man cannot make an absolute lease in possession for years; but he may make an absolute lease in reversion for years (y). Where powers were given to make leases of present but not of future interest, and so as the same should go with and be incident to the remainder and reversion; a lease with a reversion in execution of those powers to the tenant in possession of the freehold, his heirs and assigns, was held good, because "heirs and assigns" meant those to whom the remainder and reversion would go (z). Where one having power to make leases for twenty-one years in possession made a lease to *A.* for twenty-one years in trust for the payment of debts, but the lease was made to commence from a time to come, and so not pursuant to the power, yet being made for the payment of debts, it was supported in equity (a).

(c) *Usual Covenants.*

What are usual Covenants within such Powers.

It has been held, that the question, what are *usual covenants* in a lease under a power requiring them to be inserted, is a question of fact for the jury, and not a question for the construction of the court (b): thus *Buller*, J., in the case of *Goodtitle* d. *Clarges* v. *Funucan* (c), observed, that "the Court were relieved from determining whether the covenant was usual or not: because the jury had expressly found that it was unusual." It has been held, that what are "usual covenants" depends on what are the usual and customary covenants of the neighbourhood (d): but in another case it was held, that what are the "usual and reasonable covenants" must depend on the leases of the same land in existence at the time of the creation of the power; and therefore where there was a lease of lands by a tenant for life under a power requiring the usual and reasonable covenants to be contained in the lease, and as to one portion of the lands, the lease in existence at

(u) *Doe* d. *Pulteney* v. *Cavan* (*Lady*), 5 Term Rep. 567.

(x) *Goodright* d. *Hall* v. *Richardson*, 3 Term Rep. 462. As to concurrent leases, see post, Sect. 18, (i), p. 152.

(y) *Winter* v. *Loveday*, 1 Lord Raym. 267.

(z) *Hotley* v. *Scott*, Lofft, 316.

(a) *Pollard* v. *Grenville*, 2 Bro. Cha. Ca. 10.

(b) *Bennett* v. *Womack*, 3 Car. & Pay. 96; *S. C.* not *S. P.* 7 Barn. & Cres. 627; 1 Man. & Ry. 644; Powell on Powers, 578.

(c) 2 Dougl. 565.

(d) *Boardman* v. *Mostyn*, 6 Ves. 467, 471; and see the cases collected in 4 Jar. Prec. 297, 3rd ed.

the time of the creation of the power, contained no clause as to doing suit by grinding at a mill, but a prior expired lease did contain a reservation to that effect; and as to another portion, there were two leases in existence at the time of the creation of the power, the last executed of which was lost, but the previous one contained such a reservation; it was held, that a lease by the tenant for life containing no such covenant or reservation, was altogether void, on account of the omission as to the latter portion of the land, though it was not affected by the omission as to the former portion (*e*). If the covenants in a lease under such a power be upon the whole such as leave the parties upon the same footing as under former leases (as where it appeared that what was thrown on the landlord was compensated by what was paid by the tenant), their differing in trivial circumstances will not be material. Where there was a power to tenant for life to lease for years, with the usual covenants, &c., it was held that a lease made by him, containing a proviso, that in case the premises were blown down, or burned, the lessor should rebuild, otherwise the rent should cease, is void, the jury finding that such covenant is unusual (*f*); so, a covenant not to assign without licence was held by *Thurlow*, L. C., not to come within a contract to grant a lease with common and usual covenants. "Common and usual" covenants, his lordship observed, must mean covenants incidental to the lease; and that though the covenant not to assign without licence might be a very useful one where a brewer or a vintner let a public house (as was the case), that would not make it a common covenant (*g*). Where the power required that all usual and reasonable covenants should be inserted, and an old lease contained a covenant to do suit and service in the courts of the manor of W., and to pay all usual fines and amerciaments; and in the new lease there was a covenant to do suit and service, but not a covenant to pay the fines and amerciaments, and it appeared that no courts baron or customary courts had been held in the manor for above a century, and that there had been no freeholders or copyholders within the manor within living memory; it was held, that the omission in the covenant was reasonable (*h*). Where a power to lease was given upon reserving the ancient, usual and accustomed rents, heriots, boons and services; a covenant "to keep in repair" was held to be "an ancient boon," and the omission of it was deemed fatal (*i*)

(d) *Proviso for Re-entry.*

Construction and Execution of Powers to grant Leases with a Proviso for Re-entry.

A power to tenants for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases for non-

(*e*) *Doe* d. *Egremont* (*Earl*) v. *Stephens*, 6 Queen's B. Rep. 208; and see *Smith* v. *Doe* d. *Jersey* (*Earl*), 7 Price, 281; 3 Bligh, 290; 2 Brod. & Bing. 474; 3 Moore, 339.

(*f*) *Doe* d. *Ellis* v. *Sandham*, 1 Term Rep. 705.

(*g*) 3 Bro. Cha. Ca. 632.

(*h*) *Doe* d. *Egremont* (*Earl*) v. *Williams*, 11 Queen's B. Rep. 688.

(*i*) *Earl of Cardigan* v. *Montague*, Sugd. on Powers, App. 3, cited in *Atkyns* v. *Horde*, 1 Burr. 122.

payment of rent, is well executed by a lease for lives, providing a re-entry in case the rent remains in arrear fifteen days, and there is no sufficient distress upon the premises, the conditional proviso being the usual form in leases: thus such a lease was held valid in an action of ejectment by the reversioner against the lessees, on the ground that the proviso for re-entry was conformable with the power to demise, and satisfied the particular condition in question, on which it was to be exercised; and that the lease was therefore a good execution of the power to demise, which was held to be general, and such as authorized the lessor to annex, in the fair and bonâ fide exercise of a due discretion, reasonable and legal qualifications to the power of re-entry for non-payment of the rent reserved; and did not require the tenant for life to exact an absolute unqualified right to have an immediate power to re-enter on the expiration of the day on which the rent reserved should be made payable (*k*). Both the above qualifications are legal and reasonable, and may be annexed to a power of re-entry for non-payment of rent, required by an indefinite leasing power to be contained in leases to be made under it, to temper the rigour of such a right, where the requisition in such leasing power is general in its terms, or does not expressly prohibit their introduction without being a departure from the exigency of the power. Where a power of leasing required the insertion in the leases of a clause of re-entry for non-payment of rent, and a lease was made with a proviso for re-entry if the rent should be forty-two days in arrear, it was held such a lease was valid (*l*). So where a power required the insertion of a clause of re-entry, if rent should be behind for twenty-one days; leases with a power of re-entry, if the rent should be behind or unpaid for twenty-one days, and no sufficient distress could be had, were held valid (*m*). But a lease with a proviso for re-entry, if the tenant should suffer the premises to be out of repair, and should not repair the same *within six months next after notice*, was held bad, the clause as to notice not being usual (*n*).

(e) *Lands usually Let.*

What Lands are considered as having been usually let.

With respect to the subject-matter upon which a power to lease is to operate,—leasing powers are to be liberally construed; therefore, where the power was to extend to land usually demised, it was held, that land settled for years, determinable on lives, by a family settlement, came within that description (*o*); so are lands which have been

(*k*) *Smith* v. *Doe* d. *Jersey* (*Earl*), 7 Price, 281; 3 Bligh, 290; 2 Brod. & Bing. 473; 3 Moore, 339; and see 5 Moore, 332; 5 Maule & Selw. 467; 1 Brod. & Bing. 97.

(*l*) *Rutland* v. *Doe* d. *Wythe*, 5 Mees. & Wels. 688; 2 Mees. & Wels. 661; Mur. & Hurl. 245; *S. C.* in error, 10 Cl. & Fin. 419; 12 Mees. & Wels. 355.

(*m*) *Tankerville* (*Lord*) v. *Wingfield*, 7 Price, 343; 5 Moore, 346, n.; 2 Brod. & Bing. 498, n.; but see contra, *Core* v. *Day*, 13 East, 118.

(*n*) *Doe* d. *Egremont* (*Earl*) v. *Burrough*, 6 Queen's B. Rep. 229.

(*o*) *Right* d. *Basset* v. *Thomas*, 1 W. Black. 446; 3 Burr. 1441, 1448.

twice previously let (*p*). But lands not demised for the space of twenty years before the execution of a power to demise at the rent then usually reserved and paid, cannot be leased under such a power (*q*): nor can lands which have been only once previously let (*r*): nor if lands have been leased by virtue of a contract only from year to year for three years, can they be said to have been usually let, because it is but one lease, though renewable every year. Any kind of demise is sufficient to support such a power, there being no necessity that the land should have been demised by indenture; a demise at will, or by copy, is sufficient to make land to be accounted usually demisable (*s*); and a covenant to stand seised, as it is a lease if made by the owner, is also evidence of the usual manner of demising (*t*). Under a power in a will, "to demise and lease such parts of the testator's premises as had been usually granted or demised, and were then in lease, for any term of years determinable on lives, to any persons, for the like terms, and in like manner, and under the like rents, services and conditions as the same had been usually granted; and the residue of the same premises, unto any persons, for any term of years not exceeding twenty-one years in possession, at the best and most improved rent that could be reasonably gotten for the same, so as that no *such* demise or lease should be made dispunishable for waste, nor without a condition of re-entry on non-payment of the rent or services thereby reserved, and so as each lessee should execute a counterpart of his lease:" it was held that the word "such" could not be thrown back, so as to apply to or govern the first class of the testator's premises, which had been usually let and were then in lease, but must be confined to the latter class of property, viz. the residue of the premises, as to the terms of leasing which the testator had given separate and specific directions. It was also held in the above case, that a lease under the power of lands which were in lease at the time of the creation of the power (the second lease accurately following the terms of the former lease of the same lands) was well executed under such power, although the second lease did not contain a clause of re-entry on non-payment of 40*s*. reserved in lieu of a heriot; the first lease containing no clause of re-entry on non-payment of a like reservation (*u*). Under a power of leasing "for one, two or three lives, or for any term of years determinable on one, two or three lives, such lands as were then demised for any such term," lands are not included which were then held under a demise to "*W*. and *G*. for ninety-nine years, if *W*. and his widow, and any eldest son living, or in ventre sa mere at the time of his (*W*.'s) death, or if no son, any eldest daughter then living or in ventre sa mere, or any or either of

(*p*) 2 Roll. Abr. 261.

(*q*) Powell on Powers, 397; *Tristan* v. *Gore* v. *Baltinglas*, Vaugh. 31; Sir T. Jones, 27.

(*r*) 2 Roll. Abr. 261.

(*s*) Powell on Powers, 392.

(*t*) *Right* d. *Basset* v. *Thomas*, 3 Burr. 1441, 1447; 1 W. Black. 446.

(*u*) *Doe* d. *Bligh* v. *Colman*, 1 Bing. 28; 7 Moore, 271.

those three, viz. of the said *W.* and his such wife, son or daughter, should so long live, remainder to the said *G.* and his widow, son or daughter, in the same manner," of which description of persons five were in fact living at the time of the power reserved, who were all entitled in succession, three at a time, to come in under the lease: under such a general power the three lives must be certain and co-existing (*x*).

Whether Lands not before in Lease may be demised.

It seems now to be settled that the question—whether lands not before in lease may be demised under a power to lease lands and other hereditaments, provided that such rent or more be reserved upon every lease as has been reserved, or paid for it, within a given time previous to the creation of the power,—is a question of construction on the intention of the author of the power, to be collected from the instrument creating the power, or the circumstances of the estate (*y*). Thus, where there was a power to lease a manor, except the demesne lands, it was held, that copyholds, though within the description, could not be demised; yet that the rents and services of the manor might, notwithstanding a qualification annexed to the power, which said that the ancient rent should be reserved, and there could be no reservation of rent upon a lease of rents and services out of which no rent issues: for it appeared to be the intent of the settlement, that part of the manor should be demisable. Again, the rents and services were considered demisable, because it appeared that part of the manor was intended to be within that power, but that the demesne lands were not to be comprised; and if so, the rents and services must be included, for the whole of the manor consists in demesnes, rents and services; and if a man have a power reserved to him of making a lease of two things, and a qualification is annexed to the power, which cannot extend to one of these things, he may make a lease of that thing without any regard to the qualification (*z*). Under a power in a family settlement to make leases of all or any part of the premises, reserving the ancient rent, lands always occupied with the family seat cannot be demised; for in such case the qualification annexed to the power, "that the ancient rent must be reserved," manifestly excludes the mansion-house and lands about it *never* let: the nature of the thing in such case speaks the intent (*a*). So, under the settlement of an estate, with a power to the tenant in possession to let all or any part of the premises, so as the usual covenants be reserved, a lease of

(*x*) *Doe* d. *Wyndham* v. *Halcombe*, 7 Term Rep. 713.

(*y*) Powell on Powers, 402; 2 Roll. Abr. 262; *Wakeman* v. *Walker*, 3 Keb. 597; nom. *Walker* v. *Wakeman*, 1 Vent. 294; 2 Lev. 150.

(*z*) *Loveday* v. *Winter*, 5 Mod. 245, 378; 12 Mod. 148; 1 Comb. 37; 1 Lord Raym. 267; 2 Salk. 537. It was held by Rokeby, J., in this case that even had the express words used in the power, "so as it be not of the demesne lands," been left out, yet there would have been a restraint by implication from making leases of customary land held of the manor; for if the customary land might be demised, the manor would be destroyed, which it must be presumed was not the intent of the parties.

(*a*) *Bagot* v. *Orton*, 8 Mod. 249; Fort. 332.

tithes which had never been let before was held void. In all these cases the intention of the parties is to govern the court in construing the powers (*b*).

Whether such Leases are good for Part only.

Where there was a devise of lands to trustees and their heirs, in trust to the use of a man and his first and other sons in strict settlement, remainder to another and his first and other sons in strict settlement, with power to the trustees from time to time, during the minorities of the persons to whom the premises should descend, and to any tenant for life, to grant any *lease of all or any part of the lands so limited, so as there be reserved the ancient and accustomed yearly rent, &c.:* a lease of part of the lands devised, in several parcels, in one of which parcels were included, together with lands anciently demised, two closes never before demised, at one entire rent, viz. the ancient rent for that part which had been anciently demised, was held to be void for the whole of the lands included in that parcel, as well as the lands never before let as those anciently let; but it was considered good as to the other parcels, which contained only lands anciently demised, and on each of which there was a separate reservation of the ancient rent (*c*). Where lands were demised to a person for life, with power to lease for lives all but a certain excepted portion, reserving the like rents as were then reserved, or more, the rents then being 29*l.*; and the devisee made a lease for three lives at the yearly rent of 40*l.* of the lands within the power and part of the excepted lands, it was held that the rent could not be apportioned, and that the lease being void for the excepted lands was void as to all (*d*). But where a lease was held void because lands under a power were let together with other lands not under the power, it was held that the lease was good as to the latter lands against the heir of the lessor (*e*).

(f) *Mode of Execution.*

What is requisite to be attended to.

Where the power directs the particular manner in which the lease is to be executed, the direction must appear to have been exactly pursued; as if the deed be required to be executed under the *hands and seals* of the parties, in the presence of and attested by two or more credible witnesses, it must be actually so executed, in the presence of the requisite number of witnesses. It has been held that where the attestation stated that some of the necessary formalities had been observed, but omitted to state anything as to the others, the power was not well executed; and that an attestation made subsequently to the execution of the deed, which certified that the formality omitted was in fact performed, would not remedy the defect; for that the

(*b*) *Pomeroy* v. *Partington*, 3 Term Rep. 665.

(*c*) *Doe* d. *Barlett* v. *Rendle*, 3 Maule & Selw. 99. See also *Fuller* v. *Abbott*, 4 Taunt. 105.

(*d*) *Doe* d. *Williams* v. *Matthews*, 5 Barn. & Adol. 298; 2 Nev. & Man. 264.

(*e*) *Doe* d. *Lord Egremont* v. *Stephens*, 6 Queen's B. Rep. 208.

attestation must be considered as part of the same transaction with the execution of the deed (*f*). In a late case in error, however, it has been held, where the attestation was general, "witness C. D., E. F., G. H.," and the concluding testimonium clause of a document mentioned all the formalities required, that the power was well executed (*g*). A power to demise with the consent of a person in writing duly attested, is not well executed by a demise professing to be made with his consent, "testified by his being a party to these presents:" the written consent should be signed in the presence of a witness (*h*). If the power requires that the lessee should execute a counterpart, it seems that it is not necessary that the execution of the lease and counterpart should be contemporaneous (*i*) (*k*).

(*f*) *Wright* v. *Wakeford*, 4 Taunt. 213; *Doe* d. *Mansfield* v. *Peach*, 2 Maule & Selw. 576; *Wright* v. *Barlow*, 3 Maule & Selw. 512; *Doe* d. *Hotchkiss* v. *Pearce*, 6 Taunt. 402; 2 Marsh. 102; *Symonds* v. *Symonds*, 6 Mad. & Geld. 207.

(*g*) *Burdett* v. *Doe* d. *Spilsbury*, 6 Man. & Gran. 386; 4 Ad. & Ell. 1; 6 Nev. & Man. 259.

(*h*) *Freshfield* v. *Reed*, 9 Mees. & Wels. 404.

(*i*) *Fryer* v. *Coombs*, 11 Ad. & Ell. 403.

(*k*) An important statute, 12 & 13 Vict. c. 26, was passed in the year 1849, and came into operation on the 1st of June, 1850 (see 12 & 13 Vict. c. 110). It is intituled "An Act for granting Relief against Defects in Leases made under Powers of leasing in certain Cases." It recites as follows the grievances and inconveniences for which it provides remedies:—

"Whereas, through mistake or inadvertence on the part of persons granting leases, and through ignorance on the part of lessees of the titles of persons from whom leases are accepted, leases granted by persons having valid powers of leasing are frequently invalid as against the successors in estate of such persons, by reason of the non-observance or omission of some condition or restriction, or by reason of some other deviation from the terms of such powers: and whereas leases granted in the intended exercise of such powers are sometimes invalid as against the successors in estate of the persons granting the same, by reason that at the time of granting the same, the person granting the lease could not lawfully grant such lease, although at a subsequent time, and during the continuance of his estate in the hereditaments comprised in such lease, he might have granted the same in the lawful exercise of such power; and whereas it is expedient that provision should be made for granting relief in the cases aforesaid in manner after mentioned."

Sect. 2. "That when, in the intended exercise of any such power of leasing as aforesaid, whether derived under an act of parliament, or under any instrument lawfully creating such power, a lease has been or shall hereafter be granted, which is by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled after the determination of the interest of the person granting such lease to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made bonâ fide, and the lessee named therein, his heirs, executors, administrators or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a grant, at the request of the lessee, his heirs, executors, administrators or assigns (as the case may require), of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract: provided always, that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators or assigns, shall be entitled by virtue of any such equitable contract as aforesaid to obtain any variation of such lease, when the persons who would have been bound by such contract are willing to confirm such lease without variation."

Sect. 3. "*That the acceptance of rent under any such invalid lease as aforesaid shall, as against the person so accepting the same, be deemed a confirmation of such lease.*"

The 13 Vict. c. 17, repeals this section, and enacts as follows:—

Sect. 2. "That when, upon or before the acceptance of rent under any such invalid lease, as in the said first-recited act mentioned, any receipt, memorandum or note in writing, confirming such lease is signed by the person accepting such rent, or some other person by him thereunto lawfully authorized, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease."

SECT. 18.—*Particular Leases.*

(a) *From the Crown.*

Statutes regulating Crown Leases.

Leases by the Crown are regulated by the statutes 10 Geo. IV. c. 50; 2 & 3 Will. IV. c. 1; and 8 & 9 Vict. c. 99, which must be referred to. Leases by the Crown of lands which belong to the Duchy of Cornwall are regulated by statute 1 & 2 Will. IV. c. 5 (*l*).

(b) *By Ecclesiastical Persons.*

Statutes.

Leases by ecclesiastical persons (*m*), made by virtue of the statutes of 1 Eliz. c. 19, 13 Eliz. c. 10, or 32 Hen. VIII. c. 28, must be made by indenture, whether of lands, of which they are seised in right of

Sect. 3. "That when, during the continuance of the possession taken under any such invalid lease, as in the said first-recited act mentioned, the person for the time being entitled (subject to such provision as aforesaid) to the hereditaments comprised in such lease, or to the possession or the receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs, executors or administrators (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing, signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorized; and after confirmation and acceptance of confirmation, such lease shall be valid, and shall be deemed to have had from the granting thereof the same effect as if the same had been originally valid."

Sect. 4. "That when a lease granted in the intended exercise of any such power of leasing as aforesaid is invalid, by reason that at the time of the granting thereof the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then and in every such case such lease shall take effect and be as valid as if the same had been granted at such last-mentioned time, and all the provisions herein contained shall apply to every such lease."

Sect. 5. "That when a valid power of leasing is vested in or may be exercised by a person granting a lease, and such lease (by reason of the determination of the estate or interest of such person or otherwise) cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of this act, be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease."

Sect. 6. "Provided, that nothing in this act contained shall extend or be construed to prejudice or take away any right of action, or other right or remedy to which, but for the passing of this act, the lessee named in any such lease as aforesaid, his heirs, executors, administrators or assigns, would or might have been entitled under or by virtue of any covenant for title or quiet enjoyment contained in such lease on the part of the person granting the same, or to prejudice or take away any right of re-entry, or other right or remedy to which, but for the passing of this act, the person granting such lease, his heirs, executors, administrators or assigns, or other the person for the time being entitled to the reversion expectant on the determination of such lease, would or might have been entitled, for or by reason of any breach of the covenants, conditions or provisoes contained in such lease, and on the part of the lessee, his heirs, executors, administrators or assigns, to be observed and performed."

Sect. 7. "That this act shall not extend to any lease by an ecclesiastical corporation or spiritual person, or to any lease of the possessions of any college, hospital or charitable foundation, or to any lease where, before the passing of this act, the hereditaments comprised in such lease have been surrendered or relinquished, or recovered adversely, by reason of the invalidity thereof, or there has been any judgment or decree in any action or suit concerning the validity of such lease, and shall not prejudice or affect any action or suit already commenced and now pending in any court of law or equity, but every such action and suit may be proceeded with, and such relief had therein as if this act had not passed."

Sect. 8. "That this act shall not extend to Scotland."

(*l*) See ante, Chap. I., Sect. 9, p. 11.

(*m*) See ante, Chap. I., Sect. 11, p. 14, and ante, 146, n. (*h*).

their churches, or of tithes; unless indeed in the latter case the instrument be merely an agreement with the party who ought to pay the tithes to retain them. With respect to the form of leases by ecclesiastical persons, the provisions of the stat. 32 Hen. VIII. c. 28, are applicable (*n*). The stat. 6 Will. IV. c. 20, explained and amended by 6 & 7 Will. IV. c. 64, imposes on ecclesiastical persons certain restrictions in respect of the renewal of leases for lives, for forty, thirty and twenty-one years respectively, and for years generally.

5 & 6 Vict. cc. 27, 108.

With regard to leases granted under the stat. 5 & 6 Vict. c. 27 (*o*), the following is an outline of what is requisite to make a lease binding on the successor of the incumbent who grants it. It must be (sect. 1) by deed to be executed by the lessee, and must be made with the consent of the bishop of the diocese and of the patron, and, where the land is copyhold, of the lord of the manor, if necessary; such consents to be testified by their executing the lease before execution by the incumbent. It must be in possession and not in reversion; there must be reserved, payable to the incumbent for the time being, quarterly, the best and most improved yearly rent, without any fine. The lessee must not be made dispunishable for waste; and he must covenant with the incumbent and his successors for due payment of the rent, and of all taxes, &c.; not to assign or underlet without the consent of the bishop and patron; to cultivate according to the most improved system of husbandry; to keep and leave the lands and every thing in good repair and condition; to keep the buildings insured against fire, and to lay out all money received under any insurance in rebuilding. The lease must contain a reservation of all timber and underwood and of all mines; and also a power of re-entry for non-payment of rent, or in case the lessee is convicted of felony, or becomes a bankrupt or insolvent, or compounds his debts, or assigns his estate for payment of his debts, or in case execution issues against him or his effects, or in case he does not perform all his covenants. Provision may be made in it for any special mode of cultivation or improvement. The execution of the lease by the bishop and patron is made (sect. 4) conclusive evidence that all the covenants contained in it are proper covenants. The statute 5 & 6 Vict. c. 108, empowering ecclesiastical corporations to grant leases for long terms of years (*p*), must itself be referred to for the form of leases required in cases arising under it.

(c) *By Tenants in Tail.*

Form of Leases by Tenants in Tail under 32 Hen. VIII. c. 28.

By statute 32 Hen. VIII. c. 28, called *The Enabling Statute*, any person whatsoever of full age who has any estate of inheritance in fee tail in his own right of any lands, tenements or hereditaments, may,

(*n*) These are fully stated, in speaking of leases by tenants in tail, in the next division.

(*o*) Ante, 22.

(*p*) Ante, 23.

without fine or recovery, make leases of such lands for lives or years, and such leases shall be good to bind the issue in tail, but not the remainder-man or reversioner, so as these conditions following be therein observed and kept:—

Must be by indenture.

1. Such lease must be by indenture, and not by deed-poll or by parol (q).

Must be in præsenti.

2. It must be made to begin *from the day* of the making thereof, or *from the* making thereof (r); therefore a lease made to begin from Michaelmas, which shall be three years afterwards, for twenty-one years, or a lease made to begin after the death of the tenant in tail for twenty-one years, is not good. But a lease made for twenty years to begin at Michaelmas next, is, it seems, a good lease.

Must not be concurrent with an existing Lease.

3. If there be an old lease of the land in being, the same must be expired, surrendered or ended within a year of the time of the making of the new lease; and this surrender must be absolute and not conditional; also it must be real, and not illusory, or in show only; for there must not be a double or concurrent lease in being at the same time (s).

Must not exceed Three Lives or Twenty-one years.

4. These leases must not exceed three lives, or twenty-one years, from the time of making them; for the words of the statute are to make a lease for three lives, *or* twenty-one years, so that either the one or the other may be made; but not both; and a lease for more is void, not only for the overplus of time more than three lives or twenty-one years, but for the time of the three lives or twenty-one years also. It has been held, that if a tenant in tail make a lease for ninety-nine years determinable upon three lives, that it is not a good lease; but if a lease be made by a tenant in tail for a lesser time, as for two lives, or for twenty years, it is a good lease. If a lease be made for four lives, and it happens that one of the lives dies before the death of the tenant in tail, yet this accident will not make the lease good, but it remains voidable notwithstanding.

Must be of Lands or Corporeal Hereditaments.

5. These leases must be of lands, tenements or hereditaments, manurable or corporeal, which are necessary to be let, and whereout a rent by law may be issuing and reserved; therefore if a tenant in tail make a lease of such a thing as lies in grant only, as an advowson, fair, market, franchise or the like, out of which a rent cannot be reserved, especially if it be a lease for life, this lease is void, although the thing have been anciently and accustomably let. A grant of a rent-charge therefore out of such lands is void. If a tenant in tail make a lease of a portion of tithes rendering rent, this lease is unquestionably void (t).

(q) Co. Litt. 44 a.
(r) Ibid.
(s) Ibid. 44 b.
(t) Co. Litt. 44 b; *Jewel's case*, 5 Co. Rep. 3.

Must be of Lands usually let.

6. They must be of those lands or tenements which have been most commonly let to farm, or occupied by the farmers thereof, by the space of twenty years next before the lease made, so as if it had been let for eleven years at one or several times within twenty years before the new lease made, it is sufficient (*u*). Although the letting have been by copy of court-roll only, yet such a letting in fee for life or years is a sufficient letting; and so also is a letting from year to year. But these lettings to farm must be made by such as are seised of an estate of inheritance; for if it have been only by a tenant in courtesy, in dower or the like, this will not serve to be a letting within the intent of the statute (*x*).

Must have a Reservation of the usual Rent.

7. There must be reserved upon such leases yearly, during the term granted, and payable to the lessor and his heirs to whom the reversion shall appertain, so much yearly farm or rent, or more, as has been most accustomably yielded or paid for the lands, &c. within twenty years next before such lease made (*y*); therefore if the rent be reserved but for part of the time of the new lease, the lease is void; so if the tenant in tail have twenty acres of land that have been accustomably let, and he make a lease of these twenty acres and of one acre more which has not been accustomably let, reserving the usual yearly rent, and so much more as to exceed the value of the other acre, this is not a good lease by the statute: so if the tenant in tail of two farms, the one at twenty pounds rent, the other at ten pounds rent, make a lease of both these farms together at thirty pounds rent, this is not a good lease within the statute. If, however, besides the annual rent there have been formerly reserved things not annual, as heriots, fines or other profit upon the death of the farmers, or profit out of another's soil, as pasturage for a colt, &c., and upon the new lease the yearly rent be reserved, but these collateral reservations be omitted, yet the lease will be good: so also if there be more rent reserved upon the new lease than the rent which has been anciently paid, the lease is good notwithstanding; so if a tenant in tail of land let a part of it which has been accustomably let, and reserve the rent pro ratâ or more, this is good, for that is in substance the accustomable rent. If two coparceners be tenants in tail of twenty acres, every one of equal value and accustomably let, and they make partition so as each have ten acres, they may make leases of their several parts of each of them, reserving the half of the accustomable rent. If the accustomable rent had been payable at four days or feasts of the year, yet if it be reserved yearly payable at one feast it is sufficient, for the words of the statute are, to be reserved *yearly*. On a question whether the reservation of the ancient "copyhold" rent or more, in a lease made by

(*u*) See also ante, Chap. I., Sect. 11, p. 14.

(*x*) Ibid.; *Dean and Chapter of Worcester's case*, 6 Co. Rep. 37.

(*y*) See also ante, and post, Book II., Chap. I., Sect. 2, (e).

tenant in tail, would answer the description of the ancient "accustomed" rent within the statute, it was held that it would (z).

Must not be without Impeachment of Waste.

8. Such leases must not be made without impeachment of waste; therefore if a lease be made for life, with a remainder for life, &c., it is not warranted by the statute, because it is dispunishable of waste; but if a lease be made to one during three lives it is good, for the occupant shall be punished for waste, if any happen (a).

(d) *By Husbands in right of their Wives.*

Form of Leases made by Husbands seised in right of their Wives.

Husbands, by the above-mentioned statute of 32 Hen. VIII. c. 28, may, without fine or recovery, make leases of the lands, tenements or hereditaments whereof they have any estate of inheritance in fee-simple or fee-tail in right of their wives, so as there be observed in such leases the conditions or limitations before required in leases made by tenants in tail; and so that the wife join in the same deed, and be made party thereunto, and seal and deliver the same deed herself in person; and that the farm and rent be reserved to the husband and to the wife, and to the heirs of the wife, according to her estate of inheritance in the same. If a man and his wife make a letter of attorney to another to deliver the lease upon the land, this lease is not a good lease from the wife warranted by the statute; and yet in this, and in other like cases of leases not warranted by the statute, it is a good lease against the husband. When the lease is one warranted by the statute, it binds the husband and wife both, and the heirs of the wife (including her issue); but if it be of an estate-tail, it does not bind the donor (viz. the reversioner) nor him in remainder (b). The 3rd section of the above statute further provides, that "the husband shall not in anywise alien, discharge, grant or give away the same rent reserved, nor any part thereof, longer than during the coverture, without it be by fine levied by the said husband and wife; but that the same rent shall remain, descend, revert or come, after the death of such husband, unto such person or persons and their heirs, in such manner and sort, as the lands so leased should have done if no such lease had been thereof made." It seems that this section extends only to leases of lands which were the sole inheritance of the wife, and not to the leases of lands of which she and her husband were joint-tenants (c).

(e) *By Agents.*

How Leases by Agents should be executed.

It was formerly laid down that if a man have authority by virtue of a power of attorney to grant leases for years generally by indenture, the attorney ought to make them in the name and style of his prin-

(z) Co. Litt. 44 b; *Dean and Chapter of Worcester's case*, 6 Co. Rep. 37; *Lord Mountjoy's case*, 5 Co. Rep. 4.

(a) Co. Litt. 44 b; *Dean and Chapter of Worcester's case*, 6 Co. Rep. 37.

(b) Shep. Touch. 280.

(c) *Smith* v. *Trinder*, Cro. Car. 22; *Grute* v. *Locroft*, Cro. Eliz. 287.

cipal, and not in his own name: for the power of attorney gives him no interest or estate in the lands, but only an authority to supply the absence of his principal by standing in his stead; which he can no otherwise do than by using his name, and making them just in the same manner and style as he would have done if he had been present (*d*). If he made them in his own name, though he added also "by virtue of the letter of attorney to him made for that purpose," yet such leases were held void; because the indenture being made in his name must pass the interest and lease from him, or it could pass it from nobody: it could not pass it from the principal immediately, because he was no party, and it could not pass it from the attorney at all, because he had nothing in the lands: and then his adding, "by virtue of the letter of attorney," would not help it, because the letter of attorney made no estate or interest in the land to him, and consequently he could not by virtue thereof convey over to any other. Neither could such interest pass from the principal immediately, nor through the attorney; for then the same indenture must have had this strange effect at one and the same instant, first, to draw out the interest from the principal to the attorney, and from the attorney to the lessee, which it certainly could not do; and therefore all such leases so made were considered absolutely void and not good, even by estoppel against the attorney, because they pretended to be made not in his own name absolutely, but in the name of another by virtue of an authority which was not pursued (*e*). But now, although it is still considered that the execution of an indenture by an attorney must be in the name of the principal, in order to be binding upon the latter (*f*); and that the power of attorney must be under seal as well as the deed itself; it matters not in what form of words such execution is denoted by the signature of the name; as if opposite the seal be written "for *J. B.*" (the principal), "*M. W.*" (the attorney), ("L.S.") (*g*). Where a party executes a deed under a power of attor-

(*d*) *White* v. *Cuyler*, 6 Term Rep. 176; 1 Esp. 200.

(*e*) Bac. Abr. tit. *Leases*, (I 10).

(*f*) *Berkeley* v. *Hardy*, 8 Dowl. & Ryl. 102; 5 Barn. & Cres. 355.

(*g*) *Wilks* v. *Back*, 2 East, 142. This case, therefore, of making leases by a letter of attorney seems to differ from that of a surrender of a copyhold, or of livery of seisin of a freehold by a letter of attorney; for in those cases when they say, "we *A.* and *B.*, as attornies of *C.*," or "by virtue of a letter of attorney from *C.* of such a date," &c., "do surrender," &c., or "deliver to you seisin of such lands," these are good in this manner, because they are only ministerial ceremonies, or transitory acts in pais, the one to be done by holding the court rod, and the other by delivering a turf or twig; and when they do them as attornies, or by virtue of a letter of attorney from their master, the law pronounces thereupon as if they were actually done by the master himself, and carries the possession accordingly. But in a lease for years it is quite otherwise, for the indenture or deed alone conveys the interest, and is the very essence of the lease both as to the passing it out of the lessor at first, and its subsistence in the lessee afterwards. The indenture or deed itself is the conveyance without any subsequent construction or operation of law thereupon; and therefore it must be made in the name and style of him who has such interest to convey, and not in the name and style of the attorney who has nothing therein; but in the conclusion of such lease it is proper to say, "in witness whereof *A. B.* of such a place, &c., in pursuance of a letter of attorney hereunto annexed, bearing date such a day;" or if the letter of attorney be general, and concern more lands than those com-

ney, the power ought to be produced (*h*). An authority to an agent to execute an indenture under seal must also be under seal. In one case where a deed was produced purporting to bind a trading company, it was held that proof that the person executing it was their general law agent was primâ facie sufficient, without showing that he was authorized to execute the particular deed (*i*).

Liability under Leases granted by Agents.

If a man describe himself in the beginning of an agreement to grant a lease as making it on behalf of another, but in a subsequent part of it say that he will execute the lease, he is personally liable (*k*). An agreement for a lease made with an agent who acts under a power of attorney, and a lease executed by such agent in pursuance of the agreement, shall bind the principal (*l*) (*m*).

Revocation of Powers of Attorney.

It is not necessary that a power of attorney given by a deed should be revoked by deed (*n*).

(f) *Trust Terms.*

Nature and Use of Trust Terms.

Terms for a long period of years, as 500 or 1000 years, are frequently created for particular purposes, as to raise portions, and for other purposes in family settlements, &c., and when the purpose is answered, they attend the inheritance: so they are also sometimes created by way of mortgage (*o*). As such terms, however, have little to do with the relation of landlord and tenant, it is unnecessary to add more on this head.

(g) *By way of Mortgage.*

Nature and Effect of Leases by way of Mortgage.

A lease for years may also be created by way of mortgage. The present method of mortgaging is by a demise of the land for a term, under a condition to be void on payment of the mortgage-money and interest; and a covenant is usually inserted in the deed, that till default shall be made in the payment of the money borrowed, the mortgagor shall receive the rents and profits without account. Where a mortgage in the form of a lease was granted of a married woman's

prised in the present lease, then to say, "in pursuance of a letter of attorney, bearing date such a day, &c., a true copy whereof is hereunto annexed, hath put the hand and seal of the master;" and so to write the master's name, and deliver it as the act and deed of the master; in which last ceremony of delivering it in the name of the master of such attorney, this exactly agrees with the ceremony of surrendering by the rod, or making livery by a turf or twig by the attorney in the name of and as attorney for his master; which proves that there is a great diversity between using the name of the attorney in the making of leases, and using his name in making a surrender of copyhold or livery of seisin of a freehold estate. Bac. on Leases, 142.

(*h*) *Johnson* v. *Mason*, 1 Esp. 89.

(*i*) *Doe* d. *Macleod* v. *East London Waterworks Company*, Mood. & Malk. 149.

(*k*) *Norton* v. *Herron*, 1 Car. & Pay. 648; Ryan & Moody, 229.

(*l*) *Hamilton* v. *Clanricarde* (*Earl*), 1 Bro. Parl. Cas. 341.

(*m*) See also *Cornfoot* v. *Fowke*, 6 Mees. & Wels. 358; and *Fuller* v. *Wilson*, 2 Gale & Dav. 460; 3 Queen's B. Rep. 58; and *Wilson* v. *Fuller*, 3 Queen's B. Rep. 68; 1009; 3 Gale & Dav. 570; ante, 40, note (*u*).

(*n*) *Rex* v. *Wait*, 11 Price, 508.

(*o*) *Best* v. *Stamford*, 1 Salk. 154; *Doe* d. *Wyndham* v. *Halcombe*, 7 Term Rep. 713; *Denn* d. *Tarzwell* v. *Barnard*, Cowp. 595. The nature of a term to attend upon the inheritance is well explained in the case of *Willoughby* v. *Willoughby*, 1 Term Rep. 763.

estate by the husband and wife; and after the husband's death, the deed being in the hands of the mortgagee, the widow had directed the tenants in possession to attorn to him, and had settled with him for the balance of the rents, styling him mortgagee, and had not questioned his possession for many years: in delivering the judgment of the Court, Lord *Mansfield* said, that they were all of opinion that the conveyance in this case, though in the form of a lease, was in substance a mortgage; and not being within the reason for which leases by a married woman are held to be only voidable, was absolutely void on the death of the husband; but that the acts done by the widow, the deed being in possession of the mortgagee, were tantamount to a re-delivery, which, without re-execution, is equivalent to a new grant (*p*). Where the lease is not a beneficial lease, it is for the interest of the mortgagee to allow the tenant to continue; and where it is, the tenant may put himself in the place of the mortgagor, and either himself redeem or get a friend to do it (*q*). Upon a refusal of the money by the mortgagee, a tender being made at the place and at some time of the day specified in the condition, under the old form, the land was considered discharged, because upon the tender the demise was void (*r*): but if one mortgaged his reversion in fee to the lessee for years, whereby his term was surrendered, and afterwards paid the money pursuant to the condition, yet his term was extinguished and not revived (*s*).

(h) *In Reversion.*

What are Leases in Reversion.

All leases where there is a particular estate out, are leases in reversion (*t*): thus, if one let a manor for thirty years, and the next day let it to another for forty years, to commence from Michaelmas next after the date; this passes a reversionary interest; for the lease being for years, is a chattel which may well expect or wait: so, a husband may make a lease of lands held in joint tenancy with his wife, to commence after his death, and it will be good though the wife survive; for the husband having an interest to dispose of in his life, he might dispose of all the term, and it shall bind the wife; so when he has disposed by an act executed in his life of the interest of the term, and has created a term in interest, it is as good as if he had granted all the term (*u*). Where a person seised in fee granted a lease for years, and afterwards granted another lease to another person, to commence at the expiration of the first lease; it was held that the lessor had not parted with the reversion so as to prevent him distraining for rent due under the first lease (*x*).

(*p*) *Doe* d. *Simpson* d. *Butcher*, 1 Dougl. 50.
(*q*) *Keech* d. *Warne* v. *Hall*, 1 Dougl. 21.
(*r*) Bac. Abr. tit. *Mortgage*, (D).
(*s*) Com. Dig. tit. *Surrender*, (L 1).
(*t*) *Goodtitle* d. *Clarges* v. *Funucan*, 2 Dougl. 565; ante, 150, note (*g*).
(*u*) *Grute* v. *Locroft*, Cro. Eliz. 287.
(*x*) *Smith* v. *Day*, 2 Mees. & Wels. 684; Mur. & Hurl. 185.

How Leases in Reversion may be made.

Where there is a prior lease or estate in being, leases cannot be made by parol; for besides that by the statute of frauds no parol lease for above three years is to have any other effect except as a lease at will, a deed is of the very essence of the grant of a reversionary interest, and without it no reversion can pass out of the lessor: such leases therefore must be made by deed—either deed-poll or indenture (*y*). If one make a lease for life, and afterwards grant the lands to another for twenty-one years after the death of the tenant for life; these words are sufficient to pass a reversionary interest by way of future lease, though there is not the word "demise" or any other word usual or proper to describe a lease for years by; for there are words sufficient to prove a present contract for the reversionary interest of the lands, after the estate for life determined (*z*).

Time when Leases in Reversion shall take Effect.

A lease in reversion of several parcels of land, made to commence on the happening of several contingencies, shall take effect and commence respectively as those contingencies happen (*a*). If one has made a lease for life, or for eighty years, if the lessee should so long live, and he afterwards by indenture lets the same lands to another for years to begin presently, and then the first lease determines by death, surrender or forfeiture; the second lessee shall have the lands in possession presently for the residue of the years, because such second lease, by reason of the estoppel (for an indenture concludes all parties to it), takes effect between the parties presently, and therefore shall come in possession whenever the first lease is out of the way; but if such second lease has been only by deed-poll, there must have been, before the statute of Anne, an attornment to have made it good as a grant of the reversion (*b*): so if one make a lease to one for twenty-one years, and afterwards make another lease to another for years, to begin from the end and expiration of the aforesaid term of twenty-one years, and the first lease be determined, either by an express surrender, or by an implied surrender in law, as by the acceptance of a new lease for life from the lessor, the second lease shall begin presently; but if it has been to begin after the end and expiration of the aforesaid twenty-one years, it will not begin upon the surrender, forfeiture or other determination of the first term till the twenty-one years have actually run out by effluxion of time: the reason of which difference is, that in the first case the word "term" comprehends as well the estate or interest in the land as the time for which it is demised, and therefore the second lease being limited to begin *from* the end and expiration of the aforesaid term of twenty-one years, whenever the term is determined, the second lease shall begin; but in the other case, it is not to begin till *after* the end and expiration of the twenty-

(*y*) 29 Car. II. c. 3; Bac. Abr. tit. *Leases*, (N).

(*z*) Bac. Abr. tit. *Leases*, (K).

(*a*) *Veal* v. *Roberts*, Cro. Eliz. 199.

(*b*) See post, Chap. VI., Sect. 5, for the nature of attornment.

one years, which cannot be ended but by effluxion of time (c). Where a lease for years was made, and during the term the lessor granted a lease in reversion of part of the premises to an under-lessee, who was in possession of them, to commence on the day the original lease determined; it was held that the reversionary lease took effect in possession immediately on the determination of the first lease (d).

(i) *Concurrent Leases.*

Nature of concurrent Leases.

If a lease be made for life or years to one, and afterwards the lessor make a lease for years to another, the second lease is a concurrent lease, and good at least for so many years as shall be to come after the first lease is determined according to the agreement: thus if the first lease be for twenty years, and the second lease be for thirty years, and both begin at one time, the second lease is good for the last ten years (e). A devisee for life, with power to make leases for twenty-one years, whereupon the old accustomed rent should be reserved, made a lease for twenty-one years under the old rent, &c., and a year before the expiration of that lease he made a lease to another for twenty-one years to begin presently; the last was considered to be good within his power as a concurrent lease, because it was no charge upon the reversion, nor was there any more than twenty-one years in the whole against the reversioner: but this power would not warrant the making of leases in reversion, for then he might charge the inheritance ad infinitum (f). One who has a power to grant a concurrent lease within seven years of the expiration of the old one, may grant a lease at any time on the surrender of the old one (g). If a power enables a tenant for life to make leases for years, determinable upon one, two or three lives in possession, of such part and parts, and so much only of the lands of the creator of the power as are then demised or granted for any such time, &c.; no lands can be demised under such a power, but what are at the time of the execution of the power under lease for one, two or three concurrent lives; or for any term of years, determinable upon one, two or three concurrent lives; the meaning of such restriction is, in figurative language, that the candles shall be all burning at the same time (h).

SECT. 19.—*Estoppel.*

Nature and Use of Estoppels.

Indentures of lease for years sometimes enure by way of *estoppel*, which word signifies an impediment or bar to a man's invalidating his own solemn act (i). Though the reasons why estoppels are allowed seem to be that no man ought to allege any thing but the truth for

(c) Bac. Abr. tit. *Leases*, (L 1).
(d) *Hinchliffe* v. *Kinnoul* (*Earl*), 5 Bing. N. C. 1; 1 Arn. 342; 6 Scott, 650.
(e) Shep. Touch. 275.
(f) Powell on Powers, 428; Bac. Abr. tit. *Leases*, (L).
(g) Com. Dig. tit. *Estates*, (G 13).
(h) Powell on Powers, 541; *Doe* d. *Wyndham* v. *Halcombe*, 7 Term Rep. 713.
(i) *Lyon* v. *Reed*, 13 Mees. & Wels. 285.

his defence, and what he has alleged once is to be presumed true, and therefore he ought not to contradict it; yet as estoppels in general are not favoured (*k*), because their tendency is to prevent the investigation of the truth of the case, they are to be extended only as far as positive rules have gone, and are never admitted, if by any construction it can be avoided (*l*): they continue no longer on either part than during the lease; for as they began at first by making the lease, so by determination of the lease they are at an end likewise, for then both parts of the indenture belong to the lessor (*m*). Estoppels ought to be mutual, otherwise neither party is bound by them: therefore, if a man take a lease for years of his own lands from an infant or married woman by indenture, this works no estoppel on either part, because the infant or wife, by reason of their disability to contract, not being estopped, the lessee is not estopped (*n*). If two tenants in common join in a lease for years by indenture of their several lands, it shall be the lease of each for their respective parts, and the cross-confirmation of each for the part of the other, and no estoppel on either part; because an actual interest passes from each respectively, and excludes the necessity of an estoppel: but if two joint tenants for life or in fee join in a lease for years by indenture, reserving the rent to one of them only, this shall give him the rent exclusive of the other; and here the estoppel turns not upon the interest passed by the lease, for that is several according to their several rights, as in the other case, which excludes any estoppel, but it turns upon the reservation of the rent, which, being made in this manner to one exclusive of the other by indenture, works an estoppel against all the parties to say the contrary; and though the rent issues out of one part as well as the other, yet it not being part of the thing demised, but moving, as it were, rather by way of grant from the lessee after the lease made, the lessors are considered as accepting it in this manner by indenture, which concludes them as well as it does the lessee (*o*). If the lease had been by parol or deed-poll, reserving rent to the one joint-tenant only, this would not have excluded the other joint-tenant from an equal share therein; because this reservation coming as it were by way of grant from the lessee, and being only by parol or deed-poll, could not conclude the lessors, who with respect to the rent were as it were grantees, and only passive.

Effect of Estoppels on the Grantor.

A grantor by deed is estopped from saying that he had no interest; unless he is a trustee for the public, deriving his authority from an act of parliament (*p*). An underlease made by a lessee who, at the time of making it and subsequently, had no legal interest, operates as a

(*k*) Co. Litt. 353, n. 1; *Rex* v. *Lubbenham*, 4 Term Rep. 254; *Skipwith* v. *Green*, 8 Mod. 311.

(*l*) Com. Dig. tit. *Estates*, (K 8); Bac. Abr. tit. *Joint Tenants and Tenants in Common*, (H 1).

(*m*) Co. Litt. 47; *James* v. *London*, Cro. Eliz. 36.

(*n*) Co. Litt. 352.

(*o*) Co. Litt. 47 a; Gilb. on Rents, 63; Bac. Abr. tit. *Leases*, (O).

(*p*) *Fairtitle* d. *Mytton* v. *Gilbert*, 2 Term Rep. 169. But see *Doe* d. *Levy* v. *Horne*, 3 Queen's B. Rep. 766.

demise by estoppel (*q*). If one make a lease for years by indenture of lands wherein he has nothing at the time of such lease made, and afterwards purchase those very lands; this shall make his lease as good and unavoidable, as if he had been in the actual possession and seisin thereof at the time of such lease made; because he having by indenture expressly demised those lands, is, by his own act, estopped and concluded from saying that he did not demise them; and if he cannot aver that he did not demise them, then there is nothing to impeach the validity of the indenture, which expressly affirms that he did demise them; and consequently the lessee may take advantage thereof whenever the lessor comes to such an estate in those lands as is capable of sustaining that lease; for an estoppel which affects the interests of the land shall run with it into whose hands soever the land comes (*r*). But if it appear by recitals in the lease, that he had nothing at the time of the demise, and afterwards he purchased the lands as aforesaid, that will not enure by estoppel (*s*). Where a lessee for years made an under-lease by way of mortgage, and afterwards another under-lease by indenture for a short term, it was held, that the latter under-lease, though originally a lease by estoppel, was convertible into a lease in interest by a re-conveyance by the mortgagees, so as to give a right of action to the assignee of the lessee (*t*). But where a mortgagor had made a lease subsequently to his mortgage, a subsequent purchaser of the legal estate from the mortgagee and of the equitable estate from the mortgagor, the latter also joining in the conveyance of the legal estate, is not bound by the lease of the mortgagor (*u*). A lessor is, it seems, estopped from contending that he had merely an equitable estate when he granted the lease (*x*). But where the lease stated that the lessors were *owners* subject to a mortgage, and that they *demised* the land to the lessee, it was held neither party was estopped from denying that the lessors had a legal reversion, but that they were estopped from asserting it (*y*). After a term had been assigned by way of mortgage, *H.*, who was not shown to have had any interest, made a lease for years by deed; the mortgagees and *H.* then surrendered to the original lessor, who re-demised to *H.*, and the latter then assigned his interest to the defendant; held that there was a reversion in *H.* by estoppel on the lease made by him which passed to the defendant, who was thereby liable to the lessee on the covenants of that lease (*z*).

(*q*) *Doe* d. *Prior* v. *Ongley*, 10 Com. B. 25.

(*r*) Bac. Abr. tit. *Leases*, (O); *Trevivan* v. *Lawrence*, 6 Mod. 258; 2 Ld. Raym. 1048; 1 Salk. 276; *Goodtitle* d. *Faulkner* v. *Morse*, 3 Term Rep. 371; *Sturgeon* v. *Wingfield*, 15 Mees. & Wels. 224.

(*s*) *Hermitage* v. *Tomkins*, 1 Lord Raym. 729.

(*t*) *Webb* v. *Austin*, 7 Man. & Gr. 701; 8 Scott, N. R. 419. But see *Doe* d. *Lord Downe* v. *Thompson*, 9 Queen's B. Rep. 1037.

(*u*) *Doe* d. *Lord Downe* v. *Thompson*, 9 Queen's B. Rep. 1037; and see post, Chap. V., Sect. 5.

(*x*) *Green* v. *James*, 6 Mees. & Wels. 656.

(*y*) *Pargeter* v. *Harris*, 7 Queen's B. Rep. 708.

(*z*) *Sturgeon* v. *Wingfield*, 15 Mees. & Wels. 224.

Effect of Estoppels on the Grantee.

A lessee, by executing the lease, is estopped from disputing the title of his lessor, or, if there be more than one, of either of them (*a*), therefore in debt for rent upon an indenture, if the defendant plead nil debet he cannot give in evidence that the plaintiff had nothing in the tenements, because if he had pleaded it specially, the plaintiff might demur, for the declaration being on the indenture, the estoppel appears on record: but if the defendant plead nihil habuit, &c., and the plaintiff will not rely on the estoppel, but reply habuit, the jury shall find the truth (*b*). If the condition of a bond be to perform all the covenants in an indenture, in an action of debt on the bond, the defendant is estopped to say that there is no such indenture (*c*). Therefore in an action on a bond conditioned for the payment of the rent of certain premises recited in the condition to be demised by indenture at a certain rent, the defendant is estopped from saying that by the indenture a less rent than that mentioned in the condition was reserved (*d*). In an ejectment for mines against a member of a mining

(*a*) *Wood* v. *Day*, 7 Taunt. 646; 1 Moore, 389, *S. P.*; *Friend* v. *Eastabrook*, 2 W. Black. 1152; *Beckett* v. *Bradley*, 7 Man. & Gr. 994; 2 Dow. & Low. 586; 8 Scott, N. R. 843; see also post, Book III., Chap. IV., Sect. 1, (b); Chap. VI., Sect. 5, (h); and Chap. VII., Sect. 12, (a). The effect of an estoppel is so conclusive, that if a man take a lease for years by indenture of his own lands, whereof he himself is in actual seisin and possession, this estops him during the term to say that the lessor had nothing in the lands at the time of the lease made, but that he himself or such other person was then in actual seisin and possession thereof; for by acceptance thereof by indenture, he is for the time as perfect a lessee for years as if the lessor had at the time of making thereof the absolute fee and inheritance in him. But if such lessee of his own lands, being ejected by the lessor, should bring an ejectment, and the lessor should plead not guilty, and give the lease and some matter of forfeiture thereof in evidence to support his plea, without pleading and relying on the estoppel, and the jury should find the special matter, viz. that the defendant had nothing in the lands at the time of such lease made, but that the plaintiff himself was then in actual seisin and possession thereof, whether the court, upon this verdict, are bound to adjudge according to the truth of the case, namely, that such lease by one who then had nothing in the lands was void; or if they are to adjudge according to the law, working by way of estoppel upon such lease by indenture, seems to be a doubt in the books; but Sir Edward Coke lays it down for a rule, that the jury do well to find the truth, viz. that the lessor had then nothing in the land; but then upon such finding, the court is to adjudge, according to the operation of law upon the estoppel wrought to both parties by the indenture, that they are bound; and this seems to be the better opinion. But if such lease for years were made by deed-poll of lands, wherein the lessor had nothing, it would not estop the lessee to aver that the lessor had nothing in those lands at the time of the lease made, because the deed-poll is only the deed of the lessor, and made in the first or third person; whereas the indenture is the deed of both parties, and both are, as it were, put in and shut up by the indenture. This, however, is where both parties seal and execute the indenture as they may and ought; for otherwise, if the lessor only seal and execute it, the lessee seems to be no more concluded than if the lease were by deed-poll; for it is only the sealing and delivery of the indenture as his deed that binds the lessee, and not his being barely named therein, for so he is in the deed-poll; but that being only sealed and delivered by the lessor, can only bind him and not the lessee, who is not to seal and execute it; yet it should seem that such lease by deed-poll binds the lessor himself as much as if it were by indenture, because it is executed on his part with the very same solemnity, and therefore it should seem he is bound by such lease by way of estoppel. If a man take a lease for years of his own lands by patent from the king, rendering rent, this shall not estop the lessee, as an indenture between common persons in such case would do, because the king cannot be estopped; and if he be not estopped, neither shall the lessee; Bac. Abr. tit. *Leases*, (O). And if a man take a lease for years of the herbage of his own land by indenture, this is no conclusion to say that the lessor had nothing in the lands at the time of the lease made, because it was not made of the lands themselves; Co. Litt. 47 b.

(*b*) Bull. N. P. 170.

(*c*) 1 Roll. Abr. 872, P. 3.

(*d*) *Lainson* v. *Tremere*, 1 Ad. & El. 792; 3 N. & M. 603.

company, it was held that the defendant was estopped from disputing the title of the lessor of the plaintiff, who had leased the mines to the company, of which the lessor was a partner at the time of the action, but not at the time he granted the lease (*e*). The lessee may, however, show that his landlord's title has expired (*f*): but where a defendant in an action for use and occupation had occupied apartments in a house belonging to a wife, and had paid rent to the husband, who subsequently, with the knowledge of the defendant, granted a lease of the whole house to the plaintiff; it was held, that having occupied with notice of the lease, he could not impeach its validity, nor controvert the plaintiff's title (*g*). The liberty of showing that the landlord's title has expired has always been the rule with regard to the action of ejectment, but the case of *Balls* v. *Westwood* (*h*) establishes a different principle with respect to the action of use and occupation. The authority of that case, however, has been somewhat shaken by *Claridge* v. *Mackenzie* (*i*) and *Mountenoy* v. *Collier* (*k*); and although it cannot perhaps be asserted that no distinction exists between ejectment and use and occupation in respect of the power of the tenant to show that his landlord's title is at end, yet it would seem to be a defence in an action for use and occupation, that the plaintiff's title expired after the demise and before the period for which he claims, even if there has been no eviction or surrender of possession by the defendant; at least if there is a claim on the tenant by the person entitled to the mesne profits from the expiration of the plaintiff's title, and submission on the tenant's part (*l*). Upon an information to set aside a lease of charity lands, it was held in Chancery that the lessees could not dispute the title by setting up an adverse title whilst they retained possession (*m*). The interest of a tenant for life and a rever-

(*e*) *Francis* v. *Doe* d. *Harvey*, 1 Horn. & Hurl. 362; 4 Mees. & Wels. 331.

(*f*) *Neave* v. *Moss*, 1 Bing. 363; 8 Moore, 389; *England* d. *Syburn* v. *Slade*, 4 Term Rep. 682; *Doe* d. *Jackson* v. *Ramsbotham*, 3 Maule & Selw. 516; *Doe* d. *Strode* v. *Seaton*, 2 Cr. M. & Ros. 728; 1 Gale, 303; Tyr. & Gr. 19; *Downes* v. *Cooper*, 2 Queen's B. Rep. 256; 1 Gale & Dav. 573; *Agar* v. *Young*, 1 Car. & Mar. 78; *Claridge* v. *Mackenzie*, 4 Man. & Gran. 143; 4 Scott, N. R. 796; and see *Doe* d. *Leeming* v. *Skirrow*, 7 Ad. & El. 157; Will. Wol. & Dav. 517; 2 Nev. & Per. 123.

(*g*) *Rennie* v. *Robinson*, 1 Bing. 147; 7 Moore, 529.

(*h*) 2 Campb. 11.

(*i*) 4 Man. & Gr. 152.

(*k*) 1 Ell. & Bl. 630.

(*l*) *Mountenoy* v. *Collier*, 1 Ell. & Bl. 630.

(*m*) *Att.-Gen.* v. *Hotham* (*Lord*), 3 Russ. 415. If one party even takes an interest in land under another, although that interest be wrongfully acquired, he cannot afterwards dispute the title of the person under whom he took that interest. Thus where a person under a fraudulent pretence borrowed the keys of a house from another, and then retained possession, it was held that he could not dispute the title of the lender, in an ejectment, so as to maintain his own possession; *Doe* d. *Johnson* v. *Baytup*, 3 Ad. & El. 188; 1 Har. & Wol. 270; 4 Nev. & Man. 837.

In ejectment on a clause of re-entry in a lease executed by the mortgagor after the mortgage, the lessee may set up as an answer a subsequent mortgage to another person by the same mortgagor; *Doe* d. *Marriott* v. *Edwards*, 5 Barn. & Adol. 1065; 3 Nev. & Man. 193; 6 Car. & Pay. 208.

Where a lessee, in March, 1832, took certain premises from parties as agents for the trustees of the joint estate of T. and S. B.; and upon the trial of an action for use and occupation brought by the trustees, it appeared, on their own evidence, that in 1831 they were trustees for the estate of S. B. only; it was held that the lessee was estopped to take advantage of this discrepancy, having in 1832 taken the premises from the lessors as trustees of the joint

sioner are the same, and therefore a lessee who has paid rent to the first, cannot set up title in another person as an answer to an action by the latter after the death of the former (*n*). A lessee, by executing an indenture of lease, admits a will under which it is recited that the lease was granted (*o*). A lessee of tolls, under an instrument signed by two persons as trustees, admits they are trustees (*p*). An assignee also is estopped by the deed which estops his assignor (*q*): and an assignor by executing the assignment in which the original lease is recited, is precluded, in an action by the assignee, from calling upon him to prove the lease (*r*): so an assignee of a void lease by a tenant for life is estopped from disputing the title of the remainderman, though his assignment was after the death of the tenant for life, and payment to and acceptance of rent by the remainderman, and with notice of that fact (*s*). So where a lease was granted by *A.* and *B.* as granting parties, and reserved the rent and right of re-entry to a close, it was held that the assignee of the lessor was estopped from showing that *A.* had no interest in the premises (*t*). In defence of an action of ejectment, it may be shown that the parties under whom the plaintiff claims had no title when they conveyed to him, although the defendant himself claims by a conveyance from the same parties, if the latter conveyance was subsequent to that which the defendant seeks to impeach (*u*). Where a lease granted under a power contained in a settlement recited the title of the lessor, and showed that he had only an equitable interest, the lessee was held not to be estopped from disputing the title of the lessor so disclosed in the lease (*x*).

Effect of Estoppels on the Validity of the Lease.

In an action of debt for rent, where the title to the land is not in question, the defendant is estopped from saying the lease is not a good one; as that being a lease for lives, it could not be granted without livery and seisin, or by lease and release, or bargain and sale; or that being a lease of a freehold, it could not commence in futuro, for let the lease be what it will, the covenant is good: and if otherwise, the tenant might enjoy the land, and yet the landlord have no remedy for his rent (*y*). Where a tenant for life under a devise, with a leasing

estate; *Fleming* v. *Gooding*, 10 Bing. 549; 4 Moore & Scott, 455.

Where the plaintiff came into occupation under one who had paid rent upon a distress by the defendant, it was held that, after proof of this fact, the plaintiff was stopped to dispute the defendant's title to the rent, notwithstanding the defendant inadvertently put in evidence a document which showed that the plaintiff's predecessor occupied under a lease to which the defendant was in law a stranger; *Cooper* v. *Blandy*, 1 Bing. N. C. 45; 4 Moore & Scott, 562.

(*n*) *Doe* d. *Colemore* v. *Whitroe*, 1 Dowl. & Ryl. N. P. C. 1.

(*o*) *Bringloe* v. *Goodson*, 8 Scott, 71; 5 Bing, N. C. 738.

(*p*) *Willington* v. *Brown*, 8 Queen's B. Rep. 169.

(*q*) *Taylor* v. *Needham*, 2 Taunt. 278; and see *Barwick* d. *Richmond* (*Mayor*) v. *Thompson*, 7 Term Rep. 488; *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208.

(*r*) *Nash* v. *Turner*, 1 Esp. 217.

(*s*) *Johnson* v. *Mason*, 1 Esp. 89.

(*t*) *Parke* v. *M'Loughlin*, 1 Ir. Law Rep. 186, N. S.

(*u*) *Doe* d. *Oliver* v. *Powell*, 1 Ad. & El. 531.

(*x*) *Greenaway* v. *Hart*, 23 Law J., C. P., 115.

(*y*) *Monroe* v. *Kerry* (*Lord*) (*in error*), 1 Bro. Par. Cas. 67.

power, let to defendant by a lease, not noticing the power; and after the death of the lessor, a succeeding tenant for life under the same devise brought ejectment against the defendant, on the ground that the lease was not a valid execution of the power; it was held, that the defendant was not estopped from setting up an outstanding term of years in trustees created by a tenant in fee, from whom the devisor had inherited, as the lessor of the plaintiff himself denied the right of the defendant's lessor to grant the lease (*z*).

Effect of Estoppels as to the Description of the Premises.

The tenant is not estopped by the description of the lands in the lease: thus, where in covenant the plaintiff declared that he had demised to the defendant a house and several parcels of land, which were particularly described, some to be arable, some meadow, and some pasture, and especially two meadows, called Laine's Meadows, and that the defendant covenanted to pay 5*l.* per acre for every acre of meadow which he should plough up during the lease; and a breach was assigned in ploughing up Laine's Meadows, &c.; and there was a plea, that for sixty years past Laine's Meadows has been arable land, and at times ploughed up and sowed, as the tenants thought proper; and a traverse, that at the time of making the lease it was meadow ground, as stated in the declaration; to which the plaintiff demurred, on the ground that the defendant was estopped to say that what in the lease was called meadow was of any other nature; the court held, that the indenture was to be construed according to the intent of the parties, and that the intention was only to covenant against the ploughing up of real meadow, and said that every body knew that in such deeds, the parcels were very often taken from former deeds, without regard to every alteration of the nature of the land: and it would be the hardest case in the world, that if the land had been arable at one time and laid down at another, the tenant should be concluded by calling it by either of those descriptions:—that it was not the essence of a deed, as what is struck at by nil habuit in tenementis: that it would be carrying estoppels too far to extend them to such a case: therefore, they were all of opinion, that the defendant had a right to try the fact, whether it was ancient meadow or not (*a*).

(*z*) *Doe* d. *Lord Egremont* v. *Wyndham*, 12 Queen's B. Rep. 711.

(*a*) *Shipwith* v. *Green*, 1 Stra. 610; 3 Danv. 272; 8 Mod. 311.

SECT. 20.—*Bonds for Performance of Covenants.*

Nature of the Bond and its Effect.

It is not unusual for a lessor, in addition to the lease, to require and take from the lessee, and sometimes also from another person, as a surety, a bond (*a*) for the performance of the covenants contained in the lease: by this means he has the more extensive security of the penalty in the bond (*b*). Such a bond has been held to be only a security under the statute 8 & 9 Will. III. c. 11, to the extent of the penalty: yet it has also been held, that the penalty is merely a security, and that where it is not sufficient, the plaintiff may recover damages as well as the penalty; and that nothing can prove the principle stronger than the constant practice, when an action is brought on a bond, of giving damages (*c*). A bond for performance of covenants is forfeited by breach of an implied covenant,—as if the lessee be evicted out of the premises demised (*d*),—as well as by a breach of an express covenant. It has been said that where there is a bond for the performance of the covenants in a lease, if the lessee assign the lease, he may likewise assign the bond: but this must be before any of the covenants are broken, for if any of the covenants are broken, and the lessee afterwards assign the lease and bond, and the assignee puts the bond in suit for those breaches, it will be maintenance (*e*).

Proceedings on such Bonds.

In an action of debt on bond for performance of covenants, the breach must be as particular as the covenant; so it has been held, that the defendant, in pleading to an action of debt on such a bond, that the covenants were performed, must show the indenture from the counterpart (*f*): a breach cannot be assigned for non-payment of rent without showing a demand, except performance be pleaded (*g*). A demurrer to a breach of covenant, after plea of covenants performed, confesses the breach and contradicts the plea: yet to a plea of performance, a replication of non-payment of rent, without stating a demand, is good: for a denial of such demand would have been a departure from the plea (*h*). Where performance is pleaded, and matter of excuse is afterwards set forth in the rejoinder, it is a departure; it should have been pleaded in bar (*i*). Where one of two assignees of a lease gave a bond to the lessee, by whom the assignment was made, conditioned for the payment of the rent to the lessor, and the performance of the other covenants in the lease, and for in-

(*a*) For the form of such bond, see post, Book IV., Chap. I., Sect. 9, (n).

(*b*) A bond conditioned for the payment of rent and performance of covenants in a lease, is sufficiently stamped with a 1*l.* 15*s.* stamp, as a bond "not otherwise charged" in the schedule of the statute 55 Geo. III. c. 184; *Corn Exchange and Market Place, Winchester (Proprietors)* v. *Gillingham*, 4 Queen's B. Rep. 475; 3 Gale & Dav. 567; reversing *Toovey* v. *Simons*, 3 Jur. 1173; and *Attree* v. *Anscomb*, 2 Maule & S. 88.

(*c*) *White* v. *Sealy*, 1 Dougl. 49; *Lonsdale (Lord)* v. *Church*, 2 Term Rep. 389.

(*d*) *Noke's case*, 4 Co. Rep. 80.

(*e*) *Anon.*, Godb. 81.

(*f*) *Tibbs* v. *Clow*, 11 Mod. 312; *Cook* v. *Remington*, 6 Mod. 237; *Jones* v. *Barkley*, 2 Dougl. 684, &c.

(*g*) *Speecot* v. *Sheres*, Cro. Eliz. 828.

(*h*) *Chapman* v. *Chapman*, Cro. Car. 76.

(*i*) *Arran (Countess)* v. *Crispe*, 1 Salk. 221.

demnifying the lessee against the non-performance of the covenants, both the assignees of the lease having become bankrupt, and the bond having been forfeited before the bankruptcy, it was held, that the lessee could not prove for the damages which had accrued previously to the bankruptcy, not having paid them to the lessor (*k*). In an action upon a bond, appearing upon oyer to be conditioned for the payment of the rent of certain premises, recited in the condition to be demised by indenture at a certain specific rent, as by the said indenture, &c., the defendant cannot plead that the indenture mentioned in the condition was an indenture by which a certain rent, less in amount than the rent mentioned in the condition, was reserved, and that such less rent has been paid (*l*).

(*k*) *Taylor* v. *Young* (*in error*), 3 Barn. & Ald. 521; 2 Moore, 326; 8 Taunt. 315.

(*l*) *Lainson* v. *Tremere*, 1 Ad. & El. 792; 3 Nev. & Man. 603; and see *Ingleby* v. *Mousley*, 3 Moore & Scott, 488.

CHAPTER V.

TENANCIES FOR LESS TERM THAN YEARS.

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SECT. 1.—*Tenancy generally.*

Evidence of Tenancy.

IN many cases, where no positive contract of letting and hiring has been made, a tenancy may be implied from the acts of the parties, the principal of which is the payment of rent. Such payment frequently affords evidence of a promise by the tenant to hold the premises either on the terms of some previously existing agreement, or from year to year, or otherwise: thus, where there was an agreement of demise for three years, executed in March, 1845, in writing, but not by deed, which was prevented from operating as a lease by statute 7 & 8 Vict. c. 76, and was not re-established as a lease by statute 8 & 9 Vict. c. 106, which repealed the former act, but took effect only from October, 1845; and the tenant entered into possession of a house under such agreement made with *A.* and *B.*, paid them rent, and so became tenant from year to year to them on such terms of the agreement as were not inconsistent with a yearly tenancy; and afterwards, *A.* assigned all his interest in the premises to *B.*, and the tenant continued in occupation, and paid rent to *B.* singly; it was held to be reasonable to presume, in the absence of proof to the contrary, that the tenant had, in consideration of *B.* permitting him to continue, agreed to hold of *B.* on the terms on which he had held of *A.* and *B.*; and that an action lay at the suit of *B.* singly against the tenant for not putting the premises in repair and keeping them repaired; there being a stipulation to that effect in the agreement with *A.* and *B.*, and that being a term not inconsistent with a yearly holding (*a*). But the occupation of a tenement by a public company in September is not to be inferred from the payment of rates in respect thereof by the company in the April previous, coupled with the fact of the same business being continuously carried on there (*b*). Where premises are taken under a written agreement, a verbal alteration of the rent will not constitute a fresh de-

(*a*) *Arden* v. *Sullivan*, 14 Queen's B. Rep. 832.

(*b*) *Gauntlett* v. *Whitworth*, 2 Car. & Kir. 720. As to facts amounting to admissions of tenancy, see *Doe* d. *Nicholl* v. *Bower*, 18 Law Times, 221.

mise (c). Occupation under a lease means occupation of all that passes under the lease, whether in actual enjoyment or not, and whether known or not to exist at the time of the lease (d).

Sect. 2.—*Tenants from Year to Year.*

What constitutes a Tenancy from Year to Year.

A tenancy from year to year exists where a man lets lands or tenements to another without limiting any certain or determinate estate; especially if an annual rent be reserved (e). The presumption of a yearly tenancy in the case of a hiring of farms and lands, indefinite as to time, arises from this, that the produce of them being ordinarily gathered once a year only, the enjoyment thereof is reasonably considered to have been the consideration for the payment of the rent (f). The following position is an illustration of this: "If the produce of the demised lands requires two years to come to perfection, as if it be liquorice, madder, &c., a general holding will, it seems, enure as a tenancy from two years to two years, and cannot be determined by a notice to quit at the end of the first or third year (g). The same rule prevails in the French law (h). Such tenancies were formerly considered as mere tenancies at will; but as it was found to be extremely inconvenient and unjust that a tenant who occupied land should, after he had sown it, be turned out of possession without reasonable notice to quit, it was held that a general occupation was an occupation from year to year, and that the tenant could not be turned out of possession without reasonable notice to quit (i); such notice being considered to be a half-year's notice, to expire at that period of the year at which the tenancy commenced (j). The same law of notice applies also to the tenant. If, therefore, a man once take possession of premises, he is bound to retain them for one year, because until then the proper notice cannot have expired, and even though he give up the premises and let them to another tenant, the landlord may still look to him for the rent, unless he accept the incoming tenant; but if he receive rent

(c) *Crowley* v. *Vitty*, 7 Exch. Rep. 319. Where lessor and lessee, acting on a belief that a demise was put an end to, agreed to redeem the rent, there was held to be a release of the existing term, and a new demise at the reduced rent; *Hodges* v. *Lawrence*, 18 Just. Pea. 347.

(d) *Whittington* v. *Corder*, 20 Law Times, 175.

(e) Com. Dig tit. *Estates*, (H 1); *Germain* v. *Orchard*, 3 Salk. 223; 1 Salk. 346; 2 Black. Com. 147; 16 Ves. 252; *Doe* d. *Hull* v. *Wood*, 14 Mees. & Wels. 662; *Roe* d. *Bree* v. *Lees*, 2 W. Black. 1171; *Doe* d. *Hollingworth* v. *Stennett*, 2 Esp. 717; *Pope* v. *Garland*, 4 You. & Coll., Exch., 394.

(f) Addison on Contracts, 398.

(g) Adams on Eject. 3rd edit. 138.

(h) Pothier, Louage, partie 1, ch. 2, art. 4, 28.

(i) The subject of notices to quit, which often raises points as to the tenancy, will be further considered, post, Chap. VII., Sect. 6.

(j) *Doe* d. *Martin* v. *Watts*, 7 Term Rep. 85; *Clayton* v. *Blakey*, 8 Term Rep. 3. The distinction taken between a tenant from year to year, and a tenant for a term of years, is rather a distinction in words than in substance. A tenant from year to year is entitled to estovers and the same advantages as a tenant for a term of years; in truth, he is a tenant from year to year, as long as both parties please; and considering how many large estates are held by this tenure, it would be dangerous to say that the term ceases at the end of the year; *Rex* v. *Stone*, 6 Term Rep. 297.

from him, he shall be deemed to have made his election to accept. In the absence of any evidence to the contrary, the tenancy, under a written agreement for the hire of premises at a yearly rental from year to year, must be taken to begin from the day on which the agreement professes to have been executed, and that question is for the judge, and not for the jury (*k*). A tenancy from year to year is considered as recommencing every year (*l*). A party was held to occupy a tenement "for the term of one whole year at least," within 1 Will. IV. c. 180, where he entered at noon on the 30th September in one year, and quitted at four in the afternoon of the 29th of September in the following year (*m*).

How created.

A general verbal demise at an annual rent, where the bulk of the farm is inclosed and a small part only of it in the open common fields, creates a tenancy from year to year, and not for such time as the round of husbandry continues; but where the crop, as of liquorice, madder, &c., does not come to perfection in less than two years, it might, as we have seen above, be otherwise (*n*). Where *T.* holding pictures of *P.*'s as a security for an alleged debt, hired rooms of the plaintiff in which to deposit them, and *P.* having died, the defendants, his administrators, contested *T.*'s claim by a suit in Chancery, and pending the suit, in order to prevent the pictures from being distrained, they petitioned the Court to satisfy the plaintiff's rent out of certain funds paid into Court in the course of the cause; upon *T.*'s claim having been disallowed by the Court, and the pictures ordered to be delivered to the defendants, who, in order to obtain them, paid rent to the time of delivery; it was held, that these circumstances did not constitute the defendants tenants to the plaintiff (*o*). Where in trespass the issue was, whether the plaintiff was tenant of the defendant under a demise "for one year from the 23d of April, 1821, and thence afterwards from year to year;" it was held, that evidence that the plaintiff had paid rent to the defendant was not sufficient proof of *such* demise (*p*). A demise by a tenant from year to year to another, also to hold from year to year, is in legal operation a demise from year to year during the continuance of the original demise to the intermediate landlord (*q*). A person granted two rent charges and then made a lease for years, the second grantee recovered in ejectment on his rent charge being in arrear, whereupon the lessee for years attorned to him; afterwards the first grantee's rent charge being in arrear, the two grantees referred the matter to arbitration, and it was awarded that the arrears due to the first grantee should be first satisfied out of the rents,

(*k*) *Bishop* v. *Wraith*, 2 Com. L. Rep., Exch., 287.

(*l*) *Tomkins* v. *Lawrance*, 8 Car. & Pay. 729.

(*m*) *R.* v. *St. Mary, Warwick* (*Inhabitants*), 1 Ell. & Bl. 816.

(*n*) *Roe* d. *Bree* v. *Lees*, 2 Wm. Black. 1171.

(*o*) *Strahan* v. *Smith*, 4 Bing. 91.

(*p*) *Phillips* v. *Moseley*, 1 Car. & Pay. 262.

(*q*) *Pike* v. *Eyre*, 9 Barn. & Cres. 909; 8 Man. & Ry. 661; see also *Oxley* v. *James*, 13 Mees. & Wels. 209.

whereupon the lessee attorned to the first grantee; it was held, that this created a new tenancy from year to year between the first grantee of the rent charge and the lessee for years, determinable on the payment of the arrears, on which the lease for years would revive (r). Where there was an agreement to become tenants of premises at a certain rent per quarter, the tenants paying a quarter's rent on that day, and finding security for paying one quarter's rent in advance as long as the tenancy lasted, it was held to be a quarterly tenancy, and not one from year to year (s). Where a lessee of premises having mortgaged his term, the superior landlord recovered the premises by ejectment for a forfeiture, and granted a new lease to the mortgagee, who returned the lease of the premises to the mortgagor, saying, "Go on as before, pay me the money you owe me, and then you shall have a lease;" it was held that a tenancy from year to year was not created (t). A memorandum, whereby a person agrees to pay for the occupation of a floor furnished from 4th March to the following 4th September the sum of 52*l.* 10*s.*, and also agrees to occupy the rooms from the 4th September to the 4th December, furnished, on the same terms, viz. 26*l.* 15*s.* for the three months, or take them unfurnished *at the rate of* 84*l.* per annum, does not create a tenancy from year to year (u). The court, under the following circumstances, decided that there was not a conveyance of the fee, but that a tenancy from year to year had been created. *A.* being seised in fee of a moiety of lands, and *B.* being seised for life of the other moiety, they by indenture, reciting that they were entitled thereto as tenants in common, and that they had agreed to grant a perpetual lease thereof to *C.*, his heirs, &c., granted, demised, &c., the same to *C.*, his heirs, executors, administrators and assigns, for ever," to hold from a day then past, unto and to the use of *C.*, his heirs, executors, administrators and assigns, for ever," paying yearly to *A.* and *B.*, their heirs, &c., the yearly rent of 120*l.*, half-yearly, &c. The deed contained all the covenants usually found in an ordinary lease (v). So where, by order of the Poor Law Commissioners, half-yearly payments were made by the guardians of a poor law union for the use of a workhouse; it was held, that under the circumstances of the case, the payments were made not under an actual or supposed contract of tenancy, but under authority of law (w).

Implied from Occupation under an Agreement.

Where the occupier, under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year, on the terms

(r) *Doe* d. *Chawner* v. *Boulter*, 6 Ad. & El. 675; 1 Nev. & Per. 650; Will. Wol. & Dav. 333.

(s) *Wilkinson* v. *Hall*, 3 Bing. N. C. 508; 4 Scott, 301; 3 Hodges, 56.

(t) *Doe* d. *Rogers* v. *Pullen*, 2 Bing. N. C. 749; 3 Scott, 271; 2 Hodges, 39. See also further, *Tenants at Will*, Sect. 4, post, p. 190.

(u) *Atherstone* v. *Bostock*, 2 Man. & Gr. 511; 2 Scott, N. R. 637; Drink. 96.

(v) *Doe* d. *Robertson* v. *Gardiner*, 12 Com. B. Rep. 319.

(w) *Guardians of Woodbridge Union* v. *Guardians of Colneis*, 13 Queen's B. Rep. 269.

of the agreement (*x*). But the payment of rent after the termination of a lease may be explained by either party, so as to rebut the implication of a yearly tenancy (*y*). So where a lease in writing, but not under seal, as required by the repealed statute 7 & 8 Vict. c. 76, operated as an agreement for a lease, it was held that the lessee by payment of rent became tenant from year to year, subject to the terms of the agreement (*z*). An occupation of premises, pending the execution of a lease, constitutes the relation of landlord and tenant, and will entitle the landlord to sue for rent upon a quantum valebant (*a*). Where a party entered upon the possession of premises under an agreement for a lease at a certain rent, and occupied them more than a year, but paid no rent; and an account was afterwards delivered to him by the landlord, charging him with a half-year's rent, the amount of which he at first disputed, but admitted that half a year's rent was due, and named the amount, and the account was altered accordingly; it was held that a yearly tenancy might be implied (*b*). Where an agreement for a lease for seven years at a specified rent was entered into, and the tenant occupied for more than a year, and paid two quarters' rent at the amount agreed for, it was held there was sufficient evidence of a tenancy from year to year (*c*). And where a plaintiff took possession of premises under an agreement for a lease, to be granted to him for a term of ten years, at a yearly rent payable half-yearly, but no lease was executed, nor was the amount of rent ascertained, and the plaintiff occupied under the agreement for three years, paying rent for two years; it was held that a tenancy from year to year was created (*d*). But where there was a negociation for a letting, upon the terms of the tenant finding a person to join with him as security, and the agreement was never in fact signed, nor the surety offered, it was considered that there was no tenancy from year to year created (*e*). An agreement for a lease at a certain rent, containing a stipulation that the lessor should not turn out the tenant *so long as* he paid the rent and did not sell, &c. any article injurious to the lessor's business, either purports to be a lease for life, and would be then void because not capable of being created by parol, or perhaps it might

(*x*) *Mann* v. *Lovejoy*, Ryan & Moody, 355; *S. P. Doe* d. *Westmoreland* v. *Smith*, 1 Man. & Ryl. 137; *Coupland* v. *Maynard*, 12 East, 134; *Doe* d. *Lloyd* v. *Powell*, 5 Barn. & Cres. 312; 8 Dowl. & Ryl. 35; 2 You. & Jer. 372; *Doe* d. *Thomson* v. *Amey*, 12 Ad. & El. 476; 4 Per. & Dav. 177; *Chapman* v. *Towner*, 6 Mees. & Wels. 100.

In the repealed statute, 7 & 8 Vict. c. 76, s. 4, which required leases in writing to be by deed, there was a special provision that persons in possession under agreements might, from payment of rent or other circumstances, be construed to be tenants from year to year; see the statute, ante, 58, 130.

(*y*) *Doe* d. *Lord* v. *Crago*, 6 C. B. 9.

(*z*) *Doe* d. *Davenish* v. *Moffatt*, 15 Queen's B. Rep. 257.

(*a*) *Hamerton* v. *Stead*, 3 Barn. & Cres. 478; 5 Dowl. & Ryl. 206; and see *Thetford* (*Mayor, &c.*) v. *Tyler*, 8 Queen's B. Rep. 95; *Weakley* d. *Yea* v. *Bucknell*, Cowp. 473.

(*b*) *Cox* v. *Bent*, 5 Bing. 185; 2 Moore & Pay. 281; and see *Watson* v. *Vand*, 8 Exch. Rep. 335.

(*c*) *Braythwaite* v. *Hitchcock*, 10 Mees. & Wels. 494.

(*d*) *Knight* v. *Bennett*, 3 Bing. 361; 11 Moore, 222.

(*e*) *Doe* d. *Bingham* v. *Cartwright*, 3 Barn. & Ald. 326.

operate as a tenancy from year to year (*f*). If a tenant hold under an agreement for a lease at a yearly rent, whereby it is stipulated that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself when he comes of age, the son must make his election in a reasonable time after he comes of age:—the delay of a year is unreasonable, and the tenant cannot be ejected upon a half year's notice to quit, served after such a delay (*g*). No tenancy can be implied under a party who has not the legal estate (*h*).

Where a Tenant holds over.

It was formerly held, that where a tenant holds over after the expiration of his term without having entered into any new contract, he holds upon the former terms (*i*); but it is now considered that under such circumstances he becomes a tenant from year to year immediately upon the receipt of the first quarter's rent by his landlord, and that until that period he is a tenant at will at the same rent which he had previously paid; therefore, where a lease of premises for a term of years expired at Midsummer, 1821, and the tenant refused to relinquish possession thereof, and insisted that he was entitled to a notice to quit, and continued in possession until Christmas following, and paid rent to that time, when he tendered the keys of the premises to his landlord, which the latter refused to accept; it was held that such continuing in possession by the tenant did not amount to a holding over by him, but was conclusive evidence on presumption of law of a tenancy from year to year, which entitled the landlord to maintain an action for the use and occupation of the premises, to recover the amount of a quarter's rent, which became due from Christmas, 1821, to Lady-day in the following year (*k*). So it was previously held that where there was a contract for a year only, or at an annual rent, without mentioning any time certain, it would be a tenancy at will, after the expiration of the first year, unless there were some evidence by a regular payment of rent that the intention was the lessee should be tenant for a year (*l*). Where a money rent was reserved, and also certain cartage, in a lease made by tenant for life, which was voidable by the remainder-man, who had the cartage done for him in the way of rent under the reservation, it was held that this created a tenancy from year to year (*m*). Where a tenant occupied land at the expiration of a lease, with the assent of the lessor, who was a parson, and on the determination of his title continued to be tenant to his successor, it

(*f*) *Doe* d. *Warner* v. *Browne*, 8 East, 166.

(*g*) *Doe* d. *Bromfield* v. *Smith*, 2 Term Rep. 436; and see *S. C.* 6 East, 530; 2 Smith, 570.

(*h*) *Morgell* v. *Paul*, 2 Man. & Ryl. 303.

(*i*) *Right* d. *Flower* v. *Darby*, 1 Term Rep. 162; *Torriano* v. *Young*, 6 Car. & Pay. 8.

(*k*) *Bishop* v. *Howard*, 2 Barn. & Cres. 100; 3 Dowl. & Ryl. 293. See also post, Book II., Chap. VI., Sect. 3, (a).

(*l*) *Goodtitle* d. *Hucks* v. *Langford*, Bull. N. P. 85; *Roe* d. *Bree* v. *Lees*, 2 W. Black. 1173.

(*m*) *Doe* d. *Tucker* v. *Morse*, 1 Barn. & Adol. 365; *Doe* d. *Brammall* v. *Collinge*, 7 C. B. 939.

was held that he was tenant under the terms of the original lease (*n*). Where the defendant agreed by parol to rent a house as tenant from year to year for the residue of a term, which was three years and three quarters, and he held it for three years and one quarter, and then quitted, it was ruled, that though perhaps he might have quitted without notice at the end of three years, yet the remaining longer implied a contract to pay rent for the residue of the term (*o*). Where there was an agreement for a year and six months certain, and the tenant held over beyond that time, it was held that the yearly tenancy commenced upon the original entry (*p*). Where a person held under a lease, commencing at Christmas, for fourteen years and six months, and at the end of that lease at Midsummer continued in occupation under another landlord, it was held that the yearly tenancy thereby created commenced at Midsummer (*q*). Where an under-tenant (who was tenant from year to year), after the expiration of the tenant's lease, being acquainted with the circumstance, held on under the new tenant for one quarter, and paid him the same rent he had been accustomed to do, and then gave up the premises without any previous notice to quit; it was held, in an action for use and occupation, that there was no evidence of a new continuing tenancy, and that therefore the under-tenant was not obliged to give a notice to quit (*r*). Where *B.* holding land of *A.* for a term of years, underlet a part to *C.* from year to year, and at the expiration of the term agreed with *A.* to hold on from month to month; it was held, in the absence of any new agreement between *B.* and *C.*, that the tenancy from year to year continued (*s*). Where by the terms of a yearly holding, the tenant, by the custom of the country, has the privilege of retaining part of the premises for particular purposes of husbandry, the original tenancy is continued as to that part by the custom (*t*). In assumpsit for rent of a mine, where the defendants continued in occupation for two months after the expiration of a notice to quit which they had given, which they contended it was usual to do in order that they might take away certain portions of coals to which they were entitled, it was held to be a question for the jury to determine whether they intended to waive the notice and continue the tenancy (*u*).

Where one Tenant succeeds another.

A yearly tenancy may also be made by a party by coming into the occupation of the premises, by the consent of the lessor, in the stead of a tenant who is leaving: thus where *A.* had been tenant of certain premises, and upon his leaving them *B.* took possession; it was held,

(*n*) *Hutton* v. *Warren*, 1 Mees. & Wels. 466; 2 Gale, 71; Tyr. & Gr. 646.

(*o*) *Sauvage* v. *Dupuis*, 3 Taunt. 410.

(*p*) *Doe* d. *Robinson* v. *Dobell*, 1 Queen's B. Rep. 806; 1 Gale & Dav. 218; see also *Berry* v. *Lindley*, 4 Scott, N. R. 61; 3 Man. & Gran. 498.

(*q*) *Doe* d. *Buddle* v. *Lines*, 11 Queen's B. Rep. 402.

(*r*) *Freeman* v. *Jury*, Mood. & Malk. 19.

(*s*) *Peirse* v. *Sharr*, 2 Man. & Ryl. 418.

(*t*) *Beavan* v. *Delahay*, 1 H. Black. 5; *S. P. Knight* v. *Bennett*, 3 Bing. 361; 11 Moore, 227.

(*u*) *Jones* v. *Shears*, 4 Ad. & El. 832; 2 Har. & Wol. 43; 6 Nev. & Man. 428.

that in the absence of any evidence to the contrary, it might be presumed that he came in as assignee of *A.*, although he never paid rent, and therefore that a notice to quit was rightly given to him (*x*). A tenant from year to year died, his widow remained in possession and continued paying the rent to the landlord, with the knowledge of a person who above a year after took out letters of administration; the widow still continued in possession for a year, paying the rent as before: it was held that this did not create a tenancy from year to year between the administrator and the widow (*y*). Where *A.* at the request of *B.*, his yearly tenant, accepted *C.* as a tenant in his stead, who proved to be insolvent, and it appeared that *B.*, when he proposed *C.* to *A.*, knew that *C.* had compounded with his creditors, but did not communicate that fact to *A.*; it was held that the suppression of such a fact was a fraud in *B.*, which rendered him still liable to *A.* for the rent (*z*). If *B.*, being tenant from year to year to *A.*, let to *C.* from year to year, and *B.* give up his interest to *A.* by verbal agreement, and afterwards *C.* agrees verbally with *A.* to become his tenant from year to year, such last agreement is a new hiring by *C.*, and puts an end to his former hiring (*a*). Where a defendant, who had occupied under a lease which expired at Lady-day, paid a quarter's rent at Midsummer, deducting something for repairs, but was not afterwards seen on the premises, and the rent was afterwards paid at irregular intervals by another person, who was in the occupation for the two ensuing years, it was held that it was correctly left to a jury to find whether the lessor had accepted that person as a tenant; and they having done so, the Court refused to set aside the verdict (*b*). A lease was made for a term of years to commence on the 1st of May; some years afterwards the tenant underlet a part with the consent of the lessor, the tenant became bankrupt, whereupon the lessor brought ejectment under the covenants of the lease, and a writ of possession was executed on the 12th of May, but the under-tenant was allowed to remain in possession of the part he occupied; on an execution being levied on the under-tenant's goods the lessor claimed a year's rent as due the previous November: held that the under-tenant's tenancy from year to year to the original lessor commenced on the 12th of May, when the writ of possession was executed (*c*).

Effect of Change of Terms in the Middle of a Quarter.

No new tenancy is created by a mere agreement for an increase or diminution of rent in a middle of a year of the tenancy (*d*), nor by an

(*x*) *Doe* d. *Morris* v. *Williams*, 6 Barn. & Cres. 41; 9 Dowl. & Ryl. 30.

(*y*) *Doe* d. *Hull* v. *Wood*, 14 Mees. & Wels. 682.

(*z*) *Bruce* v. *Ruler*, 2 Man. & Ryl. 3.

(*a*) *Rex* v. *Banbury* (*Inhabitants*), 1 Ad. & El. 136; 3 Nev. & Man. 293.

(*b*) *Woodcock* v. *Nuth*, 8 Bing. 170; 1 Moore & Scott, 317.

(*c*) *Doe* d. *Lloyd* v. *Ingleby*, 14 Mees. & Wels. 91.

(*d*) *Doe* d. *Bedford* v. *Kendrick*, Ad. Eject. 107, 4th ed.; see also *Burrowes* v. *Gradin*, 1 Dow. & Low. 213; *Crowley* v. *Vitty*, 7 Exch. Rep. 319; *Hedges* v. *Lawrence*, 18 Just. Pea. 347.

increase made at the termination of one of the years (*e*); and if a tenant enter in the middle of a quarter, and afterwards pay up to the beginning of a succeeding regular quarter, from which time he pays half-yearly, his tenancy commences from that regular quarter-day to which he paid up (*f*). But where a tenant entered under an agreement on the 7th May, but paid no rent, a six months' notice to quit, expiring on the 7th May following, was held to be a good notice (*g*). Where there is a subsisting tenancy it is not altered by an agreement of demise which is inoperative for want of the amount of rent having been fixed by valuation, and sureties having been provided (*h*). Where there was a letting by two tenants in common at an entire rent, and one of them afterwards gave notice to the tenant to pay a moiety of the rent to him, it was held to be a question for the jury whether there was a new contract, or only an alteration in the mode of receiving the rent (*i*).

How long continues.

A tenancy from year to year will, after the tenant has entered, continue until it is regularly put an end to by a proper half-year's notice to quit given by one of the parties; and if the tenant die, his personal representatives will have the same interest in it which he himself had (*k*). It is determinable at the end of the first as well as of any subsequent year, unless in creating it the parties use words showing that they contemplate a tenancy for two years at least (*l*). The absence of proof of payment or of demand of rent for sixteen years is slight evidence of the determination of a tenancy from year to year (*m*).

SECT. 3.—*Tenants for shorter Periods than a Year.*

Tenancy for less than a Year.

In leases of houses and apartments the benefits of which are not of an annual nature, but accrue at shorter intervals, the hiring will be construed to be yearly, quarterly, monthly or weekly, according to the circumstances of each case and the custom of the place or country. Of these circumstances the principal appears to be the payment of rent; therefore, where a tenancy was created of wharfs, warehouses, &c., at a certain rent per quarter, the tenancy to commence on the 14th June, the tenant paying a quarter's rent on that day and giving security for the payment of a quarter's rent in advance during his tenancy, it was held that he became tenant from quarter to quarter,

(*e*) *Doe* d. *Monck* v. *Geekie*, 5 Queen's B. Rep. 841; 1 Car. & Kir. 307; and *Geekie* v. *Monck*, 1 Car. & Kir. 307.

(*f*) *Doe* d. *Holcomb* v. *Johnson*, 6 Esp. 10; *Doe* d. *King* v. *Grafton*, 19 Law Times, 108; and 18 ibid. 347.

(*g*) *Doe* d. *Cornwall* v. *Matthews*, 11 Com B. 675.

(*h*) *John* v. *Jenkins*, 1 Cromp. & Mees. 227; 3 Tyr. 170.

(*i*) *Powis* v. *Smith*, 5 Barn. & Ald. 850; 1 Dowl. & Ryl. 490; and see *Harrison* v. *Barnby*, 5 Term Rep. 246.

(*k*) *Doe* d. *Shore* v. *Porter*, 3 Term Rep. 13; and see *Rees* d. *Mears* v. *Perrot*, 4 Car. & Pay. 230.

(*l*) *Doe* d. *Clarke* v. *Smaridge*, 7 Queen's B. Rep. 957. See *Doe* d. *Plumer* v. *Mainby*, 10 Queen's B. Rep. 473.

(*m*) *Slagg* v. *Wyatt*, 1 Arnold, 327.

and not from year to year (*n*). So a general letting at a yearly rent, though payable half-yearly or quarterly, or an acceptance of yearly rent or rent measured by any aliquot part of a year, is evidence of a taking from year to year (*o*). In like manner a demise of houses or of lodgings at a monthly or weekly rent affords a presumption of a monthly or weekly tenancy. The French law is the same in this respect (*p*).

Nature and Description of Lodgings.

If a house be divided into several apartments with an outer door to each apartment, and no communication with each other subsists, the several apartments are considered in law as distinct mansion-houses; but if the owner live in the house, all the untenanted apartments shall be considered as parts of his house; yet if there be two several tenements originally, and they become inhabited by several families who make but one avenue for both, and use it promiscuously, the original severalty is so far recognized and regarded, that they continue to be severally rateable to the poor (*q*). As to the question what shall be deemed the house of the party within the words domus mansionalis, it turns upon the fact of there being an outer door or not, for every house certainly must have an outer door; thus chambers in inns of court and in colleges, which have each of them an outer door that opens upon the common staircase, have been held in cases of burglary to be the houses of the respective occupiers. From the nature of these buildings they are all as several houses, and have separate outer doors exclusively attached to each set of chambers, because the staircase has no outer door: again, they are enjoyed as separate property; in Lincoln's Inn parties have separate estates of inheritance, in the other inns of court they have estates for life, and in colleges so long as they reside: so also if that which was one house originally comes to be divided into separate tenements, and there is a distinct outer door to each, they will be separate houses, as Newcastle House in Lincoln's Inn Fields. The distinction therefore can only be between several outer doors and one outer door; therefore if one hire a part of a house to lodge in which is actually divided from the rest, and have a door of his own to the street, a burglary committed therein may be alleged in domus mansionalis of such person; and even if the owner occupy a shop or cellar in the house, unless he sleep therein, it is the mansion of each lodger, although there be but one outer door; but it is otherwise if the owner sleep therein (*r*). Where a person had the separate use and occupation of a floor, and there was but one staircase and one

(*n*) *Wilkinson* v. *Hall*, 3 Bing. N. C. 508; 4 Scott, 301; 3 Hodges, 56.

(*o*) *Richardson* v. *Langridge*, 4 Taunt. 128; *Doe* d. *Hull* v. *Wood*, 14 Mees. & Wels. 682.

(*p*) Pothier, Louage, No. 30.

(*q*) *Tracey* v. *Talbot*, 6 Mod. 214.

(*r*) 1 Hawk. P. C. 163, s. 15; *Lee* v. *Gansell*, Cowp. 1; Lofft, 374; Fost. Crown Law, tit. *Homicide*, c. 8, s. 20. But this privilege of a lodger's tenement being regarded as his mansion-house, extends only to the purposes of protection to a man and his family, and is to be taken strictly. A bailiff therefore in the execution of mesne process may break open the door of a lodger, having first gained peaceable entrance at the outer door of the house; for the rule that every man's house

open door to that and the rest of the house, which was in the occupation of another person under the same landlord, it was held to be properly described as a messuage (*s*); but where a person occupied two rooms as a lodger to his landlord who lived in the house, it was held that it was not properly described as his dwelling-house (*t*).

Demises for short Periods.

It has been before observed, that any one possessed of a certain quantity of interest may alienate the whole or any part of it, unless restricted from so doing by agreement of the party from whom he derives that interest or estate, or by the terms upon which he takes it. Upon the same principle he may demise it, or any part of it, for any term shorter than that of which he is possessed: and when part of a messuage or tenement is let to another, it is called a lodging or lodgings (*u*). Where the defendant hired of the plaintiff apartments in his dwelling-house at a fixed rent, payable half-yearly, and entered into possession at Michaelmas, 1822; and at Lady-day, 1823, paid one half-year's rent, and at the Midsummer following gave up possession without having given notice to quit; but at Michaelmas in the same year he paid another half-year's rent, though at Lady-day, 1824, he refused to pay a third half-year's rent; in an action for use and occupation for that half-year's rent, it was held that a tenancy from year to year could not be inferred from these facts, and therefore that the action was not maintainable (*x*). Where a person hired a furnished house for three lunar months, and a receipt was given for the rent for that period, but he continued in possession afterwards, it was held that a jury were warranted in finding that the subsequent occupation was on a *weekly* hiring (*y*). By agreement on the 19th of April, certain premises were let at the yearly rent of 42*l.*, payable quarterly; the first payment, 7*l.* 13*s.* 6*d.*, to be made on the 24th of June next, being the proportion of rent due up to that time. The lessee was to enjoy at the said rent until one of the parties should give to the other six months' notice to quit, and at the expiration of "any" such notice to leave the premises in as good condition, &c. This was held to be a half-yearly tenancy, commencing from the 24th of June; and that a notice to quit given at Midsummer and expiring at Christmas was valid (*z*). Lodgings may be let in the same manner as lands and tenements: in general, however, they are let either by agreement in writing between the landlord and tenant, or by verbal agreement (*a*).

is his castle, must be confined to the breach of windows and of outer doors intended for the security of the house against persons from without endeavouring to break in.

(*s*) *Finn* v. *Grafton*, 2 Bing. N. C. 617; 2 Hodges, 58; 3 Scott, 56.

(*t*) *Monks* v. *Dyke*, 4 Mees. & Wels. 567; Horn. & Hurl. 418.

(*u*) By the Metropolitan Building Act, 7 & 8 Vict. c. 84, s. 53, under-ground rooms may not be let for dwellings unless constructed in a peculiar way. See also 10 & 11 Vict. c. 34, ss. 113, 114, 115, the General Towns Improvements Clauses Act, to the same effect.

(*x*) *Wilson* v. *Abbott*, 3 Barn. & Cres. 88; 4 Dowl. & Ryl. 693.

(*y*) *Towne* v. *Campbell*, 3 Com. B. Rep. 921.

(*z*) *Doe* d. *King* v. *Grafton*, 19 Law Times, Q. B., 108; see also 18 Law Times, 347.

(*a*) Agreements entered into with a view

A contract to let lodgings is a contract for an interest in land within the Statute of Frauds, and must therefore be in writing (*b*); but where one who had a term which expired on the 11th of November, let the premises verbally from the 11th of September to the 11th of November for 270*l.* payable immediately; it was held to be a lease of which parol evidence might be given, and not an assignment required to be in writing (*c*). Where the plaintiff took a house partly furnished at a certain rent, and the defendant agreed to send in all necessary furniture within a reasonable time, it was held that the defendant's agreement to send in the furniture was an inseparable part of a contract for an interest in land, and therefore ought to be in writing (*d*). In all cases there should certainly be a written agreement, in order to avoid all possibility of dispute as to the terms of the demise. The agreement should particularly specify the amount of rent—the time of entry—the length of notice to quit required—and such other particulars as the special circumstances of the case may require (*e*). If the lodgings be furnished, it will be proper to have a schedule of the goods they contain affixed to the agreement, in the same manner as in the case of a lease of a house with goods.

Rights and Privileges of Lodgers, and other short Tenants.

Lodgings constitute such an interest according to the duration of the term, that to many purposes the lodgers are considered in law in the light of householders, and enjoy the same protection and greater immunities. If a person take lodgings on the first and second floors of a house, he has a right to the use of the door bell, the knocker, the skylight of the staircase, and the water-closet, unless it be otherwise stipulated at the time of taking the lodgings; therefore if the landlord deprive the lodger of the use of either, an action lies. If the defendant in such a case merely pleads the general issue, he cannot show that the water-closet was useless before he removed it; but in mitigation of damages he may go into evidence to show that the plaintiff and his

to future cohabitation and prostitution are illegal and void, as being against public morality; *Walker* v. *Perkins*, 3 Burr. 1568. Therefore if a party let lodgings to an immodest woman to *enable* her to consort with the other sex, he cannot recover in an action for the lodgings so let; but if the woman merely lodge there, and receive her visitors elsewhere, he may; *Appleton* v. *Campbell*, 2 Car. & Pay. 347. So although he did not know at the time of letting the lodgings of the defendant's habits, if he afterwards become acquainted with the fact, and permit her to remain as a tenant; *Jennings* v. *Throgmorton*, Ryan & Moo. 251; *S. P. Girardy* v. *Richardson*, 1 Esp. 13.

(*b*) *Edge* v. *Strafford*, 1 Cromp. & Jer. 391; 1 Tyr. 293; *S. P. Inman* v. *Stamp*, 1 Stark. 12; see ante, p. 59.

(*c*) *Preece* v. *Corrie*, 5 Bing. 24; 2 Moore & Pay. 57.

(*d*) *Mechelen* v. *Wallace*, 7 Ad. & El. 49; 2 Nev. & Per. 224; Will. Wol. & Dav. 468; *S. P. Vaughan* v. *Hancock*, 3 Com. B. Rep. 766.

(*e*) In taking an under-lease, particularly of unfurnished apartments, especial care should be taken that the rent of the house has been paid up, and will probably continue to be paid; for if not, the furniture and goods of the under-tenant will be liable, as will be seen hereafter, to a distress for rent. Previously to taking the premises, inquiries should therefore be made on the subject of the housekeeper's landlord, and also of the tax-gatherer and collector of the parochial rates; for if distresses are levied for them also, it may cause considerable inconvenience and annoyance to the under-tenant. Where fixtures are taken from an outgoing tenant, it should also be ascertained that the tenant does not pay for those things which belong to the premises, and which the person leaving has no right to sell.

family were bad lodgers, and that he did the acts complained of to cause them to quit the house (*f*). The law does not make any distinction between lodgers and other tenants, as to the payment of their rent, or turning them out of possession; for they are in general subject to the same regulations as other tenants. Although there is no distinction in reason between houses and land, as to the time of giving notice to quit in yearly tenancies, it being necessary that both should be governed by one rule; and where rent is reserved quarterly, it does not dispense with the regular six months' notice to quit required by law, but is merely a collateral matter; yet in the case of lodgings let for a shorter term than a year, as by the month, a month's notice is sufficient; for a notice to quit has reference in all cases to the letting (*g*). It has been ruled by a very learned judge, that in the case of an ordinary weekly tenancy, a week's notice to quit is not implied as a part of the contract, unless there be a usage to that effect; but in the absence of such usage, a weekly tenant who enters on a fresh week may be bound to continue until the expiration of that week, or pay the week's rent (*h*). Upon this subject, Mr. Addison, in his able work on Contracts, p. 478, has the following passage, which appears to be warranted by the decisions and by legal analogy: "If the hiring be from half-year to half-year, half a year's notice to quit must be given; if from quarter to quarter, a quarter's notice; if from month to month, a month's notice; and if from week to week, a week's notice to quit; and if a lodger quits his apartments without giving such notice, he is liable to the payment of a quarter's, a month's or a week's rent, according to the term of hiring (*i*)." It may not be amiss to observe in this place, that if a tenant quit apartments without giving notice, the landlord may recover the rent though he has put up a bill in the window for the purpose of letting the apartments (*k*): or lighted and used fires in the rooms (*l*); but if the landlord let the apartments to another tenant, he has rescinded the contract, and cannot recover rent for any subsequent portion of the period included in the original tenancy during which they remain unoccupied and unproductive (*m*). A tenant of apartments is not justified in quitting without notice, merely from a fear, however reasonable, that his goods may be seized for his landlord's rent (*n*).

Notice to quit.

(*f*) *Underwood* v. *Burrows*, 7 Car. & Pay. 26.

(*g*) *Doe* d. *Parry* v. *Hazell*, 1 Esp. 94.

(*h*) *Huffell* v. *Armistead*, 7 Car. & Pay. 56; and see *Doe* d. *Peacock* v. *Raffan*, 6 Esp. 4; and *Towne* v. *Campbell*, 3 Com. B. Rep. 921.

(*i*) *Doe* d. *Parry* v. *Hazell*, 1 Esp. 94; *Doe* d. *Peacock* v. *Raffan*, 6 Esp. 4; *Doe* v. *Scott*, 6 Bing. 362; *Doe* v. *Bayley*, 5 Car. & Pay. 67; 6 East, 121, n.; *Towne* v. *Campbell*, 3 Com. B. Rep. 921.

(*k*) *Redpath* v. *Roberts*, 3 Esp. 225.

(*l*) *Griffith* v. *Hodges*, 1 Car. & Pay. 419.

(*m*) *Walls* v. *Atcheson*, 3 Bing. 462; 11 Moore, 379; 2 Car. & Pay. 268.

(*n*) *Rickett* v. *Tullick*, 6 Car. & Pay. 66. See further as to notices to quit, post, Chap. VII., Sect. 6.

SECT. 4.—*Tenants at Will.*

What constitutes a Tenancy at Will.

A tenancy at will is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor; in this case, the lessee is called tenant at will, because he has no certain nor sure estate, for the lessor may put him out at any time he pleases. Although courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will, but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved; and although it is said, that in the country, leases at will, in the strict legal notion of a lease at will, being found extremely inconvenient, exist only notionally; the observation, Mr. Hargrave thinks, means, not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by express words, and that the judges incline strongly against implying them (*o*).

How Tenancies at Will are created.

If an agreement be made to let premises so long as both parties like, and reserving a compensation, accruing de die in diem, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will strictly so called: and though the tenant has expended money on the improvement of the premises, that does not give him a right to hold them until he be indemnified (*p*). After a tenant at will had taken possession there was an agreement for a lease, but no lease was prepared. On the back of the draft there was an indorsement made and signed. Rent had been paid and a receipt given for a quarter's rent, and a distress also had been put in by the landlord upon the tenant. The above facts were held insufficient to alter the original tenancy at will into a tenancy from year to year (*q*). If one lease for years, with a proviso, that he may enter at his will, it is a lease at will (*r*): so, if one demise a tenement to another, excepting the new house for his habitation when he pleases to stay there, and at other times for the use of the lessee; the lessee has the new house as tenant at will (*s*). The words "I give you a close to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it," create a tenancy at will (*t*). So a party having become tenant to two others at their will and pleasure, at the rate of 25*l.* 4*s.* per annum, payable quarterly, and having remained in possession under this agreement for two years, and paid a year's rent, after which the lessors distrained for a quarter's

(*o*) 2 Black. Com. 147; *Timmins* v. *Rawlinson*, 3 Burr. 1609. But see the case as reported in 1 W. Black. 533; Co. Litt. 55; see also *Doe* d. *Hull* v. *Wood*, 14 Mees. & Wels. 682.

(*p*) *Richardson* v. *Langridge*, 4 Taunt. 128.

(*q*) *Doe* d. *Benson* v. *Frost*, 17 Law Times, Q. B., 145.

(*r*) Co. Litt. 55 a.

(*s*) *Cudlip* v. *Rundall*, 4 Mod. 9; 3 Salk. 156; 12 Mod. 15; 1 Show. 310; Carth. 202; Com. 177; Holt, 410.

(*t*) *Rex* v. *Fillongley*, Cald. 569.

rent, was held to be tenant at will and not from year to year (*u*). If a tenant for years continue after his term, and his rent be paid and accepted as before, it has been stated that he shall be a tenant from year to year; but while he so continues, until his rent is paid and accepted, he is tenant at will only (*x*); and it has been held, in a case at nisi prius, by Lord Kenyon, that if a tenant whose lease is expired be permitted to continue in possession pending a treaty for a further lease, he is not a tenant from year to year, but so strictly at will, that he may be turned out of possession without notice (*y*): it is the same if he be admitted tenant pending a treaty for purchase, which is afterwards broken off (*z*). If a man enter under a void lease, and pay rent, he is not a disseisor, but a tenant at will (*a*): so where one enters under a void lease by a tenant for life, and after his death the remainder-man receives rent (*b*): but if a man enter by colour of a grant or conveyance which was void, he shall be a disseisor, and not a tenant at will (*c*): in such cases, however, the tenant holds under the terms of the lease in all other respects except the duration of time (*d*). A person who lives in a house rent free, by the sufferance of the owner, is a tenant at will (*e*). A minister of a dissenting congregation, placed in possession of the chapel and dwellinghouse by certain persons in whom the fee was vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those persons; and his interest is determinable by a demand of possession, without any previous notice to quit; he is not entitled of right, before the determination of his tenancy, to have a reasonable time allowed him for the removal of his furniture (*f*). Where a tenant at will let into possession a person whom the landlord had refused to take as tenant unless he found security, and who remained in possession two years, continuing to endeavour to find securities, but without success; it was held, that he was not even tenant at will (*g*). Slight evidence has been held sufficient to make a tenant on sufferance a tenant at will (*h*). Where a term is created by way of use, the owner

(*u*) *Doe* d. *Bastow* v. *Cox*, 11 Queen's B. Rep. 122.

(*x*) Com. Dig. tit. *Estates*, (H 1 and I 1); *Clayton* v. *Blakey*, 8 Term Rep. 3.

(*y*) *Doe* d. *Hollingsworth* v. *Stennett*, 2 Esp. 717. It may be a question whether under such circumstances the party be not tenant at sufferance only; *Simpkin* v. *Ashurst*, 1 C. M. & R. 261.

(*z*) *Peacock* v. *Peacock*, 16 Ves. 57; *Doe* d. *Stanway* v. *Rock*, 1 Car. & Mar. 549; 4 Man. & Gran. 30; *Ball* v. *Cullimore*, 2 C. M. & R. 120; and see post, Sect. 7.

(*a*) *Denn* d. *Warren* v. *Fearnside*, 1 Wils. 176; *Goodtitle* d. *Galloway* v. *Herbert*, 4 Term Rep. 680.

(*b*) *Doe* d. *Martin* v. *Watts*, 7 Term Rep. 83; 2 Esp. 501; and see *Ludford* v. *Barber*, 1 Term Rep. 86; and *Doe* d. *Tucker* v. *Morse*, 9 Barn. & Adol. 365.

(*c*) Com. Dig. tit. *Estates*, (H 2).

(*d*) *Doe* d. *Rigge* v. *Bell*, 5 Term Rep. 471; *Arden* v. *Sullivan*, 14 Queen's B. Rep. 832.

(*e*) *Rex* v. *Collett*, Rus. & Ry. C. C. 498; *S. P. Rex* v. *Jobling*, Rus. & Ry. C. C. 525; see *Doe* d. *Groves* v. *Groves*, 10 Queen's B. Rep. 486.

(*f*) *Doe* d. *Jones* v. *Jones*, 10 Barn. & Cres. 718; 5 Man. & Ryl. 616, 752; *Doe* d. *Nicholl* v. *M'Kaeg*, 10 Barn. & Cress. 721; 5 Man. & Ryl. 620; and see *Revett* v. *Brown*, 5 Bing. 7; 2 Moore & Pay. 12.

(*g*) *Doe* d. *Heming* v. *Brett*, Hurl. & Walm. 3.

(*h*) *Turner* v. *Doe* d. *Bennett* (*in error*), 9 Mees. & Wels. 643; *S. C.* 7 Mees. & Wels. 226.

of the fee is as a tenant at will to his own trustee (*i*). An admission of half a year's rent being in arrear is some evidence of a tenancy at will (*k*).

How Tenancies at Will may be determined.

An estate at will may be determined either by the express declaration of either of the parties (*l*), or by implication of law: of the latter description will be the death of either of the parties, which in general determines the will (*m*)—acts of ownership exercised by the landlord—his alienation of the reversion (*n*)—waste committed by the tenant—his deserting or leasing or assigning the premises over;—or, in short, doing any act which is inconsistent with an estate at will (*o*). Thus an entry by the landlord on the land without the tenant's consent, and cutting and carrying away stone therefrom, amounts to a determination of the will (*p*). It is requisite that the landlord should give the tenant notice that he determines the tenancy if the act relied on be done off the premises. Where the act is done on the land, it is presumed that the tenant is there and knows of it (*q*). A sub-demise or assignment by a tenant without notice thereof to his landlord does not determine the will (*r*). Committing high treason and being outlawed have each been also held to be an implied determination of an estate at will (*s*). But the outlawry of the tenant at will will not determine the tenancy until a seizure, nor an extent levied upon him until the *liberate* (*t*). So where a party who has created a tenancy at will afterwards becomes insolvent, the vesting order, with knowledge thereof by the tenant, is a determination of the tenancy (*u*). So the lessor by making a lease for years to commence presently determines the tenancy at will, although there be a stipulation that the new lessee shall not enter until after the day for payment of the rent by the tenant at will (*x*). The will is also determined by an agreement by the lessor for the sale of the freehold to the tenant at will (*y*). The words "unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to the

(*i*) Sugd. V. & P. 1129, 11th edit.; and see post, Book III., Chap. VII., Sect. 4 (b); and *Doe* d. *Jacobs* v. *Phillips*, 10 Queen's B. Rep. 130.

(*k*) *Cox* v. *Bent*, 5 Bing. 185.

(*l*) As by a demand of possession by the landlord, or by the tenant quitting the premises; see *Doe* d. *Heming* v. *Brett*, Hurl. & Walm. 3.

(*m*) *Doe* d. *Stanway* v. *Rock*, 1 Car. & Mar. 549; 4 Man. & Gran. 30; *Crockerell* v. *Owerell*, Holt, 417; *James* v. *Bean*, 11 Ves. 391; *Att.-Gen.* v. *Lord Foley*, 2 Dick. 363.

(*n*) A feoffment, with livery of seisin made on the land, determines a tenancy at will, though the tenant be not present nor assenting to the feoffment; and the feoffee may maintain trespass against the tenant at will who has entered on his possession; *Ball* v. *Cullimore*, 2 Cromp. M. & Ros. 120; 1 Gale, 96; 5 Tyr. 753. But see *Doe* d. *Goody* v. *Carter*, 9 Queen's B. Rep. 863; post, p. 302.

(*o*) Cruise's Dig. tit. ix. s. 17; Co. Litt. 57 a, 55 b, n. 15; *Hinchman* v. *Isles*, 1 Ventr. 247; *Countess of Shrewsbury's case*, 5 Rep. 13 b; *Moss* v. *Gallimore*, 1 Doug. 279; *Birch* v. *Wright*, 1 Term Rep. 382.

(*p*) *Doe* d. *Bennett* v. *Turner*, 7 Mees. & Wels. 226; *S. C.* (*in error*), 9 Mees. & Wels. 643.

(*q*) *Pinhorn* v. *Souster*, 8 Exch. Rep. 763; *Carpenter* v. *Colins*, Yelv. 73.

(*r*) Ibid.

(*s*) Co. Litt. 55 b; *Denn* d. *Warren* v. *Fearnside*, 1 Wils. 176.

(*t*) *Hinchman* v. *Isles*, 1 Ventr. 247.

(*u*) *Doe* d. *Davies* v. *Thomas*, 6 Exch. Rep. 854.

(*x*) *Dinsdale* v. *Isles*, 2 Lev. 88.

(*y*) *Daniels* v. *Davison*, 16 Ves. 249.

tenant by the party entitled to the fee, have been held a sufficient determination of the will, and equivalent to a demand of possession, so as to maintain ejectment (*z*). A demand of possession made on the premises from the wife of an underlessee at will, is sufficient (*a*). If two joint tenants create a tenancy at will at a certain rent, and one dies, the survivor takes the whole premises and may maintain an action for the entire rent against the lessee continuing in possession (*b*). So where a lease is made to three joint tenants, rendering rent, the death of one does not determine the tenancy; but the survivors are liable to pay the whole rent (*c*). A lease at will by a feme sole does not determine by her marriage, unless the husband does some express act to determine the tenancy (*d*). Nor does the marriage of a feme sole determine a tenancy at will made to her (*e*). So if the husband and wife lease the wife's land, rendering rent, the death of the husband does not determine the will (*f*).

Rights of the Parties on the Determination.

The sudden determination of the will of one party will not operate to the material injury of the other; therefore if the tenant at will sow his land, and the landlord determine the estate before the corn be ripe, the tenant shall notwithstanding have free liberty to enter upon the land to cut and carry his crop: and, on a like principle of justice, the tenant may, in all cases, have reasonable time allowed him to remove his goods after the determination of his estate by the act of the landlord (*g*). Where there is a tenancy at will, rent being paid quarterly, the lessee, after a quarter of a year is commenced, may determine his will, but then he must pay that quarter's rent; and if the lessor determine his will after the commencement of a quarter, he shall lose his rent for that quarter; and so it is if the rent be payable half-yearly (*h*).

SECT. 5.—*Tenants on Sufferance.*

How a Tenancy on Sufferance is constituted.

A tenant on sufferance is he who enters by lawful demise or title, and afterwards wrongfully continues in possession; as if tenant pur autre vie continues in possession after the death of the cestui que vie (*i*): so any one who continues in possession without agreement, after a particular estate is ended (*k*): so if a tenant for years surrender and

(*z*) *Doe* d. *Price* v. *Price*, 9 Bing. 356; 2 Moore & Scott, 464.

(*a*) *Roe* d. *Blair* v. *Street*, 2 Ad. & El. 329; 4 Nev. & Man. 42.

(*b*) *Henstead's case*, 5 Rep. 10 b.

(*c*) Ibid. 10 b.

(*d*) Ibid. 10 a; Co. Litt. 55 b.

(*e*) Ibid.

(*f*) Ibid.; Co. Litt. 55 b; 1 Roll. Abr. 861, *Estate*, (Z 5).

(*g*) Litt. sect. 69; Noy's Max. c. 11; *Doe* d. *Nicholl* v. *M'Kaeg*, 10 Barn. & Cres. 721; 5 Man. & Ryl. 620.

(*h*) *Layton* v. *Field*, 3 Salk. 222; *Leighton* v. *Theed*, 2 Salk. 413; 1 Lord Raym. 702; *Parker* v. *Harris*, 4 Mod. 79; 1 Salk. 262; *Title* v. *Grovett*, 2 Lord Raym. 1008; Com. Dig. tit. *Estates*, (H 9); Co. Litt. 55 a, b; 2 Black. Com. 146; *Kighly* v. *Bulkly*, 1 Sid. 338; *Anon.*, Keilw. 65, pl. 6.

(*i*) Co. Litt. 57 b.

(*k*) Com. Dig. tit. *Estates*, (H); *Doe* d. *Martin* v. *Watts*, 2 Term Rep. 83; *Roe* d. *Jordan* v. *Ward*, 1 H. Black. 97; *Roe* d. *Brune* v. *Prideaux*, 10 East, 187; *Doe* d. *Collins* v. *Weller*, 7 Term Rep. 478; *Doe* d. *Tucker* v. *Morse*, 1 Barn. & Adol. 365.

then hold over, he will be either tenant on sufferance or a disseisor, at the election of the landlord (*l*). An undertenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is quasi a tenant at sufferance (*m*). Where a tenancy at will is determined by the landlord exercising acts of ownership, and the tenant remains in possession, he becomes tenant by sufferance only; but slight evidence would be sufficient to show a new creation of a tenancy at will (*n*), as the tenant signing an assessment to the land tax in which he was named occupier and the landlord proprietor (*o*): or he may by payment of rent or other acknowledgment of tenancy become tenant from year to year (*p*). There is a great difference therefore between a tenant at will and a tenant on sufferance; for a tenant at will is always in by right; whereas a tenant by sufferance enters by a lawful lease, and holds over by wrong (*q*). Against the king there is no tenant on sufferance, for the king not being capable of committing laches, such person will be an intruder. A pauper put into a house by parish officers, can by no length of time acquire any title, and may therefore be turned out by future parish officers, even by force, if he refuse to go peaceably (*r*). Where a cottage standing in the corner of a meadow (belonging to the lord of a manor), but separated from it and from a high road by a hedge, had been occupied for above twenty years without any payment of rent; and the lord then demanded possession, which was reluctantly given, and the occupier was told that if he were allowed to resume possession it would only be during pleasure, which he did, and kept possession for fifteen years, and never paid any rent; it was held that the possession was not necessarily adverse, but might be presumed to have commenced by permission of the lord (*s*). And where a cottager occupied a piece of land inclosed from the waste on the side of a turnpike road for more than thirty years, without paying rent, and at the end of the time paid sixpence rent on four several occasions to the owners of the adjoining land: it was held, that this was conclusive evidence of a permissive occupation only, so as to maintain ejectment; and that it was a proper question for the jury, whether there had been an acknowledgment of the tenancy (*t*). Where a person obtained possession of a house which

(*l*) *Pennington* v. *Morse*, Dyer, 62 a; Winch. 32; Co. Litt. 57 b; *Right* v. *Darby*, 1 Term Rep. 159; and see *Doe* d. *Till* v. *Stratton*, 4 Bing. 466.

(*m*) *Simpkin* v. *Ashhurst*, 1 Cromp. M. & Ros. 261; 4 Tyr. 781.

(*n*) *Doe* d. *Bennett* v. *Turner*, 7 Mees. & Wels. 226.

(*o*) *Turner* v. *Doe* d. *Bennett*, 9 Mees. & Wels. 643.

(*p*) *Mann* v. *Lovejoy*, 1 Ry. & Moo. 355; *Right* v. *Darby*, 1 Term Rep. 159; *Doe* d. *Calvert* v. *Frowd*, 4 Bing. 557; *Doe* d. *Clarke* v. *Smarridge*, 14 Law J., N. S., Q. B., 327.

(*q*) Co. Litt. 57 b.

(*r*) *Fox* v. *Oakley*, Peake, Ad. Ca. 214; *S. P. Wildbore* v. *Rainsforth*, 8 Barn. & Cres. 4; 2 Man. & Ryl. 185. By statutes 2 & 3 Will. IV. c. 42, and 8 & 9 Vict. c. 118, s. 108, &c., the letting allotments of land to industrious cottagers is authorized in certain cases, and a summary method of obtaining possession is given; see post, Book III., Chap. VIII.

(*s*) *Doe* d. *Thompson* v. *Clark*, 8 Barn. & Cres. 717.

(*t*) *Doe* d. *Jackson* v. *Wilkinson*, 3 Barn. & Cres. 413; 5 Dowl. & Ryl. 273.

was empty, without the privity of the landlord, intending to take a lease of it from him, and some negotiations afterwards took place between them upon the subject: it was held by Lord *Ellenborough*, that the relation of landlord and tenant never subsisted, but that if there was a tenancy of any sort it was on sufferance (*u*). A tenant at sufferance, who is turned out of possession by his landlord, without any demand of possession, cannot maintain ejectment, but may maintain trespass (*x*). A landlord may maintain ejectment against his tenant by sufferance without demand of possession (*y*). A mere tenant by sufferance has no demisable estate, at least as against any one but himself (*z*).

SECT. 6.—*Mortgagor and Mortgagee.*

Nature of the Relation of the Parties as Landlord and Tenant.

With respect to the nature of the contract subsisting between persons in the situation of mortgagor and mortgagee, so far as regards the relation of landlord and tenant, there appears to be considerable confusion in the decisions on the subject. A mortgagor has often been called a tenant at will to the mortgagee, both in courts of law and equity, but perhaps inaccurately so; and the expression has been used when it was not very material to ascertain what his power and interest were, or to settle with any great precision in what respects he did, and in what respects he did not, resemble a tenant at will (*a*). For many purposes he may be considered as strictly a tenant at will: but he is not entitled to the growing crops after the will is determined, as the mortgagee may bring his ejectment at any moment that he pleases, and recover the estate as it is with all the crops growing on it: for many purposes again he is only treated as *like* a tenant at will; thus he does not pay rent, but only interest, and in this respect he is more like a receiver than a tenant (*b*). Indeed the legal interest of a person who is in the situation of a mortgagor in possession has been considered different from that of a mere strict tenant at will; for until foreclosure, a mortgagor is considered by the courts of equity as the real owner of the estate, for, in truth, the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security; and it would be an affront to common sense, therefore, to say that a mortgagor has no interest in the mortgaged premises: the law recognizes his interest; in the case of a freehold, he has a right to vote for members of parliament, and has a right to the possession till the mortgagee brings an ejectment (*c*). The notion of a mortgagor being

(*u*) *Doe* d. *Knight* v. *Quigley*, 2 Campb. 505.

(*x*) *Doe* d. *Harrison* v. *Murrell*, 8 Car. & Pay. 134.

(*y*) *Doe* d. *Bennett* v. *Turner*, 7 Mees. & Wels. 226; and see *Doe* d. *Heming* v. *Brett*, Hurl. & Walm. 3.

(*z*) *Shopland* v. *Rydler*, Cro. Jac. 55; arguendo *Thunder* d. *Weaver* v. *Belcher*, 3 East, 451.

(*a*) *Birch* v. *Wright*, 1 Term Rep. 382.

(*b*) *Moss* v. *Gallimore*, 1 Dougl. 279.

(*c*) *Keech* d. *Warne* v. *Hall*, 1 Dougl. 22; *Rex* v. *Edington*, 1 East, 293; *Bree* v. *Holbech*, 2 Dougl. 655.

in some cases a tenant at will seems to be recognized by the 3 & 4 Will. IV. c. 27, s. 7, which provides that no mortgagor shall be deemed to be a tenant at will to his mortgagee within the meaning of that clause. On the whole, it seems more correct to say that a mortgagor in possession is not tenant at will to the mortgagee, but at most tenant by sufferance only; and may be treated either as tenant or trespasser, at the election of the mortgagee (*d*); and, therefore, where the mortgagor remains in possession, and the money is not repaid on the day stipulated, the mortgagee, who has a power of entry and sale on non-payment, may eject the mortgagor without notice to quit or demand of possession (*e*). Where the mortgagor agreed to become tenant to the mortgagee at his will and pleasure, at and after the rate of 25*l.* per annum, payable quarterly, and occupied for two years, paying the rent, it was held to be a tenancy at will, and not from year to year (*f*). The mere fact that the mortgagee has received interest down to a time later than the day of demise in ejectment, is not a recognition of the mortgagor, as his tenant (*g*); nor is the distraining after such day of demise for interest, due before the day, under a power to do so as for rent reserved on a lease, there being no clause that the mortgagor shall keep possession so long as he pays interest (*h*). Where a mortgage deed contained a covenant that the mortgagor, during his occupation, should pay a rent rather larger than the interest, half-yearly, and that the mortgagee should have the usual remedies of landlords of distress and sale, provided that this reservation should not prejudice the mortgagee's right to enter and evict the mortgagor, it was held that, after distraining for one half year's rent, the mortgagee might eject the mortgagor, without notice to quit, after a subsequent default (*i*). So where a mortgage deed contained a clause that for the better securing the principal and interest, and in contemplation of part discharge thereof, the mortgagor attorned tenant to the mortgagee, at a quarterly rent, to be recoverable by distress and sale or action, with a power of immediate entry and sale for the mortgagee, upon default of payment of the mortgage money; it was held there was no need of a notice to quit after default (*k*). A mortgage deed executed by the mortgagor only contained a clause whereby, "for the more effectual recovery of the interest, the mortgagor did attorn and become tenant to the mortgagee of the premises at the yearly rent of 40*l.*, to be paid half-yearly, so long as the principal sum remained unsecured:" the mortgagor continued in posses-

(*d*) *Doe* d. *Roby* v. *Maisey*, 8 Barn. & Cres. 767; 3 Man. & Ryl. 107; *S. P. Thunder* d. *Weaver* v. *Belcher*, 3 East, 449.

(*e*) *Doe* d. *Fisher* v. *Giles*, 5 Bing. 421; 2 Moore & Pay. 749.

(*f*) *Doe* d. *Bastow* v. *Cox*, 11 Queen's B. Rep. 122.

(*g*) *Doe* d. *Rogers* v. *Cadwallader*, 2 Barn. & Adol. 473; but see *Doe* d. *Whitaker* v. *Hales*, 7 Bing. 322; 5 Moore & Pay. 132.

(*h*) *Doe* d. *Wilkinson* v. *Goodier*, 10 Queen's B. Rep. 957.

(*i*) *Doe* d. *Garrod* v. *Olley*, 12 Ad. & El. 481; 4 Per. & Dav. 275.

(*k*) *Doe* d. *Snell* v. *Tom*, 4 Queen's B. Rep. 615; 3 Gale & Dav. 637.

sion, and made several of these half-yearly payments: it was held, that the subsequent occupation, connected with the covenant, created the relation of landlord and tenant, and that the mortgagee might distrain for a half-yearly payment in arrear (*l*). So where by a mortgage deed it was agreed that the mortgagor should hold the premises as tenant at will to the mortgagee, at a specified rent, for which it should be lawful for the mortgagee to distrain, it was held that the clause creating a tenancy was operative, as not being inconsistent with the main object of the instrument, and that a tenancy at will was thereby created (*m*). Generally it may be stated, that in a court of law a mortgagor, in the actual possession of mortgaged premises, may properly be described as tenant to the mortgagee (*n*): but he cannot be so considered, if there be an under-tenant in possession under a lease prior to the mortgage; for there can be no such thing as an under-tenant to a tenant at will; the demise itself would amount to a determination of the will. In the case of a mortgagee in possession holding over after he is satisfied, there is no tenancy either in law or in equity: he is a mere trustee, and is bound to account (*o*).

Leases by Mortgagor before the Mortgage.

If a lease be granted by a mortgagor *prior* to the mortgage, the mortgagee has the same right against the lessee and those claiming under him that the mortgagor had and no other than he had, and his power of re-entry and remedy for breach of covenants must be under the lease as assignee of the reversion, so long as the lease is in existence, and the tenant acknowledges his title (*p*). But in order to place himself in this position, the mortgagee ought to give the lessee notice of the mortgage, and demand payment of the rent, and he will be entitled both to the rent which has become due since the mortgage and is unpaid to the mortgagor, and to that which becomes due after the notice (*q*). But the lessee before receiving such notice is justified in paying his rent to the mortgagor (*r*). In ejectment by a lessor against the lessee for a forfeiture, it is a good defence that the lessor, after the execution of the lease, mortgaged the premises, although it be not shown that any interest is in arrear, or that the mortgagee has made any claim or otherwise enforced his rights against the lessor or lessee (*s*). Where a lessor, after execution of an agreement for a lease, has mortgaged the premises, the mortgagee may maintain use and occupation for the enjoyment of them subsequently to the mortgage, and notice thereof (*t*). Where a mortgage was made after a

(*l*) *West* v. *Fritche*, 3 Exch. Rep. 216.

(*m*) *Pinhorn* v. *Souster*, 8 Exch. Rep. 763.

(*n*) *Partridge* v. *Bere*, 5 Barn. & Ald. 604; 1 Dowl. & Ryl. 272; *Hitchman* v. *Walton*, 4 Mees. & Wels. 409; Horn. & Hurl. 374; see also *Doe* d. *Higginbotham* v. *Barton*, 11 Ad. & El. 307; 3 Per. & Dav. 194.

(*o*) *Quarrell* v. *Beckford*, 1 Madd. Ch. Ca. 269.

(*p*) *Moss* v. *Gallimore*, 1 Dougl. 279; *Birch* v. *Wright*, 1 Term Rep. 378; *Rogers* v. *Humphreys*, 4 Ad. & El. 299; *Burrowes* v. *Gradin*, 1 Dow. & Lo. 213.

(*q*) Ibid.; *Pope* v. *Biggs*, 9 Barn. & Cres. 245; *Ex parte Hankey*, 1 Mont. & Mac. 247.

(*r*) Ibid.

(*s*) *Doe* d. *Marriott* v. *Edwards*, 5 Barn. & Adol. 1065; 3 Nev. & Man. 193.

(*t*) *Rawson* v. *Eicke*, 7 Ad. & El. 451.

letting from year to year, and subsequently the mortgagor, on making some improvements, agreed with the tenant for an increased rent, it was held that the mortgagee, after notice to the tenant of the mortgage, might recover, in an action for use and occupation, arrears of the improved rent due at the time of the notice, as well as subsequent accruing rent (*u*). Where a mortgage was made after a letting, and it was subsequently arranged between the mortgagor, the mortgagee and the tenant, that the latter should pay the interest to the mortgagee, and the remainder of his rent to the mortgagor, it was held that after this arrangement the tenant was not justified, after a mere notice so to do, in paying the whole rent to the mortgagee (*x*). In ejectment by landlord against tenant for a forfeiture, it is a good defence that the landlord, after the execution of the lease, conveyed away his title to the premises by mortgage, although it be not shown that any interest on the mortgage is in arrear, or that the mortgagee has made any claim, or otherwise enforced his rights as against either landlord or tenant (*y*).

Leases by the Mortgagor after the Mortgage.

A lease made by the mortgagor *after* the mortgage, is subject to every circumstance of the mortgage (*z*); and as the mortgagee may eject the mortgagor without notice (*a*), so he may treat the lessee and all those who may be in possession as wrong doers, and may bring ejectment; but he cannot distrain or bring any action for the rent they have contracted to pay, as there is no relation of landlord and tenant between them, there being no contract to that effect, unless the relation of landlord and tenant has been created by the consent of both parties, or by payment of rent to the mortgagee and acceptance of it by him, or by a notice given by the mortgagee to pay rent to him, in which the tenant acquiesces, which circumstances are evidence of a contract (*b*). It follows, from the above principles, that it is no answer at law to an action for use and occupation by the mortgagor, that the mortgagee has given the defendant notice to pay the rent to him, and it is questionable whether actual payment to the mortgagor would constitute a defence (*c*). The effect of this and of other cases (*d*) to overrule the law as laid down in *Pope* v. *Biggs*, that in the case of a lease made by the mortgagor after the mortgage, the mortgagee, by merely giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents. Where a

(*u*) *Burrowes* v. *Gradin*, 1 Dow. & Low. 213.

(*x*) *Whitmore* v. *Walker*, 2 Car. & Kir. 615.

(*y*) *Doe* d. *Marriott* v. *Edwards*, 5 Barn. & Adol. 1065; 3 Nev. & Man. 193.

(*z*) *Keech* v. *Hall*, 1 Doug. 21; *Brown* v. *Storey*, 1 M. & G. 117.

(*a*) *Doe* d. *Fisher* v. *Giles*, 5 Bing. 421; *Doe* d. *Hughes* v. *Bucknell*, 8 Car. & Pay. 566.

(*b*) *Evans* v. *Elliott*, 9 Ad. & El. 342; 1 Per. & Dav. 256; 1 Wil. Wol. & Hod. 744; *Brown* v. *Storey*, 1 Scott, N. R. 9; 1 Man. & Gr. 117.

(*c*) *Wilton* v. *Dunn*, 17 Queen's B. Rep. 294; questioning the authority of *Waddilove* v. *Barnett*, 2 Bing. N. C. 538.

(*d*) *Rogers* v. *Humphreys*, 4 Ad. & El. 299; *Partington* v. *Woodcock*, 6 Ad. & El. 690; and see the observations of Patteson, J., in *Wilton* v. *Dunn*, 17 Queen's B. Rep. 300.

tenant, after notice given to him of the mortgage, paid rent to the mortgagee under a distress, it does not constitute a tenancy by relation back, so as to entitle the mortgagee to distrain for a previous half year's rent due subsequently to the notice (*e*). Where a mortgagee gave notice of the mortgage to a tenant of the mortgagor, and required him to pay all rent due and to become due in respect of the premises, it was held to be evidence from which a jury might infer a contract of tenancy for a year, as between the mortgagee and the tenant (*f*). If the mortgagor of a house lets it furnished, and afterwards the tenant receives notice from the mortgagee to pay the rent to him, which he does, the mortgagor may still recover against the tenant for the use of the furniture, for either the rent may be apportioned, or a new agreement may be inferred to take the house of the mortgagee, and to pay the mortgagor for the use of the furniture (*g*). The result of the cases seems to be that a bare notice by the mortgagee to the mortgagor to pay rent will not create a tenancy; but that a notice acquiesced in by payment of rent, continuance in possession or otherwise is evidence from which a jury may infer a contract of tenancy (*h*). If a mortgagor, who continues in possession by consent of the mortgagee, makes a lease for years, and the lessee enter, claiming nothing but his lease, he is not a disseisor, but, on payment and acceptance of his rent, a tenant at will; and if the mortgagor again enter after the expiration of the lease, he shall be tenant at will again to the mortgagee; and his acts, being by permission of the mortgagee, shall not turn to his prejudice (*i*). In the case of mortgages made *prior* to the lease, the mortgagee cannot distrain for the rent (*k*), although he may evict the tenant; nor will a payment by the tenant to the mortgagee under a distress constitute a tenancy by relation back so as to entitle the mortgagee to distrain for rent due previously (*l*). A mortgagee out of possession who gives notice of the mortgage to the tenant, who has become tenant since the mortgage, cannot maintain trespass for mesne profits against the tenant for the rents accrued due since the date of the mortgage, by mere entry upon the land after the notice, the doctrine of relation not applying to such a case (*m*). And where the mortgagee gave notice of the mortgage to the tenant in possession, who had become tenant since

(*e*) *Evans* v. *Elliott*, 9 Ad. & El. 342; 1 Per. & Dav. 256; 1 Will. Wol. & Hod. 744.

(*f*) *Brown* v. *Storey*, 1 Man. & Gr. 117; see also *Doe* d. *Hughes* v. *Bucknell*, 8 Car. & Pay. 566.

(*g*) *Salmon* v. *Matthews*, 8 Mees. & Wels. 827.

(*h*) *Brown* v. *Storey*, 1 Man. & Gr. 117; *Doe* d. *Hughes* v. *Bucknell*, 8 Car. & Pay. 566; *Pouseley* v. *Blackman*, Cro. Jac. 659; *Doe* d. *Higginbotham* v. *Barton*, 11 Ad. & El. 307; *Rogers* v. *Humphreys*, 4 Ad. & El. 299.

(*i*) *Moss* v. *Gallimore*, 1 Dougl. 279; *Archer* v. *Dalby*, Cro. Jac. 660.

(*k*) *Partington* v. *Woodcock*, 6 Ad. & El. 690; 1 Har. & Wol. 262; 5 Nev. & Man. 672; *Pope* v. *Biggs*, 9 Barn. & Cres. 245; 4 Man. & Ryl. 193; *Rogers* v. *Humphreys*, 4 Ad. & El. 299; 5 Nev. & Man. 511; 1 Har. & Wol. 625.

(*l*) *Evans* v. *Elliott*, 9 Ad. & El. 342; 1 Per. & Dav. 256; 1 Will. Wol. & Hod. 744; *Johnson* v. *Jones*, 9 Ad. & El. 809; 1 Per. & Dav. 651; and see *Alchorne* v. *Gomme*, 2 Bing. 54; 9 Moore, 130.

(*m*) *Litchfield* v. *Ready*, 5 Exch. Rep. 939.

the mortgage, and made an entry and subsequently served a notice of ejectment upon the tenant, who gave a judge's order, by which it was agreed that the action should be stayed upon the tenant's undertaking to give up possession of the premises on a day named therein; and in default thereof the mortgagee was to be at liberty to sign final judgment and to issue execution against the tenant for the whole costs of the action; it was held, first, that the mortgagee was not in a position to maintain trespass for the mesne profits from the date of the mortgage, as he had not such a possession as is necessary to support the action; and, secondly, that the judge's order could not be considered as equivalent to a judgment by default in ejectment, or as any evidence of the mortgagee's prior occupation of the premises (*n*). Where a mortgagor after mortgage demised part of the land, and then made a second mortgage, and the tenant paid rent to the second mortgagee, who demised another part of the land to a different tenant, and then notice was given to both tenants of the first mortgage, who accordingly paid their rents to the first mortgagee; it was held, in ejectment by the second mortgagee, that the tenants might both show the prior mortgage and the notice (*o*). A lease made by a mortgagor after the mortgage may bind him by estoppel as well as all those who afterwards claim under him (*p*). A party becoming tenant to the mortgagor after the mortgage will be protected in paying rent to him until he receives notice from the mortgagee to pay the rent to him (*q*). It has been said, that a jury might perhaps be warranted in inferring a recognition of the right of a tenant after the mortgage to hold the premises from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises as before the mortgage, and to lease them out exactly as if his property in them continued (*r*). Where the attorney of a mortgagee, who was also attorney of the mortgagor, applied to the tenant in possession under the mortgagor for payment of his rent, in order to satisfy the interest on the mortgage, with a threat of distress in case of non-payment, it was held, that the mortgagee could not maintain an ejectment against the tenant as a trespasser, laying the demise at a period anterior to the application (*s*); though the mere receipt by the mortgagee from the mortgagor of interest due on the mortgage will not preclude the mortgagee from ejecting the mortgagor's tenant, declaring on a demise prior to the receipt (*t*). After notice of the mortgage and demand of rent, the tenant is justified in paying to the mortgagee as well such rent as may have fallen due since the mortgage, and have remained unpaid to the

(*n*) *Litchfield* v. *Ready*, 5 Exch. Rep. 939.

(*o*) *Doe* d. *Higginbotham* v. *Barton*, 11 Ad. & El. 307; 3 Per. & Dav. 194.

(*p*) *Omelaughland* v. *Hood*, 1 Roll. Abr. 874, pl. 10; 876, pl. 5; *Webb* v. *Austin*, 7 Man. & Gr. 701.

(*q*) *Pope* v. *Biggs*, 9 Barn. & Cres. 245.

(*r*) Per Lord Denman, C. J., in *Evans* v. *Elliott*, 9 Ad. & El. 342.

(*s*) *Doe* d. *Whitaker* v. *Hales*, 7 Bing. 322.

(*t*) *Doe* d. *Rogers* v. *Cadwallader*, 2 Barn. & Adol. 473.

mortgagor, as that which may thereafter become due (*u*). A tenant holding under the lessee of the mortgagor may show that the lease was made to the lessee after the mortgage, and that he, the tenant, was compelled to pay the rent to the mortgagee, and such payment will operate as a discharge of the rent to the mortgagor (*x*); and an assent to such payment will be presumed from long acquiescence and neglect to call for rent (*y*). The mere fact of the mortgagee occasionally going to see improvements made to the property by the lessee of the mortgagor, does not raise an implied tenancy between the mortgagee and the lessee, and is not a recognition of his holding (*z*). An attornment made by the tenant of a mortgagor to the mortgagee in October, as holding of him from the Michaelmas two years previous, is sufficient to support an avowry for a distress for the two years' rent (*a*). *A.*, seised in fee, mortgaged in fee to *B.*, and afterwards leased to the defendant for thirty-one years. The plaintiff bought the legal estate from *B.*, the mortgagee, and also the equitable estate from a party who derived it from *A.*, the mortgagor, which party also joined in the conveyance of the legal estate: it was held, that the plaintiff, although he had received rent from the defendant, was not bound by the mortgagor's lease to him, but might recover in ejectment after expiration of a notice to quit, or sue him for use and occupation after the payment and receipt of rent. In this case, the plaintiff was not bound by the mortgagor's lease to the defendant, as the mortgagor had not the legal estate when he granted it. The plaintiff took the legal interest from the mortgagee, who was not estopped by the lease, and his also taking the equity of redemption through the mortgagor did not amount to an estoppel (*b*). Where a person who had bought premises which had not been conveyed to him, let his son into possession as tenant at will, paying no rent, afterwards had the property conveyed to him, and then mortgaged it; it was held, that if the mortgage had any operation on the tenancy at will, there was no new tenancy between the son and the mortgagee, so as to prevent the operation of the statute of limitations (*c*). Where a mortgagor gave an authority to the mortgagee to receive the rent of a tenant, under a demise subsequent to the mortgage, and the mortgagee received the rent for some time; after which the authority was countermanded, and the tenant refused to pay to either, and the mortgagor distrained, it was held that the relation of landlord and tenant was not created between the tenant and the mortgagee (*d*). No notice is necessary to be given by the mortgagee that he means to proceed against tenants, where

(*u*) *Pope* v. *Biggs*, 9 Barn. & Cres. 245.

(*x*) *Johnson* v. *Jones*, 9 Ad. & El. 809; 1 Per. & Dav. 651; and see *Alchorne* v. *Gomme*, 2 Bing. 54; 9 Moore, 130.

(*y*) *Dyer* v. *Rowley*, 2 Bing. 94.

(*z*) *Doe* d. *Parry* v. *Hughes*, 11 Jur. 698.

(*a*) *Gladman* v. *Plumer*, 10 Jurist, 109; 15 Law J., N. S., Q. B., 79.

(*b*) *Doe* d. *Lord Downe* v. *Thompson*, 9 Queen's B. Rep. 1037.

(*c*) *Doe* d. *Goody* v. *Carter*, 9 Queen's B. Rep. 863.

(*d*) *Wheeler* v. *Branscombe*, 5 Queen's B. Rep. 373; 1 Gale & Mer. 406.

they have come in subsequently to the mortgage; because, in such case, their title is wrongful as against the mortgagee; but there may be cases where, in consequence of the conduct of the mortgagee, notice may become necessary (*e*). If a mortgagor sues for rent after notice given to the tenant of the mortgage, the tenant may obtain relief under the Interpleader Act, 1 & 2 Will. IV. c. 58, s. 1 (*f*).

Leases granted by Mortgagee.

The mortgagee cannot before foreclosure of the equity of redemption make a lease for years of property in mortgage which will bind the mortgagor, unless to avoid an apparent loss and merely of necessity (*g*). Indeed if it were otherwise, it would be in the power of the mortgagee effectually to bar the mortgagor of his benefit of redemption by granting at pleasure beneficial leases on fines: besides, if such leases were held good, it would be difficult for the mortgagor to recover any rent, though the principal and interest should be paid; because, not claiming under the estate of the mortgagee, he could have no benefit of the lease made by him, being neither party to the deed, nor privy to the estate (*h*). If a mortgagee accepts a person as his tenant, to whom the mortgagor has granted a lease for years since the mortgage, that makes him only tenant from year to year to the mortgagee (*i*).

Leases by Mortgagor and Mortgagee.

Where lands in mortgage are to be leased, the mortgagor and mortgagee ought to concur in granting the lease (*k*). A mortgagor and mortgagee for a term joined in a deed, by which the former leased and the latter confirmed the premises to a third party for the remainder of the term, at a rent reserved to the mortgagor, his executors, &c. The deed declared that nothing therein should abridge, defeat, alter, &c., the interest of the mortgagee in the premises, which was to remain a security for his principal and interest: the mortgagee was held entitled to the rent (*l*). A mortgagor agreed to sell premises held by a tenant under a lease granted by him after the mortgage, without the concurrence of the mortgagee, who, however, was willing to concur in the sale, it was held that the mortgagor was able to make a good title (*m*). Where a lease is made by the mortgagor and mortgagee, the covenants on the part of the lessee ought to be made with the mortgagee, with a view to their running with the land (*n*). A joint action of covenant is not maintainable against a mortgagor and a mortgagee on an implied covenant, if the latter has demised, and the former, who had merely an equitable interest, has confirmed the lease (*o*).

(*e*) *Rogers* v. *Humphreys*, 4 Ad. & El. 299; 5 Nev. & Man. 511; 1 Har. & Wol. 625.

(*f*) *Murdock* v. *Taylor*, 6 Bing. N. C. 293; 8 Scott, 604.

(*g*) *Hungerford* v. *Clay*, 9 Mod. 1; Powell on Mort. 188.

(*h*) Powell on Mort. 188; *Keech* d. *Warne* v. *Hall*, 1 Doug. 22.

(*i*) *Doe* d. *Hughes* v. *Bucknell*, 8 Car. & Pa. 566.

(*k*) See *Doe* d. *Barney* v. *Adams*, 2 Cr. & J. 232.

(*l*) *Edwards* v. *Jones*, 1 Col. 247.

(*m*) *Webb* v. *Austin*, 7 Man. & Gr. 701.

(*n*) *Webb* v. *Russell*, 3 Term Rep. 393; *Stokes* v. *Russell*, 3 Term Rep. 679; *Russell* v. *Stokes* (*in error*), 1 H. Black. 562.

(*o*) *Smith* v. *Pocklington*, 1 Cro. & Jer. 445.

Effect of a Covenant to permit the Mortgagor to take Rents, &c.

If a mortgagee covenant that the mortgagor shall take the profits till default in payment, or that the mortgagor and his heirs shall take the profits; in the one case the mortgagor, and in the other his heir after his death, shall be tenant at will (*p*); but in case of the death of the mortgagor, the tenancy at will seems to be determined, till there is a receipt of interest from the heir, which seems to make him also then tenant at will to the mortgagee (*q*). If the mortgagee covenant that he will not take the profits till default in payment, and the mortgagor enters immediately, he shall not be tenant at will, but only at sufferance; for it was not agreed that *he* should take, but that the mortgagee should *not* take (*r*). A mortgage indenture after a power of sale on non-payment of the mortgage money contained a covenant by the mortgagee that there should be no sale nor notice of a sale, nor means taken for obtaining possession until a year after notice thereof to the mortgagee: the mortgagee also covenanted for quiet enjoyment by the mortgagor or his tenant at will, on payment of a yearly rent, but no livery of seisin was made to the mortgagor; it was held, that under this deed the mortgagor was tenant at will only to the mortgagee, and that no tenancy from year to year was thereby created (*s*). So if a mortgage be made by bargain and sale, with a proviso that the mortgagee, his heirs and assigns, "shall not intermeddle with the actual possession of the premises, or perception of the rents," until default of payment: the mortgagor is a tenant on sufferance, and not a tenant at will, as he would have been on a covenant that *he* should take the profits till default of payment (*t*). An estate was mortgaged in fee, with the usual proviso for redemption, on payment in June, 1834, and it was also provided that the mortgagee should not call in the principal money until December, 1840, if the interest were regularly paid; and there was a covenant that the mortgagor should hold, occupy and enjoy the estate until default in payment of the principal or interest as aforesaid: it was held that this operated as a lease to the mortgagor until December, 1840 (*u*). If the mortgagee covenant that the mortgagor shall retain the possession until default made, and then assign without the mortgagor joining in the assignment, it puts an end to the similarity of his estate to an estate at will, and makes the mortgagor in the nature of a tenant on sufferance (*x*).

(*p*) Com. Dig. *Estates*, (H 1); *Archer* v. *Dalby*, Cro. Jac. 660.

(*q*) Bac. Abr. tit. *Mortgage*, (A).

(*r*) Com. Dig. tit. *Estates*, (H 2).

(*s*) *Doe* d. *Dixie* v. *Davies*, 7 Exch. Rep. 89.

(*t*) *Powsley* v. *Blackman*, Cro. Jac. 659. The Court of Chancery will not suffer, in a deed of mortgage, any agreement in it to prevail, that the estate should become an absolute purchase in the mortgagee upon any event whatsoever.

(*u*) *Wilkinson* v. *Hall*, 3 Bing. N. C. 508; 3 Hodges, 56; 4 Scott, 301; see also *Doe* d. *Lyster* v. *Goldwin*, 2 Queen's B. Rep. 143; 1 Gale & Dav. 463; and *Doe* d. *Roylance* v. *Lightfoot*, 8 Mees. & Wels. 553; *Doe* d. *Parsley* v. *Day*, 2 Queen's B. Rep. 147.

(*x*) A mortgagee in possession is not obliged to lay out money any further than to keep the estate in necessary repair; but if he has expended any sum in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may certainly add that to the principal of his debt; and it shall carry interest. If the

A tenant for years of a house demised it by way of mortgage to hold from thenceforth, subject to the proviso after named; and he also sold and transferred the fixtures and some chattels to the mortgagee, also subject to the proviso after named; the deed contained a proviso for reconveyance on payment of the money on a certain day, and also a proviso that, on non-payment, the mortgagee might enter upon and receive the rents, and sell the premises, and also the fixtures and chattels; it was held, that the mortgagee's right to take possession did not attach until the day on which the money was to be paid, and that therefore he could not maintain an action of trespass previously (*y*). But where a person demised premises, to hold from thenceforth for a term, provided that if the lessee paid a certain sum and interest a year after, then that the demise should be void, provided also that upon default the lessee might sell; and there was a *covenant* by the lessor for payment of principal and interest, and that at any time after default it should be lawful for the lessee to enter, and from thenceforth to hold the premises and take the rents; it was held that the lessee might take possession immediately and before default (*z*).

SECT. 7.—*Master and Servant.*

Legal Effect of an Occupation as a Servant.

A servant put into the occupation of a cottage, with less wages on that account, does not occupy it as a tenant; but the master may properly declare on it as his own occupation, in an action on the case for a disturbance of a right of way over the defendant's close to such cottage; and it matters not that the cottage was divided into two parts, one of which only was in the occupation of such servant, the other being occupied by a tenant paying rent (*a*). Where a defendant, on being served with a declaration in ejectment, assented to the character of tenant in possession, and afterwards appeared and pleaded: it was held, that it was quite sufficient evidence for a jury to find that he was the tenant in possession, although it also appeared that he was in the situation only of a servant, and managed the business for the real owner of the premises (*b*). One of two partners, joint tenants of a house where their joint business is carried on, has a right to authorize a joint weekly servant to remain in the house, though the other partner has regularly given him a week's notice to leave the

estate lie at such a distance that he *must* employ a bailiff to collect the rents, what he pays to the bailiff shall be allowed; but not where he does or may receive the rents himself. Accepting a mortgage does not, it seems, estop the mortgagee from saying that the mortgagor had no estate in the premises mortgaged; but a mortgagor is never permitted to dispute the title of his mortgagee, because no man is permitted to dispute his own solemn deed. Powell on Mort. 185, 189, n. 212, 6th ed.

(*y*) *Wheeler* v. *Montefiore*, 2 Queen's B. Rep. 133; 1 Gale & Dav. 493; but see *Doe* d. *Parsley* v. *Day*, 2 Queen's B. Rep. 147.

(*z*) *Rogers* v. *Grazebrook*, 8 Queen's B. Rep. 895.

(*a*) *Bertie* v. *Beaumont*, 16 East, 33; *S. P. Rex* v. *Stock*, 2 Taunt. 339: and see *Mayew* v. *Suttle*, 23 Law J., Q. B., 372; *S. C.* affirmed on error, 24 ibid. 54; *R.* v. *Shipdam*, 3 D. & R. 384; *R.* v. *Bardwell*, 2 B. & C. 161; *R.* v. *Kelstern*, 5 M. & Sel. 136; *R.* v. *Cheshunt*, 1 B. & Ald. 473; *R.* v. *Snape*, 6 A. & E. 278.

(*b*) *Doe* d. *James* v. *Staunton*, 2 Barn. & Ald. 371; 1 Chit. 119.

service (c). Where a party was employed by the Highgate Archway Company to collect toll for them, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent; and the Company having ceased to collect toll at the particular spot, he was dismissed from their employ, and received a notice to leave the house, which he promised to do, it was held that these circumstances did not constitute the party a tenant of the Company (d). Officers or servants of government, who are *permitted* to occupy houses belonging to government as part remuneration for their services, may be considered as occupying as tenants within the Reform Act, 2 Will. IV. c. 45, s. 27, but not if they are *required* to occupy them with a view to the more efficient performance of their duties (e).

Sect. 8.—*Vendor and Vendee.*

Legal Effect of an Occupation in the Character of Vendee.

An occupation under an agreement for the sale of premises, if a title can be made, may create a tenancy (f): thus, where *A.* entered into an agreement with *B.* to sell land then in the possession of the latter on certain terms; and to execute a conveyance in case *A.* should be found owner thereof, and could make a good title thereto; and agreed, that in the meantime *B.* should remain in possession; and *A.* afterwards brought an action of ejectment against *B.* to try the title, without having demanded possession, or otherwise determined *B.*'s tenancy; it was held, that the action was not maintainable: for one who was put in possession under an agreement for the purchase of land could not be ousted by ejectment before his lawful possession was determined by demand or otherwise; and even considering such lawful possession as a tenancy at will, the defendant's confession (by entering into the common rule under the old practice) of a lease by the lessor to the nominal plaintiff was not a constructive determination of the will whereon to maintain ejectment (g). Where *A.*, having agreed to buy lands of *B.*, had paid part of the purchase-money, and was let into possession, it was held that this was a mere tenancy at will, which might be determined by a demand of possession: and consequently an ejectment might be maintained (h). An occupation under an agreement for assigning a lease, where it was agreed that the assignee should pay the lessee until the completion of the assignment, at the rate of 100*l.* per year, was held to constitute the relation of landlord and tenant between the lessee and assignee (i): but where, in an

(c) *Donaldson* v. *Williams*, 1 Cromp. & Mees. 345.

(d) *Hunt* v. *Colson*, 3 Moore & Scott, 790; and see *Mayew* v. *Suttle*, 23 Law J., Q. B., 372.

(e) *Hughes & Chatham (Overseers)*, 5 Man. & Gran. 54; *Dobson & Jones*, id. 112.

(f) *Doe* d. *Newby* v. *Jackson*, 1 Barn. & Cres. 448; 2 Dowl. & Ryl. 514; and see *Kirtland* v. *Pounsett*, 2 Taunt. 145; *Hearne* v. *Tomlins*, Peake, 192; *Hope* v. *Booth*, 1 Barn. & Adol. 498; *Doe* d. *Milburn* v. *Edgar*, 2 Bing. N. C. 498; 2 Scott, 732; 1 Hodges, 437; *Winterbottom* v. *Ingham*, 7 Queen's B. Rep. 611.

(g) *Right* d. *Lewis* v. *Beard*, 13 East, 210.

(h) *Doe* d. *Hiatt* v. *Miller*, 5 Car. & Pay. 595; *Ball* v. *Cullimore*, 2 Cromp. M. & Ros. 120; 1 Gale, 96; 5 Tyr. 753.

(i) *Saunders* v. *Musgrave*, 6 Barn. & Cres. 524; 9 Dowl. & Ryl. 529; 2 Car. & Pay. 294.

agreement for the sale of leasehold premises, to be paid for by instalments, it was stipulated, that in default of payment of the instalments at specified times, the former instalments should be forfeited, and the vendor should not be compellable to convey; upon which the purchaser was let into possession, and made default, he was held to be from thenceforth a mere tenant upon sufferance (*k*). So where a person was let into possession under an agreement of purchase, he paying interest on the purchase-money until completion of the purchase, which was to be in three months, and the purchase not being then completed, he continued in possession, it was held that there was only a tenancy at will, which might be determined without a notice to quit (*l*). Where *A.* agreed by parol to sell an estate to *B.* on certain terms, provided *B.* would continue *C.* his tenant, not for one year only, but from year to year (*C.* having just before been let into possession under a contract for the purchase of the estate, which he had failed to pay for in time, and had therefore forfeited his deposit); and *A.* thereupon agreed to take *C.*'s forfeited deposit as part of the purchase-money; and *A.* and *B.* afterwards reduced their agreement respecting the purchase into writing, in which no notice was taken of the stipulation concerning *C.*'s tenancy: it was held, that this stipulation being collateral to the written agreement was binding upon *B.*; and that the agreement operated as a tenancy for two years certain at least, though no rent was then mentioned, but was to be settled afterwards; and that the tenancy could not be put an end to at the end of the first year by six months' previous notice to quit (*m*). Where there was an agreement between *P.* and W. for the sale of lands to the latter, to be occupied on the 25th of March; and before that day *W.* agreed to let to the defendant from that day, and he was let into possession before the day, by the consent of *P.*, who had notice that *W.* had so agreed to let the land, on the 29th of May; the conveyance was executed as of the 25th of March, subject to a term redeemable on payment by *W.* of the purchase-money with interest, with a power to *P.* to enter for default of payment by *W.*: it was held that *P.* might bring ejectment for default of payment without giving the defendant any notice to quit, on the ground that the relation of landlord and tenant did not subsist between *P.* and the defendant (*n*).

Occupation by Vendor.

A continuance of occupation by a vendor without any agreement will not raise an implied tenancy: therefore where a defendant and another person conveyed an undivided moiety to the plaintiff of several houses, in one of which the defendant had resided a long time, and continued so to do, it was held, use and occupation could not be maintained against him (*o*).

(*k*) *Doe* d. *Moore* v. *Lawder*, 1 Stark. 308; see also *Doe* d. *Rogers* v. *Pullen*, 2 Bing. N. C. 749; 3 Scott, 271; 2 Hodges, 39.

(*l*) *Doe* d. *Tomes* v. *Chamberlaine*, 5 Mees. & Wels. 14; and see *Doe* d. *Bord* v. *Burton*, 16 Q. B. 807.

(*m*) *Denn* d. *Jacklin* v. *Cartwright*, 4 East, 29; see also *Doe* d. *Chadborn* v. *Green*, 9 Ad. & El. 658; 1 Per. & Dav. 454; 2 Will. Wol. & Hod. 122.

(*n*) *Doe* d. *Parker* v. *Boulton*, 6 M. & S. 148.

(*o*) *Tew* v. *Jones*, 13 Mees. & Wels. 12.

CHAPTER VI.

CHANGE IN THE RELATIVE SITUATION OF THE PARTIES.

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SECT. 1.—*Assignments generally.*

Nature and Description of an Assignment.

AN assignment is the transferring and setting over to another some right, title or interest in things, in which a third person, not a party to the assignment, has a concern and interest. The party assigning is called the assignor, and he to whom the assignment is made the assignee (*a*). Every one who has an estate or interest in lands and tenements (excepting perhaps a tenant at will or on sufferance), or who has a present and certain estate or interest in things which lie in grant,—as in a rent, common or advowson,—may dispose of his estate therein by assignment. The word "assigns" extends not only to the immediate assignee, but also to assignees ad infinitum:—it includes, on the one hand, the heirs and personal representatives of assignees; and on the other hand, the assignees of the heirs or personal representatives of the original party (*b*).

What Description of Property may be assigned.

A term of years may be assigned, even though the interest be future, as where it is to commence in futuro; for the interest is vested in præsenti, though it does not take effect till a future time. Although ordinarily a lessee cannot assign his term if an actual ouster has taken place, until he has re-entered; yet a lessee for years of the crown may do so (*c*). So a contingent interest, which a husband has in right of his wife, or the possibility of a term, though not strictly good by way of assignment at law, yet may be assigned in equity, where there is a valuable consideration (*d*). Generally a chose in action cannot be assigned, yet the king, by virtue of his prerogative, may assign a

(*a*) Bac. Abr. tit. *Assignment.*
(*b*) Com. Dig. tit. *Assignment*, (A B).
(*c*) *Wingate* v. *Mark*, Cro. Eliz. 275; *Bruton* v. *Rainsforth*, Cro. Eliz. 15.
(*d*) *Theobald* v. *Duffy*, 9 Mod. 102.

chose in action, and the assignee may sue either in his own name or in that of the king (*e*): but if the king grant a chose in action to another, his grantee cannot again assign it over. Covenants running with the land form an exception to the rule that a chose in action cannot be assigned; also bail bonds, replevin bonds and other bonds by statute, in any of which cases the assignee may sue in his own name. If a lessee enter into a covenant, which runs with the land, for himself and his assigns, and then grant over the term, and the assignee is guilty of a breach, an action of covenant lies either against the assignee at common law, because the covenant runs with the land, or it lies against the lessee at the election of the lessor, who may charge both; but execution shall be taken against one of them only; but if he take both in execution, he that is last taken shall have an audita querela. A power, where it is coupled with an interest, may be assigned, although a bare power is not assignable; therefore if a lease be made with an exception of the trees, and a power be reserved to the lessor to enter and cut them down, he may assign his power to another person; but if it be not properly pursued, the lessee may maintain trespass both against the lessor and his assignee (*f*). A licence to search for and raise metals, and also to carry them away and convert them to the use of the licencee, passes an interest which is capable of being assigned (*g*). It appears to be the better opinion, that a contract for a lease is not assignable in the same manner as a lease (*h*). The interest or estate that a man has by extent is also assignable from man to man at pleasure (*i*): so if the conuzee of a statute extend the land of the conuzor, who is afterwards evicted by a conuzee of a prior statute, yet he may assign his interest; for he shall have it again after the prior statute is satisfied (*k*): but as a mere right is not assignable, if the conuzee of a statute sue out an extent, and a liberaté be returned, and he suffer the conuzor to keep possession, he cannot assign the lands; for his possession under the liberaté is by his own entry turned to a right (*l*). An annuity may be demised by way of assignment, and in certain cases an office may be assigned.

In what Way Assignments may be made.

Persons become assignees either by act of the party or by act of law; under the first head may be classed those who become so by an instrument of assignment of the reversion—or of the term, either absolutely or by way of mortgage—or by act of attornment: under the latter head may be stated, those who have thrown upon them the interest in the premises—in consequence of the property having been taken under writs of execution—by bankruptcy—or by insolvency—

(*e*) *Cross* v. *Faustenditch*, Cro. Jac. 180.
(*f*) *Warren* v. *Arthur*, 2 Mod. 317.
(*g*) *Muskett* v. *Hill*, 5 Bing. N. C. 694; 7 Scott, 885; see also *Doe* d. *Hanley* v. *Wood*, 2 Barn. & Ald. 724.
(*h*) *Oherlihy* v. *Hodges*, 1 Scho. & Lef. 123; and see *Rawson* v. *Eicke*, 7 Ad. & El. 451; Will. Wol. & Dav. 675; 2 Nev. & Per. 423.
(*i*) Shep. Touch. 242.
(*k*) Com. Dig. tit. *Assignment*.
(*l*) *Hannam* v. *Woodford*, 4 Mod. 48.

or by marriage—or lastly, by the death of the original party. Each of these modes of acquiring the character of an assignee will be considered in this chapter, after having in the first place premised that an assignment must be in writing (*m*), and also (if not of a copyhold) must be by deed (*n*). The Statute of Frauds enacts, "that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing; or by act and operation of law (*o*)." The statute 7 & 8 Vict. c. 76, s. 3, which took effect on the 1st January, 1845, enacts that "no assignment of any freehold or leasehold land shall be valid at law unless the same shall be made by deed." This is repealed from the 1st of October, 1845, by the statute 8 & 9 Vict. c. 106, which enacts, sect. 3, that "an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments" made after that day, "shall be void at law unless made by deed." A demise by a termor to another of the whole of the term, where it is the intention of the parties to create the relation of landlord and tenant, is a lease, and not an assignment (*p*). It has been held that the assignment of a lease from year to year, otherwise than by deed or note in writing, is void under the Statute of Frauds (*q*): but in one case an assignment of a lease was held legal, under the peculiar circumstances of the case, though neither sealed, delivered nor stamped (*r*). Where *A*. desired *B*. to go to the landlord of premises, and hire them for him, which *B*. did in his own name, and *A*. afterwards occupied them; it was held that *B*. merely acted as trustee, and that therefore no assignment to *A*. of his interest was necessary (*s*). An assignment of a lease to an alien is not void (*t*).

What Stamps are necessary on Assignments in Writing.

By the Stamp Act, 55 Geo. III. c. 184, sch. 1, tit. *Assignation*, assignments are charged with the same duty as conveyances, the amount of which has been previously stated (*u*): and assignations or assignments of any property, real or personal, heritable or moveable, not otherwise charged in the schedule, nor expressly exempted by other clauses of the statute from all stamp duty, are to pay a duty of 1*l*. 15*s*.: and where the same, together with any schedule, receipt or other matter put or indorsed thereon or annexed thereto, shall contain 2160 words or upwards, then for every entire quantity of 1080 words con-

(*m*) By the Statute of Frauds, 29 Car. II. c. 3, s. 3.

(*n*) By 7 & 8 Vict. c. 76, s. 3, and 8 & 9 Vict. c. 106, s. 3.

(*o*) 29 Car. II. c. 3, s. 3. See also the 4th section of the statute, ante, 55.

(*p*) *Pollock* v. *Stacy*, 9 Queen's B. Rep. 1033; and see post, 212.

(*q*) *Botting* v. *Martin*, 1 Camp. 318; and see *Preece* v. *Corrie*, 2 Moore & Pay. 57; 5 Bing. 24.

(*r*) *Beck* d. *Fry* v. *Phillips*, 5 Burr. 2827.

(*s*) *Clark* v. *Waterlow*, 8 Car. & Pay. 365.

(*t*) *Wootton* v. *Steffenoni*, 12 Mees. & Wels. 129; see ante, Chap. II., Sect. 6, p. 45.

(*u*) See ante, Chap. IV., Sect. 10, p. 107.

tained therein over and above the first 1080 words a further progressive duty of 1*l.* 5*s.* By the Stamp Act, 13 & 14 Vict. c. 97, any assignment or surrender of a lease or tack upon any other occasion than a sale or mortgage, is chargeable with a duty equal to the ad valorem duty with which a similar lease or tack would be chargeable under the act: "Provided always, that where a similar lease or tack would be chargeable under this act with any stamp duty amounting to 1*l.* 15*s.* or upwards, then such assignment or surrender shall be chargeable only with a duty of 1*l.* 15*s.*" The assignment of a lease in writing without seal, did not require a stamp before the 44 Geo. III. c. 98. If a parol warranty and agreement to assign be reduced into writing, but not stamped, and the assignment be afterwards legally executed, the warranty cannot be proved by parol (*x*).

SECT. 2.—*Assignment of the Reversion.*

How Assignments of the Reversion may be made.

A lessor who has parted with his present possession in the premises demised may still assign his reversionary interest therein to a stranger. At common law such an assignment would only have given the assignee a right to the rent reserved, to distrain for it, and to sue for breaches of covenants in law, but not for breaches of express covenants entered into by the lessee with the grantor; to remedy this defect, the statute 32 Hen. VIII. c. 34, was passed, which enacted that all grantees of reversions should enjoy all the advantages, benefits and remedies by action only for non-performance of conditions, covenants or agreements, contained or expressed in leases, which the grantors or lessors themselves had or enjoyed. So that now the grantee of a reversion may take advantage of all express covenants which run with the land, as well as of covenants in law, though only the lessor and his heirs be named in the lease (*y*). The remedy is mutual, for the same statute gives the lessee a right of action against the grantee of the reversion.

Statute 32 Hen. VIII. c. 34.

To what the Statute of Hen. VIII. extends.

The statute extends to estates for life, or for years only, and not to estates in fee or in tail, or to mere collateral covenants (*z*); but it includes devisees (*a*), grantees of part of the reversion only (*b*), and, for some purposes, assignees of the reversion of part of the demised premises (*c*).

How Assignments of the Reversion may be made.

An assignment of the reversion after an under-lease must be by deed (*d*); and it has been held that a reversion of a tenancy from year to year cannot pass without deed (*e*). *A.* let a house to *B.*, as tenant from year to year, and afterwards granted a lease by deed to

(*x*) *Hodges* v. *Drakeford*, 1 New Rep. 270.
(*y*) *Thursby* v. *Plant*, 1 Saund. 287.
(*z*) *Webb* v. *Russell*, 3 Term Rep. 393.
(*a*) *Machell* v. *Dunton*, 2 Leon. 33.
(*b*) *Attoe* v. *Hemmings*, 2 Bulst. 281; *Wright* v. *Burroughs*, 3 Com. B. Rep. 685; 4 Dow. & Low. 438; Co. Litt. 215 a.
(*c*) *Twynam* v. *Pickard*, 2 Barn. & Ald. 105. See post, Book III., Chap. II., Sect. 3, (c).
(*d*) *Beely* v. *Perry*, 3 Lev. 155.
(*e*) *Brawley* v. *Wade*, M'Clel. 664.

C. of the house for twenty-one years: this was held to transfer the reversion to *C.*, and to disentitle *A.* to recover from *B.* the rent due after the lease (*f*). A conveyance of the fee, out of which a term of years has been created, and an under-lease granted by the termor to the owner of the fee, who had also taken an assignment of the under-lease, passes the chattel interest therein as well as the fee (*g*).

Effect of a Mortgage of the Reversion.

Mortgages *subsequent* to a lease operate as grants of the reversion, and carry with them, as incidental to such reversion, a right to the rent and the benefit of the landlord's remedies for the recovery. The mortgagee, therefore, may enforce the payment of the rent from the lessee either by distress or action; and the lessee will be exonerated by such payment from any demand on the part of the mortgagor or those claiming under him; even though actual compulsion on the part of the mortgagee has not been resorted to, but the lessee has paid the rent voluntarily (*h*).

SECT. 3.—*Assignment of the Term.*

(a) *Absolutely.*

What amounts to an Assignment.

In order to constitute a valid assignment, it is necessary that the legal estate of the assignor be passed; for a transfer of a mere equitable interest will not make a man an assignee; and therefore the delivery and depositing of a lease as a security for money, without any written assignment, passes no interest at law, although it may create a right which may be enforced in equity (*i*); but the transfer may be complete, although the assignee has never in fact got possession of the deed of assignment, by reason of a claim of lien on the part of the assignor's attorney for the expense of preparing it (*k*).

Distinction between an Assignment and an Under-lease.

An assignment, as contradistinguished from an under-lease, signifies a parting with the whole term; and when the whole term is made over by the lessee, although in the deed by which that is done the rent and a power of re-entry for non-payment are reserved to himself, and not to the original lessor, yet the instrument amounts to an assignment, and not an under-lease; and in such case, the person to whom it is made over may sue the original lessor or his assignees of the reversion, or be sued by them as assignee of the term, on the respective covenants in the original lease, even though new covenants are introduced into the assignment (*l*). If a termor for years make a

(*f*) *Harmer* v. *Bean*, 3 Car. & Kir. 307.

(*g*) *Burton* v. *Barclay*, 7 Bing. 745; 5 Moore & Pay. 785.

(*h*) *Moss* v. *Gallimore*, 1 Doug. 279. Payments agreed to be made by an occupier of the soil, under a parol licence to dig earth and make bricks, are in the nature of rent; and as such, a mortgagee is entitled, after notice in the usual manner, to all sums in arrear at the time of the notice, or which may become due afterwards; *Ex parte Hankey*, 1 Mont. & Mac. Bank. Cas. 247.

(*i*) *Doe* d. *Maslin* v. *Roe*, 5 Esp. 105.

(*k*) *Odell* v. *Wake*, 3 Campb. 394.

(*l*) *Palmer* v. *Edwards*, 1 Dougl. 187, n. It is necessary that the person sought to be charged as an assignee claim and be in possession through the same estate as the person whom he succeeds; for if he come in by an elder title, he is not an assignee; *Roach* v. *Wadham*, 6 East, 289.

lease for a time exceeding his interest, it shall operate as an assignment: therefore if a lessee for three years assign his term for four years, or demise the premises for four years, he does not thereby gain any tortious reversion, but it amounts to an assignment of his interest (*m*). In an action by the lessor against a person as assignee, to whom the lessee demised for a longer term than he himself had, and at a higher rent; it was held to operate in law as an assignment, and that it might be so described in pleading (*n*). So where a person holding under a lease made by a tenant for life, which was defeasible, and who therefore was tenant from year to year only, underlet for a term of years, and the underlessee again underlet for a less term; it was held, that the underlessee had parted with his whole interest (*o*). The general rule is contained in the above decisions, but a recent case (*p*) has decided that where a termor of land demised it to another by payment of a weekly rent for the whole of his term, it being the intention of the two to create the relation of landlord and tenant, such demise was not to be deemed an assignment against the intention of the parties; and an action for use and occupation might be brought by the termor in respect of the whole term, although the lessee had given a week's notice to quit before the expiration of the term, and had quitted accordingly. This case proceeded on the ground that it was the intention of the parties to create the relation of landlord and tenant, and the transaction being by parol only, and therefore void as an assignment, to hold that it was an assignment would be a violation of the maxim, ut res magis valeat quam pereat. The decision was founded upon the case of *Poulteney* v. *Holmes* (*q*), where it was ruled that a verbal agreement by a termor that another should have the premises for the remainder of the term, paying rent to him, was an underlease, and not an assignment. The authority of this latter case has been disputed. In *Parmenter* v. *Webber* (*r*), the lessee of two farms had agreed in writing with another that the latter should have them during the lease, remaining tenant to the lessee during that period. The undertenant accordingly took possession and paid a year's rent to the lessee, who afterwards distrained for rent in arrear. It was contended in argument that the agreement operated as an underlease, and that the lessee was entitled to distrain. The court, however, held that the agreement amounted to an absolute assignment of all the lessee's interest, and that he was not enabled to distrain. In another case, it was held that a similar written agreement amounted to an assignment, and not to a lease, and that the party so assigning the premises could not distrain. The effect of these two cases is to decide, not that use and occupation

(*m*) *Hicks* v. *Downing*, 1 Ld. Raym. 99; Bull. N. P. 106.

(*n*) *Wollaston* v. *Hakewill*, 3 Scott, N. R. 593.

(*o*) *Oxley* v. *James*, 13 Mees. & Wels. 200.

(*p*) *Pollock* v. *Stacy*, 9 Queen's B. Rep. 1033.

(*q*) 1 Stra. 405.

(*r*) 8 Taunt. 593; see also —— v. Cooper, 2 Wils. 375.

could not have been maintained by the person who had so parted with all his interest, but merely that he had no power to distrain. In *Preece* v. *Corrie* (*s*), a parting with the whole term by verbal agreement was held to create the relation of landlord and tenant, although there was no reversion. So in *Baker* v. *Gostling* (*t*), a termor who had under-leased by indenture for a term of years longer than his own, the under-lessee covenanting to pay him rent, was held entitled to sue the under-lessee for such rent. On the other hand, the case of *Poulteney* v. *Holmes* has been questioned by Mr. Jarman, in his work on Conveyancing (*u*), and by Parke, B., in *Barrett* v. *Rolph* (*v*). That learned judge there says, that *Poulteney* v. *Holmes* "cannot be supported on the ground of the reservation of the rent" (that being the ground on which it proceeded), and that it is "certainly of very doubtful authority." No decision, however, was given in the case, a compromise having been effected by the parties. The effect of the decision of the Queen's Bench in *Pollock* v. *Stacy* appears to be to relax the severity of the old law, by which instruments are to speak for themselves, and to decide that whether a written instrument or a verbal agreement is to operate as a lease or an assignment depends upon the intention of the parties, to be collected not merely from the terms of the instrument or agreement, but from extrinsic matter.

By what Expressions Assignments may be made.

An assignment is usually made by the words "grant, assign and set over;" but no particular expressions are necessary for the purpose, provided the intention of the parties be sufficiently explained. No consideration need be expressed in an assignment; for the fact of the assignee being subject to the payment of the rent reserved by the lease is considered to be a sufficient consideration (*x*). Woods which were excepted out of the lease, but subsequently granted by the lessor to the lessee, have been held not to pass by an assignment of the lease (*y*). Where a lessee for life granted all his estate and interest to *A.* and his executors: it was held not to amount to an assignment, because a grant to a man and his executors could not convey an estate for life, being a freehold (*z*). An agreement to assign on payment of a sum by instalments, the assignee in the mean time to perform the covenants in the lease and keep the assignor harmless, and the assignor to re-enter on non-payment of any instalment, is merely an agreement for an assignment and not an assignment (*a*).

Contracts to assign.

Where a lessee agreed to execute an effectual assignment of two leases of premises, "as he held the same for terms of twenty-eight years," and the assignee agreed to accept the proper assignment of the

(*s*) 5 Bing. 24; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 905.
(*t*) 1 Bing. N. C. 19.
(*u*) Vol. iv. p. 518.
(*v*) 14 Mees. & Wels. 348; and see *Cottee* v. *Richardson*, 7 Exch. Rep. 151; ante, 45.
(*x*) Noy, Max. 92.
(*y*) Godb. 188.
(*z*) *Derby* (*Earl*) v. *Taylor*, 1 East, 502.
(*a*) *Hartshorne* v. *Watson*, 5 Bing. N. C. 477; 7 Scott, 494; 2 Arn. 70.

leases as above described, without requiring the lessor's title, it was held that he was bound to take an assignment of two consecutive leases, though the second was void, being executed under a power which had not been pursued (*b*).

What are the proper Covenants to be inserted in Assignments.

The proper covenants on the part of the assignor of a term of years are, that the indenture of lease is good in law; that he has power to assign; that he has kept the covenants up to the time of assignment; to save the assignee harmless from former grants and incumbrances; for further assurance; for the delivery of deeds and muniments; and for quiet enjoyment. The proper covenants on the part of the assignee are, that he will pay the rent; perform the covenants contained in the indenture of lease; and save harmless the assignor from any breach committed by him or his assigns (*c*).

General Liability of Lessee and Assignee.

In leases, as the lessee is a party to the original contract, and as besides the privity of estate there exists a privity of contract, and he continues always liable upon express covenants, notwithstanding any assignment; therefore an action of *covenant* will lie against a lessee for years, on an express covenant, notwithstanding he has assigned his term, and the lessor has accepted rent from the assignee; but an action of *debt* will not lie after acceptance of rent; so, the executor of a lessee is liable to the grantee of the reversion on such covenants, though the lessee may have assigned his term, and the grantee have accepted rent of the assignee (*d*). But as the assignee is a stranger to the original contract between the lessor and lessee, there can only exist a privity of estate between himself and the lessor or assignee of the reversion; and he is only bound to the performance of the covenants during the time such privity exists, and then only to such covenants as relate to the estate itself (*e*). The lessor may at the same time sue the lessee upon his express covenant, and the assignee upon the privity of estate; but he can have execution against one only. An eviction out of part of the land will only amount to a discharge of an assignee pro tanto (*f*).

On what Covenants the Assignee is liable.

An assignee must take the thing assigned, subject to all the equity to which the original party was subject; the assignee of a term is

(*b*) *Spratt* v. *Jeffery*, 5 Man. & Ryl. 188.

(*c*) On an agreement to assign a lease, and to indemnify the lessee from the rent, the assignee entered before any legal assignment was made, some goods of the lessee being left on the premises; it was held that the assignee was liable on his indemnity, those goods having been taken as a distress for rent, and that it was immaterial whether the goods were left with the leave of the assignee; *Groom* v. *Bluck*, 2 Man. & Gr. 567; Drink. 103.

(*d*) *Batchelor* v. *Gage*, Cro. Car. 188; *Barnard* v. *Godscall*, Cro. Jac. 309; *Norton* v. *Acland*, Cro. Car. 579; *Glover* v. *Cope*, 4 Mod. 81; *Marsh* v. *Bruce*, Cro. Jac. 334; *Brett* v. *Cumberland*, Cro. Jac. 522.

(*e*) See also post, Book III., Chap. II., Sect. 3, (c). An equitable assignee of a term has been held liable in equity to make good to a lessee the loss occasioned to him by breaches of covenant in the lease, committed during the possession of the assignee, although the lessee was no party to the contract for the assignment, and it was agreed that the assignee should not be entitled to an assignment; *Close* v. *Wilberforce*, 1 Beav. 112.

(*f*) *Stevenson* v. *Lambard*, 2 East, 575; and see *Campbell* v. *Lewis*, 3 Barn. & Ald. 392; and post, Book II., Chap. I., Sect. 6. As to non-liability of executor of assignee to retain proceeds of sale of lease to indemnify against future breaches of covenant for rent, &c., see *Collins* v. *Crouch*, 13 Queen's B. Rep. 542.

bound, therefore, to perform all the covenants which are annexed to the estate, for by the acceptance of the possession of the land, he makes himself subject to all the covenants which run with the land (*g*). as well as to covenants in law, which are inherent in the estate; and to such he is bound without being named by the special word "assigns" (*h*); but the assignee of a lease is not liable to the original lessor for a breach of covenant not running with the land, unless he be expressly named in the lease as a covenantor (*i*). The assignee of a term is not liable at all on mere collateral covenants; therefore where the lessee of certain premises covenanted to pay annually, during the term of twenty-one years, twenty shillings to the churchwardens of the parish, his assignee was held to be not liable (*k*). Though generally a personal or collateral covenant affects not an assignee, yet if the covenant regard something to be done upon the land, and the assignee be named, though it were not in being at the time of the demise, and be in some measure collateral—as to build a wall or new house upon the land—it shall bind the assignee, because he will receive the benefit of it (*l*). Where a lessee of tithes covenanted for himself and his assigns not to take tithe in kind from the other party (the owner of lands in the parish), nor from his tenants, but to accept a reasonable composition, not exceeding three shillings and sixpence per acre, his under-lessee of the tithes was held not to be an assignee within the meaning of the covenant, and not bound by such a covenant of the lessee (*m*).

When the Assignee's Liability commences.

Under an absolute assignment of a term, the assignee may be sued on the covenants before he has taken actual possession, for by the assignment the title and possessory right pass, and the assignee becomes possessed in law; and as to the actual possession, that must depend on the nature of the property, whether it can take place, for the premises may be waste or unprofitable ground, or ground intended to build upon (*n*): so the assignee of an assignee is liable, although he has not taken actual possession, for breaches of covenant happening after the assignment to him (*o*): so a mortgagee by assignment of the term, though not in possession, is liable to perform the covenants in the lease, for a mortgagee is liable, not on the score of possession, but as assignee, and his liability is not limited by his possession, but continues as long as he has the legal estate; he ought in prudence to have taken an under lease (*p*). Though the assignee be named in the original

(*g*) As to what covenants run with the land, see ante, Chap. IV., Sect. 5, (b), p. 88.

(*h*) Bull. N. P. 159; Esp. N. P. 289; *Parker* v. *Webb*, 3 Salk. 4.

(*i*) *Grey* v. *Cuthbertson*, 2 Chitt. 482; 1 Selw. N. P. 498; 4 Dougl. 351.

(*k*) *Mayho* v. *Backhurst*, Cro. Jac. 438; *Bateman* v. *Allen*, Cro. Eliz. 437.

(*l*) Com. Dig. tit. *Covenant*, (C 3); Bull. N. P. 159.

(*m*) *Brewer* v. *Hill*, 2 Anst. 413.

(*n*) *Walker* v. *Reeves*, 2 Dougl. 461, n.; 3 Dougl. 19.

(*o*) *Taylor* v. *Shum*, 1 Bos. & Pul. 21.

(*p*) *Stone* v. *Evans*, Peake, Ad. Ca. 94; *S. P. Williams* v. *Bosanquet*, 1 Brod. & Bing. 238; 3 Moore, 500, overruling *Eaton* v. *Jaques*, 2 Dougl. 455.

covenant, if it has been broken before assignment, no action will lie against him, for he shall not be answerable for a breach which he never committed: thus where the lessee covenanted to pull down certain old houses and build others within seven years, but did not perform the covenant, and at the end of seven years assigned, an action was held not to lie against the assignee, because the breach was complete before the assignment, and the liability of the assignee depends solely upon the privity of estate; had the covenant, however, been broken after the assignment, as if the lessee had assigned before the time expired, the assignee would have been liable (*q*).

How long the liability of an assignee continues.

As an assignee is liable in respect of the privity of estate only whilst he is in possession of the premises, he bears the burthen while he enjoys the benefit, and no longer: he may therefore assign, and thereby get rid of his liability on the covenants; and as he may do so at law, so à fortiori may he do so in equity; for though the liability of the lessee on his covenants, as has been stated, subsists under all circumstances during a continuance of the lease, yet there is no similar personal confidence in the assignee of the lessee, and when he parts with the lease he also gets rid of his liability, because the privity of estate is gone (*r*). An assignee is, however, liable at law on covenants running with the land, after he has assigned over, for a breach incurred after the assignment to him, and before his assignment over (*s*). So he is liable in equity (*t*). Such an assignment will be good, though no notice should be given to the reversioner, and though made to a beggar or married woman, or to a person leaving the kingdom, provided it be executed before his departure; nor can the lessor take advantage of it on the ground of alleged fraud, unless he can prove a trust, for it was his own fault and folly to take the first assignee for his tenant; and he is not without remedy, for he may bring covenant against the lessee, distrain upon the land, or eject for a forfeiture, if any has been incurred. The only case, Lord Eldon thought, in which a question of fraud could arise, was where the assignor had kept possession of the premises, of which he made a profit, and had made an assignment to prevent responsibility: but even there, if the possession were profitable, there would always be something on the premises for the landlord to distrain, for which reason, his lordship doubted whether there ever could be such a thing as a fraudulent assignment, and whether an issue on such point could ever be well taken. Buller, J.,

(*q*) *Churchwardens of St. Saviour's, Southwark*, v. *Smith*, 1 W. Black. 351; 3 Burr. 1272; *S. P. Grescott* v. *Green*, 1 Salk. 199; *Brittin* v. *Vaux*, Lutw. 109; *Hawkins* v. *Sherman*, 3 Car. & Pay. 459.

(*r*) *Vallant* v. *Dodmede*, 2 Atk. 546; *Pitcher* v. *Tovey*, 12 Mod. 23; *Likeaux* v. *Nash*, 2 Stra. 1221; *Walker* v. *Reeves*, 2 Dougl. 461, n.; 3 Dougl. 19; *Taylor* v. *Shum*, 1 Bos. & Pul. 21; Co. Litt. 3 a, 356 b; *Boulton* v. *Canon*, Freem. K. B. 336; *Chancellor* v. *Poole*, 2 Dougl. 764.

(*s*) *Harley* v. *King*, 2 Cromp. M. & Ros. 18; 1 Gale, 100; 5 Tyr. 692; *Pitcher* v. *Tovey*, 1 Salk. 81.

(*t*) *Philpot* v. *Hoare*, 2 Atk. 219; Amb. 480; *Treade* v. *Coke*, 1 Vern. 165; 2 Eq. Ca. 47; and see *Onslow* v. *Currie*, 2 Madd. 343.

also thought that the only case where the replication of fraud to a plea of assignment ever could be good, was where the assignor continued in possession (*u*). The assignee of a term, declared against as such, has been held not to be liable for rent accruing after he had assigned over, though it was stated that the lessor was a party executing the assignment, and agreed thereby that the term, which was determinable at his option, should be absolute (*x*); yet if the breach had been continuing, it would have been otherwise: as if it had been a covenant to repair within a certain time after notice, and the repairs had not been effected upon notice, though the premises were out of repair before the assignment (*y*). Where the lessee assigned to *A.* his interest in demised premises by indenture, executed by both parties, "subject to the payment of the rent and performance of the covenants and agreements reserved and contained in the original lease;" and *A.* took possession and occupied the premises under this assignment, and before the expiration of the term assigned to a third person; and it was after the assignment by *A.* that the lessee was called upon by the lessor to pay rent which the assignee had suffered to be in arrear; it was held, that the lessee could not maintain an action of covenant against *A.* in respect of such breach, the words "subject to the payment of rent, &c.," being words of qualification and not words of contract (*z*). If a man lease for years, and the lessee covenant for himself and his assigns to pay the rent, so long as he and they shall have the possession of the thing let, and the lessee assigns, and the term expires, and the assignee continues in possession afterwards; an action of covenant will lie against him for rent behind after the expiration of the term, for though he is not an assignee strictly according to the rules of law, yet he shall be accounted such an assignee as will make him liable to perform the covenants (*a*). There is no difference with respect to the executor or administrator of a lessee for years, for they may, like any other assignee, assign the term and divest themselves of all liability upon the privity of estate, but not upon the privity of contract (*b*): so it would seem may the assignees of a bankrupt lessee (*c*).

(*u*) It must be recollected that the extent of this power is considerably abridged by the insertion of the usual covenant by the assignee, to indemnify and save harmless the assignor or lessee from breaches of covenant committed by him or his assigns, which would of course include the person to whom he assigned it. Lord Eldon remarked that there never was an instance of an assignment, drawn with proper caution, which did not contain such a covenant; *Staines* v. *Morris*, 1 Ves. & Beam. 10. Where leasehold property in the hands of the executors of an assignee had become of less value than the rent paid, the Court of Chancery intimated that, after the refusal of the lessor to accept a surrender, the executors would be justified in making an assignment merely to relieve themselves; *Rowley* v. *Adams*, 4 Mylne & Craig, 534; 2 Jurist, 915. See also the cases cited post, 228, n. (*b*).

(*x*) *Chancellor* v. *Poole*, 2 Dougl. 764.

(*y*) Com. Dig. tit. *Covenant*, (B).

(*z*) *Wolveridge* v. *Steward* (*in error*), 1 Cromp. & Mees. 644; 3 Moore & Scott, 561; 3 Tyr. 637, reversing *S. C.* 9 Bing. 60; 2 Moore & Scott, 75.

(*a*) Bac. Abr. tit. *Covenant*, (E 3).

(*b*) *Auriol* v. *Mills*, 4 Term Rep. 94; Esp. N. P. 201.

(*c*) *Onslow* v. *Corrie*, 2 Madd. Cha. Ca. 330. See post, Sect. 7, p. 228, as to the assignees of bankrupt lessees.

Assignment of Part only of the Land.

It is a nice and difficult question, whether a lessor can maintain an action of debt against an assignee of part of the land demised to recover rent issuing from the whole of it, but there is no doubt he may distrain for it (*d*). If an issue be taken on the usual allegation that all the estate of the lessee became vested in the assignee, and the proof shows that only a part of the estate became vested in him, it is a fatal variance (*e*).

Effect of an Assignment over of Part of the Estate.

An assignee cannot discharge himself of his liability, unless he assign the whole of the estate, for, as it has been observed, covenants running with the land are in their nature divisible; therefore if he assign a part only of the estate, he will remain liable for so much as remains in his hands (*f*).

General Rights of Assignees.

In the same manner that assignees are bound by covenants real, which are annexed to the estate, and which run along with it, they may take advantage of such covenants, by bringing actions for breaches against the reversioners (*g*); and though this applies generally to all assignees, whether they come in by act of law or by deed, or statute-merchant, yet an assignee of a lease by estoppel is an exception to the rule, for there is a difference where a covenant is annexed to a thing which of its nature cannot pass at the first without deed, and where not: for in the first case, the assignee ought to be in by deed, otherwise he shall not have advantage of the covenant (*h*). An assignee shall not have an action upon a breach of covenant before his own time (*i*).

(b) *By Way of Mortgage.*

Mortgagee's Liability.

There appears to have been considerable difficulty in ascertaining the liability of a mortgagee of a lease for years by way of assignment. At one time it was considered that such an assignment did not amount to an actual transfer of the property, but was a mere security for the money advanced, and with that idea the Courts both of Law and Equity refused to make the mortgagee liable upon the covenants in the lease, unless he took possession of the premises (*k*). But this principle, that a legal mortgagee is liable only in respect of his possession, is no longer recognised either at law or in equity, for it is now considered that a mortgagee of a leasehold estate by assignment is clearly liable, so long as he has the legal estate, to perform the covenants which are obligatory on any ordinary assignee, whether he be in possession or not: thus it was held by Lord Kenyon, that he was

(*d*) *Curtis* v. *Spitty*, 1 Bing. N. C. 756; 1 Hodges, 153; *Merceron* v. *Dowson*, 5 Barn. & Cres. 479; 8 Dowl. & Ryl. 264. See also ante, 87, 92.

(*e*) *Hare* v. *Cator*, Cowp. 766; *Curtis* v. *Spitty*, 1 Bing. N. C. 756; 1 Hodges, 153.

(*f*) *Congham* v. *King*, Cro. Car. 221; *Gamon* v. *Vernon*, 2 Lev. 231; *Stevenson* v. *Lambard*, 2 East, 576; *Twynam* v. *Oickard*, 2 Barn. & Ald. 105; *Merceron* v. *Dowson*, 5 Barn. & Cres. 479.

(*g*) Bac. Abr. tit. *Covenant*, (E 5).

(*h*) *Noke* v. *Awder*, Cro. Eliz. 373, 436.

(*i*) *Lewis* v. *Ridge*, Cro. Eliz. 863.

(*k*) *Eaton* v. *Jaques*, 2 Dougl. 455; *Sparkes* v. *Smith*, 2 Vern. 275; *Walker* v. *Reeves*, 2 Dougl. 461; *Chinnery* v. *Blackburn*, 1 H. Black. 117, n. But see *Pilkington* v. *Shaller*, 2 Vern. 174; Powell on Mort. 178, &c. 6th edit.

liable to ground rent, though he never had taken possession (*l*): and in a subsequent decision upon the subject, where the mortgagee had never in fact entered at all, the case of *Eaton* v. *Jaques* was formally overruled by the Court of Common Pleas (*m*); and it has long been considered that a mortgagee of a term might assign it without being in actual possession (*n*). A mortgagee may avoid the liability of an assignee by taking an under-lease instead of an assignment, and this is the ordinary course. But if he become assignee, equity will not afford him any relief, though he may offer to forego his lien and lose his money (*o*). If, however, he has never been in possession, the Court will not entertain a bill to discover whether the lease has been assigned to him, but will leave the plaintiff to recover at law as well as he can (*p*). It has always been settled, that if the mortgagee enter into possession, he becomes liable to all covenants which run with the land, for he takes it cum onere, and enjoying the profits, he must submit to the losses; and no situation is more irksome and disadvantageous than that of a mortgagee in possession, inasmuch as he must pay himself as he can out of the rents and profits (*q*). A trustee to whom a lease is assigned to secure an annuity to a third person is strictly an assignee (*r*).

Equitable Assignments by Deposit.

A species of quasi assignment may be made by a deposit of the lease as a security for money advanced; but this will not have the effect of giving the creditor any legal title. In one case where the creditor had taken possession of the premises, it was held to amount to an equitable assignment of the term, even to such an extent as to enable a lessor to maintain a bill in equity against the creditor for the specific performance of covenants running with the land (*s*).

(c) *Assignment for the Benefit of Creditors.*

Trustees under an assignment for the benefit of creditors are entitled—like assignees under the bankrupt and insolvent acts (*t*)—to a reasonable time to ascertain whether property held under a lease by the debtor can be made available for the benefit of the creditors or not; but if they act in such a way as to render the premises of less value to the lessor, or deal with the property as if the lease were vested in them, they will by that conduct make themselves personally liable

(*l*) *Stone* v. *Evans*, Peake, Ad. Ca. 94; S. C. cited 7 East, 341.

(*m*) *Williams* v. *Bosanquet*, 1 Brod. & Bing. 238; 3 Moore, 500; and see *Westerdell* v. *Dale*, 7 Term Rep. 312; *Burton* v. *Barclay*, 7 Bing. 745; 5 Moore & Pay. 785.

(*n*) *Smartle* v. *Williams*, 3 Lev. 388.

(*o*) *Anon.*, Freem. Cha. 253; *Casberd* v. *Att.-Gen.*, 6 Price, 411; *Sparkes* v. *Smith*, 2 Vern. 275.

(*p*) *Sparkes* v. *Smith*, 2 Vern. 275.

(*q*) Per Lord Kenyon, C. J., in *Cheeseman* v. *Broughton*, in K. B. East. Term, 35 Geo. III.

(*r*) *Gretton* v. *Diggles*, 4 Taunt. 766. A power given to a trustee in a mortgage deed to sell if the mortgagee requests it, does not necessarily imply a right to enter on the premises; *Watson* v. *Waltham*, 2 Ad. & El. 485; 1 Har. & Wol. 24; 4 Nev. & Man. 537.

(*s*) *Lucas* v. *Comerford*, 1 Ves. jun. 235. But see *Moores* v. *Choat*, 8 Sim. 508 (overruling *Flight* v. *Bentley*, 7 Sim. 149), and *Close* v. *Wilberforce*, 1 Beav. 112.

(*t*) See post, 87, 92.

for the payment of the rent and performance of the covenants (*u*). An action for use and occupation cannot be maintained by the lessor of a tenancy from year to year against trustees under a deed of assignment for the benefit of creditors, upon an occupation by them for the purpose of disposing of the insolvent's property, unless they have actually occupied as tenants (*x*). An assignment for benefit of creditors by a trader and farmer of all her "effects, stock, books and book debts," conveys the cattle on the farm (*y*). Where a lessee of premises at rack-rent assigned, for the benefit of his creditors, all and singular his stock in trade, &c., and all other his personal estate and effects whatsoever, and the assignees were to pay the rent accruing due up to a future day named, it was held that the lease passed under the assignment (*z*). Where a tenant assigned all his household goods, &c., and "all his tenant right and interest yet to come and unexpired" in and to the farm and premises, it was held that the tenant's interest in crops not yet sold passed (*a*).

SECT. 4.—*Under-Lease.*

Distinction between Under-leases and Assignments.

An under-lease (*b*) of the whole term has been held to amount to an assignment in law (*c*): but it appears that such instruments will be good as under-leases as between the parties to them (*d*). If a person, having an interest for three years only, make a lease for five years, it would be good for three years, but would operate as an assignment and not as under-lease; for where an authority is given to any one to execute any act, and he executes it contrary to the effect of his authority, this is utterly void; but if he execute his authority, and withal goes beyond the limits of his warrant, this is void for that part only wherein he exceeds his authority (*e*).

What Under-leases are good.

An under-lease made by a lessee for years, determinable on a future day certain, and to commence immediately on his death, is good, if he die within the time (*f*); therefore a man possessed of a term for twenty years may grant the lands for nineteen years to commence after his death, and it will be good for so many of the twenty years as shall be unexpired at the time of his death. Where a lessee has power to renew his term upon giving six months' notice of his intention before its expiration, and upon his preparing a fresh lease &c., he cannot,

(*u*) *Carter* v. *Warne*, 4 Car. & Pay. 191; 1 Mood. & Malk. 479.

(*x*) *How* v. *Kennett*, 3 Ad. & El. 659; 1 Har. & Wol. 391; 5 Nev. & Man. 1.

(*y*) *Lewis* v. *Rogers*, 1 Cromp. M. & Ros. 48; 4 Tyr. 872.

(*z*) *Ringer* v. *Cann*, 3 Mees. & Wels. 343; 1 Horn. & Hurl. 67.

(*a*) *Petch* v. *Tutin*, 15 Mees. & Wels. 110.

(*b*) It is the duty of a person contracting for an under-lease to inform himself of the covenants contained in the original lease: *Cosser* v. *Collinge*, 3 Rus. & Keen, 283; *Flight* v. *Barton*, ibid. 282.

(*c*) *Hicks* v. *Downing*, 1 Lord Raym. 99; *Wollaston* v. *Hakewill*, 3 Scott, N. R. 593; 3 Man. & Gran. 297.

(*d*) See ante, 211.

(*e*) Bull. N. P. 106.

(*f*) *Child* v. *Baylie*, Cro. Jac. 459; *Grute* v. *Locroft*, Cro. Eliz. 287. Sed vide *Capenhurst* v. *Capenhurst*, Sir T. Raym. 27.

though he gave notice of such his intention, demise the premises to another party beyond the expiration of the first term, unless he prepare such fresh lease and get it executed, or at least endeavour so to do (*g*).

SECT. 5.—*Attornment.*

Statutes regulating Attornment.

Upon the subject of attornment (which now exists scarcely in any case) it may be as well to observe, that after the statute quia emptores terrarum (*h*) was passed, by which subinfeudation was prohibited, it became necessary that when the reversioner or remainder-man, after an estate for years, for life or in tail, granted his reversion or remainder, the particular tenant should attorn or consent to pay his rent to the grantee. This necessity of attornment was in some degree diminished by the Statute of Uses (*i*); for by that statute the possession was immediately executed to the use; and by the Statute of Wills (*k*), by which the legal estate is immediately vested in the devisee. Attornments however are now rendered almost unnecessary in any case by the statute of Anne (*l*), which enacts that all grants and conveyances of manors, lands, rents, reversions, &c. by fine or otherwise, shall be good without the attornment of the tenants; but notice must be given of the grant to the tenant, before which he shall not be prejudiced by payment of any rent to the grantor, or of breach of the condition for non-payment. Also by an act in the reign of Geo. II. (*m*) attornments made by tenants to strangers claiming title to the estate of their landlords shall be null and void, and their landlords' possession not affected thereby; the statute however does not extend to vacate any attornment made pursuant to a judgment at law, or with the consent of the landlord, or to a mortgagee on a forfeited mortgage (*n*). It has been held that under the statute of Anne the execution of a mortgage deed operated as an attornment of a tenancy from year to year (*o*).

What amounts to an Attornment.

Payment of rent by a tenant to his landlord, after the title of the latter had expired, and after the tenant had received notice of an adverse claim, does not amount to an acknowledgment of title in the landlord, or to a virtual attornment; unless at the time of such payment the tenant heard the precise nature of the adverse claim, or how the landlord's title had expired (*p*). Where rent is paid by succeeding

(*g*) *Mackay* v. *Mackreth*, 2 Chitt. 461; *S. C.* not *S. P.* 4 Dougl. 213.

(*h*) 18 Edw. I. st. 1.

(*i*) 27 Hen. VIII. c. 10.

(*k*) 34 & 35 Hen. VIII. c. 5, repealed by 7 Will. IV. & 1 Vict. c. 26.

(*l*) 4 Ann. c. 16, ss. 9, 10. A rent-charge may be divided by will or by deed, operating under the statute of uses, so as to make the tenant liable without attornment to several distresses; and semble, that since the statute of 4 Ann. c. 16, s. 9, it may be so divided by a conveyance of any kind: *Rivis* v. *Watson*, 5 Mees. & Wels. 255.

(*m*) 11 Geo. II. c. 19, s. 11.

(*n*) See *Lumley* v. *Hodgson*, 16 East, 99.

(*o*) *Burrowes* v. *Gradin*, 1 Dow. & Low. 213.

(*p*) *Fenner* v. *Duploc*, 2 Bing. 10; 9 Moore, 38; and see *England* v. *Slade*, 4 Term Rep. 682; *Gregory* v. *Doidge*, 3 Bing. 474; 11 Moore, 394; and *Claridge* v. *Mackensie*, 4 Man. & Gran. 143; 4 Scott, N. R. 796.

tenants after an adverse possession of twenty-three years, it does not amount to an attornment, unless the consent, or at least the knowledge, of the landlord can be shown (*q*). Where *A.* being tenant of premises under an indenture of lease granted by *B.*, a sequestration issued out of the Court of Chancery against the latter; and *A.* then signed the following instrument:—"I hereby attorn and become the tenant to *C.* and *D.*, two of the sequestrators named in the writ of sequestration issued in the said suit in Chancery, and to hold the same for such time and on such conditions as may be subsequently agreed upon;" it was held, that this was an agreement to become tenant, and operated as an attornment; and also that as *A.* had not received possession from *C.* and *D.*, he was not estopped by the attornment from disputing their title to the premises (*r*). But an instrument whereby the tenant merely puts one person in the place of another as his landlord, and continues to hold under the same terms and conditions as before, is a mere attornment and not an agreement; and it was held that it was evidence of ownership at the time it was executed against future occupiers, though they did not claim through the person who signed it (*s*). An instrument in these terms, "I hereby certify that I remain in the house, at &c., belonging to *W. G.*, on sufferance only, and agree to give him immediate possession at any time he may require," does not amount to an agreement for a tenancy so as to require a stamp (*t*). An attornment to the mortgagee by the tenant of the mortgagor for two years' rent previously due is good (*u*).

Sect. 6.—*Writs of Execution.*

General Effect of Writs of Execution.

Where an execution is issued against the lands of a man by writ of elegit or statute-staple, the law vests the lands so seized in the judgment creditor; and where a term for years is seized and sold, as it may be by the sheriff, the vendee becomes an assignee. It may be further observed, that where a term is affected by a writ of elegit or fieri facias, it is so affected from the time the writ is lodged in the sheriff's hands; and therefore that any disposition of it after that period is void as against the judgment creditor by the Statute of Frauds, 29 Car. II. c. 3, s. 16; but this statute does not apply to cases as between the parties.

Sheriff's Duty in executing Writs of Fi. Fa.

The sheriff cannot turn a tenant out of possession when he has taken a term under an execution against the landlord (*x*); but quære

(*q*) *Meredith* v. *Gilpin*, 6 Price, 146.

(*r*) *Cornish* v. *Searall*, 8 Barn. & Cres. 471; 1 Man. & Ryl. 703; but see *Hall* v. *Butler*, 10 Ad. & El. 204; 2 Per. & Dav. 374.

(*s*) *Doe* d. *Linsey* v. *Edwards*, 5 Ad. & El. 95; 2 Har. & Wol. 139; 6 Nev. & Man. 633; see also *Doe* d. *Wright* v. *Smith*, 8 Ad. & El. 255; 3 Nev. & Per. 335.

(*t*) *Barry* v. *Goodman*, 2 Mees. & Wels. 768; Mur. & Hurl. 184.

(*u*) *Gladman* v. *Plumer*, 15 Law J., N.S., Q.B., 79; 10 Jur. 109.

(*x*) *Rumball* v. *Murray*, 3 Term Rep. 298; and see *Miller* v. *Parnell*, 2 Marsh. 78.

whether the sheriff who sells a term in possession of the debtor under a fi. fa. may not put the vendee in possession (*y*). When the sheriff under a writ of fi. fa. seizes a lease, and sells the term, he must make an assignment in writing; and if he merely puts the execution creditor in possession, the debtor may recover in ejectment (*z*). If the sheriff sells the term before the writ is returnable, but does not execute the assignment to the vendee till a subsequent period, the assignment is valid (*a*). Where a sheriff takes a lease and fixtures in execution, he must sell the fixtures separately, if he cannot find a purchaser for the whole (*b*). After having seized and sold a term for years, it is the sheriff's duty to assign it to the purchaser; in doing which he need not state in the assignment the particular interest which the defendant has, for he may not be able to ascertain precisely what it is; it is sufficient to state that the defendant is possessed of a term of years yet to come and unexpired, and to assign all his interest therein generally; and it is more prudent to state the interest in this way generally than to set it out particularly; for if he fail in any particular, the purchaser will not have a good title. Such assignments may be made by the under-sheriff in the name and under the seal of office of sheriff (*c*).

What terms may be taken under a Fi. Fa.

Where an outgoing tenant agreed to assign the remainder of his term, it has been held that the sheriff, before an actual assignment made, may sell the term under a fieri facias against the tenant, and put upon it the value agreed to be given by the incoming tenant (*d*).

What Lands may be taken under an Elegit.

Formerly copyhold lands could not be extended under an elegit, nor could more than a moiety of the debtor's lands; but now by statute 1 & 2 Vict. c. 110, s. 11 (*e*), the whole, and as well copyhold as freehold, may be extended.

Rights and Liabilities of the Parties.

It would seem that a tenant by elegit may enter by virtue of the writ without an ejectment (*f*); and may distrain for rent without attornment (*g*). The owner of property having mortgaged it for a term of years, afterwards had an elegit against his lands, and the sheriff delivered the mortgaged lands into the hands of the judgment creditor: it was held that the latter had no right to evict a person who had become tenant since the mortgage and since the execution (*h*). Seizure by a sheriff of a lease of a debtor's dwelling-house does not vest the term in the sheriff, but it remains in the debtor, even though sold by public auction, until after the sheriff executes an assignment to

(*y*) *Taylor* v. *Cole*, 3 Term Rep. 292.
(*z*) *Doe* d. *Hughes* v. *Jones*, 9 Mees. & Wels. 372; 1 Dowl. N. S. 352.
(*a*) *Doe* d. *Stevens* v. *Donston*, 1 Barn. & Ald. 230.
(*b*) *Barnard* v. *Leigh*, 1 Stark. 43.
(*c*) *Doe* d. *James* v. *Brawn*, 5 Barn. & Ald. 243.
(*d*) *Sparrow* v. *Bristol* (*Earl*), 1 Marsh. 10.
(*e*) See also stats. 11 Geo. IV. & 1 Will. IV. c. 47, and 11 & 12 Vict. c. 87.
(*f*) *Rogers* v. *Pitcher*, 6 Taunt. 202; 1 Marsh. 541.
(*g*) *Lloyd* v. *Davies*, 2 Exch. Rep. 103.
(*h*) *Poole, Mayor, &c.* v. *Whitt*, 15 Mees. & Wels. 571.

the purchaser (*i*). Persons who purchase terms from the sheriff under writs of execution, are assignees in law so as to become liable to actions on covenants contained in the lease (*k*). Where a disposition of the lease has been made by virtue of a fieri facias or an elegit, the lessee continues liable on his covenant, notwithstanding the estate be taken from him against his consent (*l*). The execution creditor is not entitled to rent becoming due after the delivery to the sheriff of a writ of elegit against the lessor, but before inquisition taken thereon (*m*).

Sect. 7.—*Bankruptcy.*

What Property passes to the Assignees.

By the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, s. 141, which act repeals 6 Geo. IV. c. 16, and part of 1 & 2 Will. IV. c. 56 (*n*), when a person shall have been adjudged a bankrupt, all his present and future personal estate (which of course includes leases and terms), and all properties which he may acquire previously to his certificate, become absolutely vested in his assignees for the time being by virtue of their appointment; and by section 142 all lands, tenements and hereditaments, except copy or customaryhold, in England, Scotland, Ireland, or the dominions, plantations or colonies, and all his interest therein, &c., shall be vested in his assignees (*o*). Assignees of bankrupts appear to be entitled to the benefit of an agreement for a lease (*p*): or of an equity of redemption (*q*): but it would seem that they are not entitled to the benefit of a covenant for the redemption of the property granted by a lease (*r*). A steam-engine, erected for the purpose of working a colliery, to be used by the lessee during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of "goods and chattels" in the repealed act 6 Geo. IV. c. 16, s. 72, or in the 12 & 13 Vict. c. 106, s. 125, the language of which is similar, nor had the bankrupt the actual or apparent ownership (*s*). So fixtures while attached to the freehold do not pass

(*i*) *Playfair* v. *Musgrove*, 14 Mees. & Wels. 239; 3 Dow. & Low. 72.

(*k*) 1 Dougl. 184.

(*l*) *Auriol* v. *Mills*, 4 Term. Rep. 98.

(*m*) *Sharp* v. *Key*, 8 Mees. & Wels. 379.

(*n*) This act repeals, wholly or in part, the principal acts relating to bankruptcy. In answer to an action by a landlord against the assignees of a bankrupt for rent, it was held that the latter might plead that the term did not vest in them; and to avoid the effect of the 1 & 2 Will. IV. c. 56, s. 25, they might also plead that it did vest, but that they abandoned it, and were not therefore liable; *Thompson* v. *Bradbury*, 3 Dowl. 147. Section 25 of 1 & 2 Will. IV. c. 56, with other sections, is repealed by 12 & 13 Vict. c. 106. By the latter act, s. 65, no farmer or grazier shall as such be deemed a trader liable to become bankrupt.

(*o*) See further, 12 & 13 Vict. c. 106, s. 142.

(*p*) *Powell* v. *Lloyd*, 1 You. & Jerv. 427; *Morgan* v. *Rhodes*, 1 Myl. & K. 435; 1 Mon. & Air. 215; stat. 12 & 13 Vict. c. 106, s. 145.

(*q*) *Vandermaker* v. *Desborough*, 2 Vern. 96.

(*r*) A covenantee having become a bankrupt, it is a question whether the right of action on such a covenant, supposing it to have been broken, would pass to his assignees; *Collison* v. *Lettsom*, 6 Taunt. 224; 2 Marsh. 1.

(*s*) *Coombs* v. *Beaumont*, 5 Barn. & Adol. 72. See also *Ex parte Scarth*, 1 Mont. Deac. & De G. 240; and *Ex parte Broadwood*, id. 631.

to the assignees of a tenant (*t*). As to the validity of payments, conveyances, contracts, executions, &c., in cases of bankruptcy, see the 12 & 13 Vict. c. 106, s. 133 (*u*).

Effect of a Covenant not to assign.

If a lease to a trader contain a proviso that it shall be void if he *become* bankrupt, the term does not pass to his assignees, but determines altogether upon that event taking place (*x*): so a lease for *so long* as the trader shall continue to inhabit the farm-house and actually occupy the land, and not let or part with the lease; for upon *his* ceasing to inhabit, &c. it immediately becomes forfeited (*y*): but the usual covenant, not to let or assign the premises without the licence of the lessor, will not prevent a lease from passing to the assignees (*z*): and to prevent it from so passing there must be an express proviso to that effect (*a*).

Extent of the Liability of the Bankrupt.

Formerly a bankrupt possessed of a term of years at the time of his bankruptcy, whether the assignees took possession or not, was at all times during the term liable to be sued by the lessor in an action of covenant, on the ground that the assignment only assigned the interest in the land, but did not destroy the privity of contract between the lessor and lessee, although it was considered otherwise with respect to the action of debt (*b*). But now, by the statute 12 & 13 Vict. c. 106, s. 145, "any bankrupt entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants or agreements therein contained; and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor or person agreeing to grant a lease, within fourteen

(*t*) *Boydell* v. *M'Michael*, 1 Cr. M. & Ros. 177; 3 Tyr. 181; *Ex parte Reynal*, 2 Mont. Deac. & De G. 443; *Ex parte King*, 1 Mont. Deac. & De G. 119; *Fletcher* v. *Manning*, 1 Car. & Kir. 350; *Ex parte Heathcoate*, 2 Mont. Deac. & De G. 711; *Ex parte Cowell*, 17 Law J., N. S. Bankr. 16; 12 Jurist, 411.

(*u*) It has been held that executions on judgments on warrants of attorney executed by seizure, but not completed by sale, are not protected; *Skey* v. *Carter*, 11 Mees. & Wels. 571; 2 Dowl. N. S. 831; *Whitmore* v. *Robinson* or *Robertson*, 8 Mees. & Wels. 463; 1 Dowl. N. S. 135; see s. 133 of 12 & 13 Vict. c. 106. See also on these enactments, *Nelstrop* v. *Scarisbrick*, 8 Dowl. 746; *Moore* v. *Phillips*, 9 Dowl. 294; *Pewtress* v. *Annan*, ibid. 828; *Edwards* v. *Lawley*, 8 Dowl. 234; *Rothwell* v. *Timbrell*, 1 Dowl., N. S., 778; *Ramsey* v. *Eaton*, 10 Mees. & Wels. 22; *Rawdon* v. *Wentworth*, ibid. 36; *Turquand* v. *Vanderplank*, ibid. 180; *Hocking* v. *Acraman*, 11 Mees. & Wels. 170; 1 Dowl. & Low. 434; *Belcher* v. *Magnay*, 12 Mees. & Wels. 102; 1 Dowl. & Low. 441; *Fawcett* v. *Fearne*, 6 Queen's B. Rep. 20; *Lackington* v. *Elliott*, 7 Man. & Gran. 538; 8 Scott, N. R. 275.

(*x*) *Roe* d. *Hunter* v. *Galliers*, 2 Term Rep. 133.

(*y*) *Doe* d. *Lockwood* v. *Clarke*, 8 East, 185; and see *Doe* d. *Norfolk* (*Duke*) v. *Hawke*, 2 East, 481.

(*z*) *Doe* d. *Cheere* v. *Smith*, 5 Taunt. 795; 1 Marsh. 359; 2 Rose, Bank. Ca. 280; and see *Doe* d. *Mitchenson* v. *Carter*, 8 Term Rep. 57, 300; *Lloyd* v. *Crisp*, 5 Taunt. 249; *Philpot* v. *Hoare*, Ambl. 480; and *Wadham* v. *Marlowe*, 2 Chit. 500; 4 Dougl. 54; 8 East, 314, n.; 1 H. Black. 438, n.

(*a*) *Doe* d. *Goodbehere* v. *Bevan*, 3 Maule & Selw. 353. See post, Chap. VII., Sect. 5, (b), and Book II., Chap. V., Sect. 2, (c).

(*b*) *Auriol* v. *Mills*, 1 H. Black. 433; 4 Term Rep. 94; *Wadham* v. *Marlow*, 1 H. Black. 438, n.; 8 East, 314, n.; 4 Dougl. 54; 1 Term Rep. 91; 2 Chit. 600; *Cowley* v. *Dunlop*, 7 Term Rep. 580; *Ludford* v. *Barber*, 1 Term Rep. 86.

days after he shall have had notice that the assignees shall have declined as aforesaid" (c). This statute, which follows the language of the repealed statute 6 Geo. IV. c. 16, s. 75, does not put an end to the lease, but merely discharges the bankrupt from any subsequent payment of the rent or observance of the covenants (d). It would seem, however, that it only exempts the bankrupt from personal liability, and does not affect the landlord's right of distress; and that it applies only to cases where covenants are broken, or rent becomes due after the delivery up of the lease by the bankrupt; for between the fiat, or the filing of the petition, and the election of the assignees, or the bankrupt giving up the lease, the property continues in the bankrupt (e). A tenancy from year to year under a parol agreement is within the statute, which is satisfied by the bankrupt giving up possession of the premises; and where the rent was agreed to be paid half-yearly, and the tenant became bankrupt before a half-year's rent was due, it was held that the lessor could not recover for the use and occupation of the premises up to the time of the bankruptcy, as no rent was due (f). A right of action on a breach of covenant not secured by a penalty, and where the damages to be recovered are uncertain, seems not to be barred by the certificate of the defendant, who became a bankrupt after the covenant was broken (g).

What amounts to an Election by the Assignees to take Leasehold Property.

Neither the assignment of a bankrupt's personal estate under his commission, nor the statutes themselves, vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate (h). They are not concluded by putting up premises to sale; for they may make an experiment to see if the lease be beneficial (i); but in a case where they put up premises to auction, and found a purchaser, and received a deposit, but the contract of sale afterwards went off without the assignees showing any reason why they did not enforce it; it was held that by so doing they had sufficiently elected to take all the estate and interest of the bankrupt in the premises (k). When the assignees of a bankrupt enter upon and take possession of his leasehold property, they become chargeable with the covenants in the lease, although the bankrupt's effects were upon the premises, and the

(c) This enactment is in accordance with the dictum of Mr. Justice Yates, in *Mayor* v. *Steward*, 4 Burr. 2239, which was however overruled.

(d) *Manning* v. *Flight*, 3 Barn. & Ad. 211. The certificate does not operate as a release of rent due before the bankruptcy; it only operates as a discharge of the person and goods of the bankrupt; *Newton* v. *Scott*, 9 Mees. & Wels. 434; 10 Mees. & Wels. 471; see also *Toppin* v. *Field*, 4 Queen's B. Rep. 386; 3 Gale & Dav. 340.

(e) *Briggs* v. *Sowry*, 8 Mees. & Wels. 729; see also *Copeland* v. *Stephens*, 1 Barn. & Ald. 593, decided on a former bankrupt statute, 49 Geo. III. c. 121, s. 19.

(f) *Slack* v. *Sharp*, 8 Ad. & El. 366; 3 Nev. & Per. 390; 1 Will. Wol. & Hod. 496; *Ex parte Hopton*, 2 Mont. Deac. & De G. 347; but see *Briggs* v. *Sowry*, 8 Mees. & Wels. 729; and *Ex parte Sutton*, 2 Rose, Bank. Ca. 86.

(g) *Banister* v. *Scott*, 6 Term Rep. 489.

(h) *Copeland* v. *Stevens*, 1 Barn. & Ald. 593.

(i) *Turner* v. *Richardson*, 7 East, 335; 3 Smith, 330.

(k) *Hastings* v. *Wilson*, Holt, 290.

assignees deliver up the keys immediately after the effects are sold (*l*); but till after some act of election to accept the lease has been done by them, the term still remains in the bankrupt (*m*). Where a bankrupt had a lease of premises, and also a reversionary interest in them, and his assignees sold his estate and reversionary interest in the premises, this was considered to amount to an acceptance of the lease by the assignees (*n*). Where the assignees of a bankrupt, who was a lessee of pasture land, being chosen on the 8th of the month, allowed his cows to remain upon the demised premises till the 10th, and ordered them to be milked there; it was held that they thereby made their election to take the premises (*o*): and where the assignee of a bankrupt lessee, chosen on the 15th November, kept the bankrupt in the premises, carrying on the business for the benefit of the creditors until April following, and himself occasionally superintended; but on the 23rd December he disclaimed the lease by letter to the landlord: it was held, that notwithstanding such disclaimer he had elected to accept the lease by using the premises for the benefit of the creditors (*p*). Where the assignees of a bankrupt, having allowed his effects to remain on the premises occupied by him nearly a twelvemonth after the bankruptcy, paid the arrears of the rent due, for the purpose of preventing a distress, at the same time intimating to the landlord that they did not mean to take the lease unless it could be advantageously disposed of; and the effects being soon after sold and removed from the premises, the lease was at the same time put up to sale by order of the assignees, but there were no bidders for it; and although not asked for the key, the assignees omitted to return it to the landlord for nearly four months afterwards, but did not otherwise make use of the premises; it was held that they were not, under these circumstances, liable to the landlord as assignees of the lease (*q*). A coachmaker, who was tenant from year to year of certain premises, and had several coaches on hire, became bankrupt, and his assignees entered on the premises to keep the coaches in repair, in pursuance of the bankrupt's contracts; in August the bankrupt's effects were sold, and the key of the premises delivered to the bankrupt, but the assignees paid the rent up to the Michaelmas following: in an action by the landlord for a quarter's rent due the Christmas following, it was held that the assignees were liable (*r*). Where the assignees of a bankrupt, who was possessed of a term, part of which he had underlet to another, released such under-tenant, and on being afterwards asked by the lessor to elect, refused to take the original lease; it was held

(*l*) *Hanson* v. *Stevenson*, 1 Barn. & Ald. 303.

(*m*) *Copeland* v. *Stephens*, 1 Barn. & Ald. 593; *Bourdillon* v. *Dalton*, 1 Esp. 233; Peake, 238; *Briggs* v. *Sowry*, 8 Mees. & Wels. 729.

(*n*) *Page* v. *Godden*, 2 Stark. 309.

(*o*) *Welch* v. *Myers*, 4 Camp. 368.

(*p*) *Clarke* v. *Hume*, 1 Ryan & Mood. 207.

(*q*) *Wheeler* v. *Bramah*, 3 Camp. 340; 1 Rose, Bank. Cas. 363.

(*r*) *Ansell* v. *Robson*, 2 Cromp. & Jer. 610.

that this did not amount to an acceptance by them, and that they were not liable as assignees of the term (*s*).

How the Assignee may be compelled to make an Election.

By stat. 12 & 13 Vict. c. 106, s. 45, if the assignees shall not, upon being thereto required, elect whether they will accept or decline a lease or agreement for a lease, the lessor or person agreeing to grant the lease, or any person entitled under such lessor or person, shall be entitled to apply to the court, who may order them to elect, and to deliver up such lease or agreement in case they shall decline the same, and the possession of the premises, or may make such other order therein as the court shall think fit. A parol lease is within this provision (*t*). If the assignees refuse to accept the lease and deliver up the deed, it amounts to a determination of the term (*u*). Where a lease belonging to a bankrupt was sold by auction, under the usual order, the court directed the assignees to execute an assignment, and the bankrupt to deliver up possession to the purchaser; and upon his refusing to comply, the bankrupt was committed (*x*).

Extent of the Liability of Assignees of Bankrupts.

Assignees of bankrupts who have sufficiently made their election to take the interest of the bankrupt in leasehold premises, become assignees in law, and are therefore liable to all the covenants which run with the land (*y*). If they therefore intermeddle with and assume the management of a farm, it will make them liable to the landlord in consideration of their tenancy for all mismanagement (*z*). In one case, where the assignees of a bankrupt entered into possession of land in the middle of a quarter, which the bankrupt had agreed to take upon a building lease upon the terms of paying the rent half-yearly; it was held that an action for use and occupation would lie against them for the whole half-year (*a*). After the assignees have accepted the lease they may rid themselves of future claims for rent by assigning to an insolvent person (*b*).

Extent of the Liability of the Lessor.

Where by a lease reciting that the lessee had purchased fixtures, on condition of their being repurchased, the lessor covenanted to repurchase, and the lessee on becoming bankrupt and his assignees declining the lease (which was delivered up), required the repurchase,

(*s*) *Hill* v. *Dobie*, 2 Moore, 342; 8 Taunt. 325.

(*t*) *Ex parte Hopton*, 2 Mont. Deac. & De G. 347; *Slack* v. *Sharp*, 8 Ad. & El. 366; 3 Nev. & Per. 390; 1 Will. Wol. & Hod. 496; but see *Briggs* v. *Sowry*, 8 Mees. & Wels. 729. This enactment is similar to the previous one in statute 49 Geo. III. c. 121, s. 19, which was held not to extend to a parol agreement for a lease; *Ex parte Sutton*, 2 Rose, Bank. Cas. 86; and to be confined to cases between lessor and lessee, or their respective assignees, and not to extend to cases between a lessee and the assignees of a lease; *Young* v. *Taylor*, 3 Barn. & Ald. 521. In one case, the Lord Chancellor, acting upon another statute containing a similar enactment, gave the assignees ten days to make their election; *Ex parte Scott*, 1 Rose, 446, n.

(*u*) *Ex parte Nixon*, 1 Rose, 445; *Ex parte Whittington*, 1 Buck, 87.

(*x*) *Ex parte Hawkins*, 1 Mont. & Mac. Bank. Cas. 115.

(*y*) *Holford* v. *Hatch*, 1 Dougl. 184.

(*z*) *Thomas* v. *Pemberton*, 7 Taunt. 206.

(*a*) *Gibson* v. *Courthorpe*, 1 Dowl. & Ryl. 205. But see *Naish* v. *Tatlock*, 2 H. Black. 319; which was not referred to in the above decision, and which is opposed to it.

(*b*) *Onslow* v. *Corrie*, 2 Mad. 330; *Fagg* v. *Dobie*, 3 You. & Coll. 96; see also *Harley* v. *King*, 2 Cr. M. & Ros. 18; 1 Gale, 100; and *Rowley* v. *Adams*, 4 Myl. & Craig, 524; 2 Jurist, 915.

it was held, that as by statute 6 Geo. IV. c. 16, s. 75 (*c*), the bankrupt, on delivering up the lease, was discharged from all the covenants on his part, performance of the covenant to repurchase could not be enforced against the lessor (*d*). So where there was a lease of a mill, and the lease recited that the machinery had been valued at a certain sum, and there were covenants that at the end or sooner determination of the term it should be again valued, and the difference paid accordingly; the lessee became bankrupt; his assignees refused to take the lease; but a valuation of the machinery was made at a sum exceeding the original valuation; the assignees then delivered up possession to the lessor, and demanded of him the difference between the two valuations, which he refused to pay; it was held, that the assignees' remedy was by an action of trover (after a demand of the machinery, which was not fixed), and not by an action on the covenants, which were determined by the bankruptcy and refusal to take the lease (*e*).

Extent of the Liability of Sureties.

A surety in a bond conditioned for the performance of covenants is not discharged from his liability to the lessor by the bankruptcy and certificate of his principal, the lessee (*f*). A surety, who has joined with a lessee in a lease, is liable to the lessor for breaches of covenant occurring after the issuing of the fiat or filing of the petition for adjudication of bankruptcy, and the delivering up of the lease by the lessee under the 12 & 13 Vict. c. 106, s. 145 (*g*).

SECT. 8.—*Insolvency.*

Enactments of the Insolvent Acts, 1 & 2 Vict. c. 110.

By the 50th section of the present Insolvent Act, 1 & 2 Vict. c. 110 (amended by 2 & 3 Vict. c. 39) (*h*), it is enacted, that if the assignees accept any lease or agreement for a lease to which the insolvent is entitled, he is discharged from all subsequent liability to the rent and covenants; and if the assignees decline to elect whether they will accept it, the lessor may apply to the Insolvent Court. Sect. 119 enacts, that neither prisoners nor their creditors shall petition any court under the Lords' Act, 32 Geo. II. c. 28 (*i*).

By sect. 12 of the 7 & 8 Vict. c. 96, when any petitioner is entitled to a lease or an agreement for a lease, and his assignees accept it, the petitioner is not to be liable for rent accruing after filing his petition,

(*c*) This section is substantially re-enacted by 12 & 13 Vict. c. 106, s. 145.

(*d*) *Kearsey* v. *Carstairs*, 2 Barn. & Adol. 718.

(*e*) *Fairburn* v. *Eastwood*, 6 Mees. & Wels. 679.

(*f*) *Young* v. *Taylor*, 3 Barn. & Ald. 521; 2 Moore, 326; 8 Taunt. 315. See ante, Chap. IV., Sect. 20, p. 175, as to these bonds.

(*g*) *Tuck* v. *Fyson*, 6 Bing. 321; 3 Moore & Pay. 715. This case was decided upon the repealed statute 6 Geo. IV. c. 16, s. 75, the language of which is similar to that of 12 & 13 Vict. c. 106, s. 145. Where there is a joint demise to two, both are tenants; and it would seem that evidence is inadmissible to show that it was intended that one should be the sole tenant, and the other merely a surety; *Rex* v. *Great Wakering* (*Inhabitants*), 3 Nev. & Man. 47; and see *Lee* v. *Nixon*, 3 Nev. & Man. 441.

(*h*) This latter act is repealed by 12 & 13 Vict. c. 106.

(*i*) This act applies to rent due at the time of the prisoner's discharge; *Brookes* v. *Hutchinson*, 1 Dowl. 493.

nor to be sued after acceptance for any subsequent non-observance of covenants, &c. If the assignees decline to determine whether they will or not accept, application may be made to the commissioner, who may make such order as he thinks just.

Points determined on the Insolvent Acts.

A landlord may distrain after his tenant's discharge under the 1 & 2 Vict. c. 110, for rent due before the arrest, the amount of which was inserted in the schedule (*k*). Previously to the present Insolvent Act, it had been held that the assignee of an insolvent lessee was entitled to an option whether he would accept the lease or not, and to have a reasonable time to decide; and that during that time he might take such steps as he might think necessary for the purpose of trying to render the property productive (*l*). The interest of an insolvent debtor in premises held by him, either for a term or from year to year under an agreement for a lease, passed by the assignment to the provisional assignee, so as to prevent the insolvent from maintaining ejectment against his tenant with respect to the same, notwithstanding no act had been done by such provisional assignee to show his acceptance or refusal of the lease (*m*). The executor of the assignee of an insolvent lessee, under the Insolvent Act, 1 Geo. IV. c. 119, is liable for breaches of covenants in the lease which happened after the death of the assignee, no new assignee having been appointed (*n*). Where the assignees of an insolvent tenant agreed to pay to the landlord a sum of money for the last quarter's rent, it was held that the sum could not be recovered on a count on an account stated, there having been no use and occupation by the defendants (*o*).

Sect. 9.—*Marriage.*

(a) *Of Lessor.*

Effect of Marriage of the Lessor on Leasehold Property.

Although, by marriage (*p*), the husband and wife become one person in law, and therefore such an union works an extinguishment or revocation of several acts done by the wife before the marriage, yet in things which would be manifestly to the prejudice of both husband and wife, the law does not make her acts void (*q*), therefore, if an unmarried woman make a lease at will or is lessee at will, and afterwards marry, the marriage is no determination of her will, so as to make the lease void; nor can she herself, without the consent of her husband, deter-

(*k*) *Phillips* v. *Sherville*, 6 Queen's B. R. Rep. 944.

(*l*) *Lindsay* v. *Limbert*, 12 Moore, 209; 2 Car. & Pay. 526; but see *Doe* d. *Palmer* v. *Andrews*, 4 Bing. 348; 12 Moore, 601; 2 Car. & Pay. 593. See also *Topham* v. *Dent*, 6 Bing. 515; 4 Moore & Pay. 264; *Crofts* v. *Pick*, 8 Moore, 384; 1 Bing. 354; and *Partington* v. *Woodcock*, 6 Ad. & El. 690; 1 Har. & Wol. 262; 5 Nev. & Man. 672.

(*m*) *Doe* d. *Palmer* v. *Andrews*, 4 Bing. 348; 12 Moore, 601; 2 Car. & Pay. 593.

(*n*) *Abercrombie* v. *Hickman*, 8 Ad. & El. 683; 3 Nev. & Per. 676; 1 Will. Wol. & Hod. 534.

(*o*) *Clarke* v. *Webb*, 1 Cromp. M. & Ros. 29; 4 Tyr. 673; 2 Dowl. 671.

(*p*) As to the effect of the marriage of the lessor with the lessee in merging the term, see post, Chap. VII., Sect. 4.

(*q*) Bac. Abr. tit. *Baron and Feme*, (E, I, K); Co. Litt. 351, n. 1, (Butler).

mine the lease in either case. Where the husband and wife made a lease for years by indenture of the wife's lands, reserving rent, and the lessee having entered, the husband before any day of payment died; upon which the wife took a second husband, and he at the day accepted the rent and died; it was held, that the wife could not avoid the lease; for that by her second marriage, she had transferred her power of avoiding it to her husband, and his acceptance of the rent had bound her, as her own before such marriage would have done; for he, by the marriage, succeeded into the power and place of his wife, and what she might have done, either as to affirming or avoiding the lease before marriage, the husband might do after the marriage. As the wife's acceptance of rent will make good and unavoidable leases for years made by her and her husband at common law, or by her husband solely, if they be by indenture or deed-poll, so, if the wife die before her husband, the same election and power of affirming or avoiding such leases descends to her issue or heir; for such leases are good till those who succeed to the estate defeat and avoid them by their disagreement thereto; therefore, where a woman tenant-in-tail, having issue by a former husband, after his death married a second husband, and they by indenture joined in a lease for years of the wife's lands, rendering rent, and then the wife died without issue by the second husband, so that he was not entitled to be tenant by the curtesy; it was held, that till the issue by the first husband entered, the lease remained good; and therefore the husband recovered in an action of covenant against the lessee, upon issue found for him, that there was no entry made by the wife's issue; because till then the lease was still subsisting, and consequently the lessee was bound by his covenants in such lease. Where a man seised of land in right of his wife makes a lease for years, rendering rent, and then his wife dies without issue by him, whereby he is not tenant by the curtesy, but his estate is determined; yet he is entitled to the rent until the heir has made an actual entry, because the lease was at first good, and drawn out of the seisin of the wife; and, therefore, till the entry of the heir, remains good between the lessor and the lessee, so that the lessee may maintain an action of covenant, and the lessor distrain and avow for the rent, till the heir has entered. Where a reversion, expectant on a term of years, is conveyed to a husband and wife, the husband alone may have an action of breach of covenant to repair; but if lands be conveyed to husband and wife with a covenant for further assurance, she must be joined with him in an action for the breach of such covenant (*r*). For rent or any other cause of action accruing during coverture on a lease or demise, or on a contract relating to the real property of the wife, whether made before or during coverture, the husband and wife *may* join, or he *may* sue alone; the

(*r*) *Middlemore* v. *Goodale*, Cro. Car. 505.

same happens when a lease for years has been granted to husband and wife, and the lessor ejects them; so also in all actions for a profit accruing during the coverture in right of the real estate of the wife (s). Where a husband seised of premises in right of his wife makes a demise in his own right, the wife being no party thereto, the reversion is not in both husband and wife, but in the husband alone; and he alone is the proper party to sue the tenant for use and occupation and double rent; and they cannot sue as reversioners for double value, the reversion not being in the two plaintiffs but in the husband alone (t). The declaration in the above case having alleged that the premises were held by the defendant "as tenant thereof to the plaintiffs;" it was held, that neither the averment of the tenancy nor the words "to the plaintiffs" could be rejected (u). The real estate, however, of the wife is under the power of the husband no longer than during the marriage; and therefore any disposition of it made by him alone may be defeated; also all charges laid on it by him fall off with his death: but the husband during the marriage may take the rents and profits of the whole estate of his wife; and as he has the sole disposition of all interests of his wife, he may, for an interest which vests in the wife, or accrues to her during coverture, either sue alone, or with his wife (x). If the husband survive he becomes entitled to all chattels real of his wife, rent, &c., accruing during the coverture, by survivorship, but to recover choses in action, as contracts made with the wife before coverture, he must sue as her administrator; he may, however, support any action for injuries to the land of his wife during coverture in his natural capacity. If there be a lease by the wife dum sola, payment of the rent ought to be to the husband; and payment to the wife without the husband's order, though there be no notice of the marriage, will not discharge the lessee. By the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 141, the marriage of a woman, plaintiff or defendant, will not cause the action to abate.

(b) *Of Lessee.*

Effect of Marriage on the Leasehold Interest of the Wife.

Marriage is a gift in law to the husband of all the wife's chattels real,—as a term for years in right of his wife: so of estates by statute-merchant, statute-staple, elegit, &c.; and of these he alone may dispose, or forfeit, or they may be extended for his debts (y); but if he make no disposition of them in his lifetime, they survive to his wife, and therefore he cannot devise them; for the husband is only possessed of a term in her right, and the term or legal interest continues in her. If the wife survive, she can maintain an action for all chattels real which the husband had in her right and did not dispose of in her

(s) Com. Dig. tit. *Baron and Feme*, (X).
(t) *Harcourt* v. *Wyman*, 3 Exch. Rep. 817.
(u) Ibid.
(x) Com. Dig. tit. *Baron and Feme*, (O).
(y) Bac. Abr. tit. *Baron and Feme*, (C 2), (1).

lifetime, allowances of rent, &c. So absolute is the power of the husband, as head or governor of the family, over the chattels real or personal of which he is possessed in right of his wife, that he may dispose of them as he thinks proper; and no act or concurrence of hers is of any avail, either in confirming or controlling such disposition: so, if a man marry a woman who has a term of years settled on her in trust, the husband may as well dispose of this trust as if the legal interest were in her (*z*). If lands are demised to a man and his wife, and the husband alone makes an underlease, he alone may sue a third person in case for an injury to the reversion (*a*). It is agreed, however, without doubt, that where a term is assigned in trust for a married woman with the privity and consent of her husband, he cannot intermeddle with or dispose of it. If a term of years be granted to a married woman and another, or if a single woman and another are joint-tenants of a term of years, and she take husband, yet in both cases the joint-tenancy still continues; for the marriage makes no severance or alteration of it, but gives the husband the same power his wife had before, by an actual disposition of her moiety, to break the joint-tenancy, and bind his wife's interest therein; but without such disposition, the joint-tenancy continues, and if the husband die, the whole shall go accordingly: so, if such joint-tenants are ousted of the term, the wife shall join with the husband and the other joint-tenant in ejectment: and the wife shall have judgment to recover as well as the husband: and if in such case, before any actual disposition made by the husband, his wife die, the whole term shall go to the surviving joint-tenant, and no part thereof to the husband; because though the husband, if he survive, is by law to have all chattels real and personal of his wife's,—and this term was a chattel real,—yet the title of the other joint-tenant to have the whole by survivorship, coming at the same instant and being the elder title, shall prevail against the husband (*b*). The husband may be sued alone for rent due during coverture on a lease which the wife has as personal representative. If the husband survive the wife, he shall have the whole interest which his wife had in any chattel real, and that without taking out administration to her: so of a copyhold for years (*c*): but where the husband, possessed of a term in right of his wife, from whom he was divorced a mensâ et thoro, was about to sell it, an injunction was granted; for though the marriage continued notwithstanding the divorce, yet the husband did nothing *as* husband, nor the wife *as* wife (*d*). If the husband and wife be evicted of a term which he has in right of his wife, and the husband brings an ejectment in his own name, and has judgment to recover; these circum-

(*z*) *Turner's case*, 1 Vern. 7, 18; *Incledon* v. *Northcote*, 3 Atk. 435.

(*a*) *Wallis* v. *Harrison*, 5 Mees. & Wels. 142; 2 Horn. & Hurl. 65.

(*b*) Com. Dig. tit. *Baron and Feme*, (E 2).

(*c*) Ibi d.

(*d*) *Anon.*, 9 Mod. 44.

stances make an alteration in the term, and vest it in the husband; because, by not making his wife a party to the recovery, he takes the whole wrong to be done to himself, and consequently if he recover it, it must be by virtue of that right whereof he was disseised. A woman who, as a married woman, has hired a house of another and obtained credit as such, will be precluded by such conduct from suing as a single woman if she gives no evidence to disprove her marriage(*e*). The action does not abate by the marriage of the woman, plaintiff or defendant (*f*).

SECT. 10.—*Death.*

(a) *Heirs or Devisees.*

What may be devised, and how.

The alteration which is effected by the death of the landlord or tenant has reference to the heir or devisee, or the executor or administrator. As no man is primâ facie ever to be looked upon as dying intestate, the devisees are first entitled to our consideration. By the statute 7 Will. IV. & 1 Vict. c. 26, a man may devise all real and personal estate which he is entitled to, either at law or in equity, at the time of his death: and if a man have a rent for him and his heirs for the life of another, he may devise it: so an interest, though it be a contingency, may be devised (*g*): therefore, if one devise a reversion after an estate for life, or in tail, and that comes to his possession, the land passes: and a general residuary clause in a will carries a reversion: so by a devise of ground-rent on leases for years, the reversion passes: so a bequest of "leasehold ground-rents in *S.*" passes the reversionary leasehold interest as well as the reserved rent. If one bequeath his indenture of lease, his whole estate in the lease passes: so, if the termor of a house or land bequeath the same to *B.* without expressing how long he should have it, he shall have the whole term and number of years (*h*); but a devisee of an equity of redemption in a term cannot be charged as an assignee of the mortgagor (*i*).

Rights and Liabilities of Heirs and Devisees.

Where a term is specifically bequeathed, it will, notwithstanding, in the first instance, vest in the executor by virtue of his office; and the legatee cannot enter until he has the special assent of the executor. Where a covenant of the lessee, which runs with the land, has been broken after the death of a lessor, the right of action is vested in the party upon whom the reversion descends, whether he be named in the covenant or not: thus, if the reversion be a freehold, and the lessor die without a will, it vests in the heir; and if the reversion be a term for years, in the executor or administrator; and in either case, if the lessor have devised or bequeathed the reversion, in the devisee (*k*). As

(*e*) *Langford* v. *Foot*, 2 Moo. & Sc. 349.
(*f*) 15 & 16 Vict. c. 76, s. 141.
(*g*) Com. Dig. tit. *Devise*, (L. M).
(*h*) Went. Off. Ex. 251.
(*i*) *Carlisle* (*Mayor*) v. *Blamire*, 8 East, 487.
(*k*) Com. Dig. tit. *Covenant*, (B 3).

a devisee is an assignee of the reversion, so also is he an assignee in law of the term, and is therefore in the predicament of an ordinary assignee; and as such liable to actions for breaches of covenant which run with the land (*l*): the same law holds good with respect to the liability of the party having the reversion for breaches of covenant after the lessor's death, whether he be heir, devisee, or personal representative. If a covenant of the lessee, running with the land, be broken during the lessor's lifetime, his executor or administrator only can sue upon it; and so it is if the covenant be personal, whether broken in his lifetime or not. If there be a breach of the lessor's covenants in his lifetime, his heir is liable if named, if the covenant be real, in respect of his assets. To maintain an action of debt on the 3 & 4 Will. & Mary, c. 14, against the heir and devisee, it is necessary that a debt should have accrued to the plaintiff in the lifetime of the devisor (*m*).

(b) *Executors and Administrators.*

What goes to the Executors and Administrators generally.

With respect to executors and administrators, they have, by virtue of their executorship or administration, all the chattels real and personal of the deceased; as well those which are in possession,—as leases for years of land, rents, commons, corn growing or cut, trees, and grass cut and severed, or the like; as also those which are in action—as the right and interest of execution upon judgments or statutes (*n*): so the arrears of rent due to the testator in his lifetime shall go to the executor or administrator in the nature of a chattel: so if a rent be granted out of land to the testator in fee-simple, fee-tail, for life or years, and it be not paid to him in his lifetime, the arrears shall go to his executor or administrator, and not to any other: so a rent charge pur autre vie, if the grantee dies in the lifetime of the cestui que vie, goes to the executors of the grantee, though they are not named in the grant (*o*). If a man be seised of land and possessed of a stock of cattle, and let to another for years, and he covenant by the lease to pay to the lessor and his wife, their heirs and assigns, 1,000*l.* per annum during the term; in this case, after the death of the lessor, his wife surviving, her executor or administrator, and not the heir of the lessor, shall have the payment; so if a man make a lease of land first for years, and then grant another the trees for a number of years, to begin after the end of the term of the land, the lessee shall have the trees in the nature of a chattel, and if he die, his executor or administrator shall have them: so if a lease for years of land be granted to a man and his heirs, or to him and his successors, and he die, his executor or administrator, and not his heir, shall have the

(*l*) *Holford* v. *Hatch*, 1 Dougl. 184.

(*m*) *Farley* v. *Briant*, 3 Ad. & El. 839; 5 Nev. & Man. 42; 1 Har. & Wol. 299. See post, Book III., Chap. II., Sect. 3, (b).

(*n*) Shep. Touch. 468.

(*o*) *Bearpark* v. *Hutchinson*, 7 Bing. 178; 4 Moore & Pay. 848; and stats. 7 Will. IV. & 1 Vict. c. 26, s. 6.

term (*p*). If a lease be made to a man for twenty years, without naming his executors or administrators or assigns; in this case, if the lessee die, his executor or administrator notwithstanding shall have it during the term: so if a lease for years be made to a bishop and his successors, and he die, his executor or administrator, not his successor shall have it: and if a lessee for life make a lease for years absolutely; in law it is a lease for so many years if the lessee so long live, and shall go to the under-lessee's executor or administrator after the under-lessee's death.

Effect of the Probate of the Will.

The right of an executor to the estate of his testator is derived from the will; and he is in possession in point of law from the time of the death, although before probate is granted (*q*); but the probate is the only evidence which is admissible to prove such right (*r*); and so long as the probate remains unrepealed, it cannot be impeached in the Temporal Courts (*s*). An executor de son tort, to whom administration is subsequently granted, may repudiate an agreement made by him, to surrender a term of years vested in the intestate (*t*).

Where Leasehold Property vests in Personal Representatives.

If the testator die in possession of a term of years, it shall vest in the executor; and although it be worth nothing, he cannot waive it, for he must renounce the executorship in toto, or not at all; but this is to be understood only where the executor has assets, for it seems that he may relinquish the lease, if the property be insufficient to pay the rent (*u*); but in case there are assets to bear the loss for some years, though not during the whole term, it seems the executor is bound to continue tenant till the fund is exhausted, when, on giving notice to the lessor, he may waive the possession (*x*). If, however, he enter on the demised premises, as by his office he is bound to do, he becomes an assignee, and is liable in that character to the lessor (*y*). An issue whether all the estate of a lessee had vested in a defendant as assignee is proved by showing her to be executrix of an assignee, though she had not entered or taken the profits (*z*). Where one of two executors of a deceased tenant for a term of years entered into the demised premises, it was held, that such entry did not accrue as the entry of the two, so as to make them both liable in an action for use and occupation (*a*). If the profits of the land exceed the amount of rent, as the law primâ facie supposes, such of the profits as are sufficient to make up the rent shall be appropriated to the payment of the lessor, and cannot be applied to any other purpose; therefore, if

(*p*) Shep. Touch. 469.
(*q*) *Smith* v. *Milles*, 1 Term Rep. 480.
(*r*) *Rex* v. *Netherseal*, 4 Term Rep. 258.
(*s*) *Allen* v. *Dundas*, 3 Term Rep. 125.
(*t*) *Doe* d. *Hornby* v. *Glenn*, 1 Ad. & El. 49; 3 Nev. & Man. 837.
(*u*) See *Reid* v. *Lord Tenterden*, 4 Tyr. 111.
(*x*) See post, p. 237, 238.
(*y*) Toll. L. of Ex. & Adm. 109; Went. Off. of Ex. 120; and see *Remnant* v. *Brembridge*, 8 Taunt. 191; 2 Moore, 94; *Buckworth* v. *Simpson*, 1 Cromp. M. & Ros. 834; 1 Gale, 38; 5 Tyr. 344.
(*z*) *Wollaston* v. *Hakewill*, 3 Man. & Gran. 297; 3 Scott, N. R. 593.
(*a*) *Nation* v. *Tozer*, 1 Cromp. M. & Ros. 172; 4 Tyr. 561; and see *Fox* v. *Waters*, 12 Ad. & El. 43; 4 Per. & Dav. 1.

in such case the lessor bring an action against the executor for the rent, he cannot plead plene administravit, for that plea would confess a misapplication of the profits; since no other payment out of them can be justified till the rent be answered (*a*). On the other hand, the profits of the land may be inadequate to the rent: in a variety of cases they may be easily supposed insufficient for a given period, although the lease may on the whole be beneficial; as, for instance, where rent is claimed for the occupation of premises from Michaelmas to Lady-day, where almost the whole profit is taken in the summer,—as in the case of a lease of tithes, or of such meadow grounds as are usually flooded in the winter: so the profits for a series of years may be less than the amount of the rent, although the lease for the whole term may be of no small value,—as in the case of a lease of woods, which are fellable only once in eight or nine years, and the felling has been very recent; in these and the like instances, the executor is personally liable only to the extent of the profits; and for such proportion of the rent as shall exceed the profits, he is chargeable merely in the capacity of executor, or, in other words, as far only as he has assets. The profits of the land are to be applied by the executor, in the first place, to the discharge of the rent, and if that fund prove insufficient, the residue of the rent is payable out of the general assets, and stands on the same footing with other debts by specialty; and this whether the rent be reserved by lease in writing or by parol.

Where Interests in Yearly Tenancies vest in Personal Representatives.

In the case of a tenancy from year to year as long as both parties please, if the tenant die, his personal representative has the same interest in the land which his testator or intestate had: for whatever chattel he had must vest in his executor or administrator as his legal representative (*b*). Where a tenant from year to year died, and a regular notice to quit was served on the widow, who remained in possession, it was held that the landlord might recover in ejectment, unless it were shown that some other person, and not the widow, was executor or administrator of the tenant; and that it was not incumbent on the landlord to show that she was either (*c*).

Extent of the Rights of Personal Representatives.

An executor or administrator may charge others for any debt or duty due to the deceased, in the same manner as the deceased himself might have done; and the same action which the deceased might have had, the executor or administrator may generally have also: therefore he may have an action of account, or assumpsit for use and occupation of his testator's or intestate's premises: so an ejectment will lie by the executor or administrator for an ejectment of the testator out of the term (*d*). An action of debt, also, for rent in arrear in

(*a*) Toll. L. of Ex. & Adm. 220.

(*b*) *Doe* d. *Shore* v. *Porter*, 3 Term Rep. 13; *James* v. *Dean*, 11 Ves. 391; *Mackay* v. *Mackreth*, 4 Dougl. 213; 2 Chit. 461; and see *Rex* v. *Great Glenn*, 5 Barn. & Adol. 188; and *Thompson* v. *Thompson*, 9 Price, 464.

(*c*) *Rees* d. *Mears* v. *Perrott*, 4 Car. & Pay. 230.

(*d*) Shep. Touch. 481.

the lifetime of the deceased, may be brought by his executor or administrator; for if any rent or arrears of rent be due to him upon a grant of rent out of his land, or reservation of rent upon any estate made by him of land; in these cases his executor or administrator may have an action of debt for this rent, or may distrain for it, so long as the land that is chargeable with the rent, and out of which it issues, is in the possession of him who ought to pay it, or in the possession of any one who claims by or under him. An executor of a lessor may sue the lessee for breach of a covenant not to fell, stub up, lop or top timber trees, excepted out of the demise, the breach having been committed in the lifetime of the lessor (*e*). So the executor of a tenant for life may sue for breach of a covenant to repair, committed by the lessee in the lifetime of the testator (*f*). Formerly an executor or administrator could not charge another, or have any action against him, for a personal wrong done to the testator, when the wrong done to his person, or that which is his, was of that nature for which damages only could be recovered; therefore an executor or administrator could not sue another for a trespass done to him in his cattle, grass or corn, or for waste done by his tenant in his land; for these are said to be personal actions, which die with the person, according to the rule, actio personalis moritur cum personâ; but now by statute 3 & 4 Will. IV. c. 42, s. 2, executors and administrators may bring actions for injuries to the real estate of the deceased committed within six months before his death. A lease belonging to an intestate, on which another has a lien, is assets in the hands of the administrator, who has power to redeem it as well as to dispose of the legal estates (*g*).

Extent of the Liability of Personal Representatives.

As an executor or administrator may charge others for any debt or duty due to the deceased; so shall he be charged by others for any debt or duty due from the deceased, as the deceased himself might have been charged in his lifetime, so far as he has any of the estate of the deceased to discharge the same; therefore, if a lease for years be made rendering rent, and the rent be in arrear, and the lessee die: in this case the executor or administrator of the lessee shall be charged out of the assets for the rent: so, also, if a lessee for years assign over his interest and die, his executor or administrator shall be charged in like manner with the arrears before the assignment, but not with any which become due after the assignment. An executor who is charged as assignee cannot discharge himself from personal liability without showing that the premises are of no value, and that he has no assets (*h*). An executor of a termor cannot waive the term, but he must either renounce or accept the executorship in toto: and if he accept the executorship, and enter on the demised premises, he is chargeable

(*e*) *Raymond* v. *Fitch*, 2 Cromp. M. & Ros. 588; 1 Gale, 337; 5 Tyr. 985.

(*f*) *Ricketts* v. *Weaver*, 12 Mees. & Wels. 718.

(*g*) *Vincent* v. *Sharp*, 2 Stark. 507.

(*h*) *Hopwood* v. *Whaley*, 6 Dowl. & L. 348.

as assignee in debt or covenant for the arrears of rent due after his entry de bonis propriis, to the extent of the value of the premises (*i*). The reason of this appears to be that rent is received by an executor not so much in the light of assets, as a profit of the land which is to be handed over to the landlord in satisfaction or diminution of arrears that may be due (*k*). An executor or administrator of a lessee charged as assignee after entry is, in the absence of other assets, liable de bonis propriis for the rent reserved to the extent to which he might by reasonable diligence have derived from the premises (*l*). Formerly an executor or administrator could not be charged in any case for any personal wrong done by the deceased, and therefore no action could be brought against him for any such cause; as for cutting down trees, or for suffering his cattle to eat up the plaintiff's grass; but now by statute 3 & 4 Will. IV. c. 42, s. 2, executors may be sued for any wrong committed by the deceased to property within six months before his death (*m*). An action for use and occupation by the deceased may also be maintained against his executor or administrator. Executors or administrators who become possessed of any term in lands or tenements, are bound by the covenants which run with the land, whether they have any assets or not (*n*); therefore, where lands come to an executor or administrator, he may be charged, like any other assignee, for a breach in his own time of covenants which run with the land; but there is a difference in this respect; that if declared against as assignee, he is chargeable as terre-tenant, or one who has the actual possession of the land, and the judgment is de bonis propriis: but if the action be brought against him as executor or administrator, the judgment shall be de bonis testatoris, even where the breach has been committed in his own time, for it is the testator's covenant which binds the executor, who represents him, and he therefore must be sued by that name (*o*). Where an administrator has occupied premises demised to his intestate, it is no plea to an action of covenant for non-payment of rent and taxes and non-repairs, to say that the premises yield no profit (*p*). But if an administrator has no assets or has fully administered, and is chargeable with no default or laches, he may discharge himself from liability to rent to a greater extent than the real value of the premises, by offering to surrender the premises to the lessor: it is however no proof of the real value being less than the rent, that the intestate has underlet to an insolvent tenant, or that the

(*i*) *Rubery* v. *Stevens*, 4 Barn. & Adol. 241; *Hopwood* v. *Whaley*, 6 Dowl. & Low. 342.

(*k*) *Tremeere* v. *Morison*, 1 Bing. N. C. 97.

(*l*) *Hopwood* v. *Whaley*, 6 Dowl. & L. 342; and 6 C. B. 744, questioning the authority of *Remnant* v. *Bremridge*, 8 Taunt. 191; 2 Moore, 94.

(*m*) See *Powell* v. *Rees*, 7 Ad. & El. 426; Will. Wol. & Dav. 680; 2 Nev. & Per. 571.

(*n*) *Buckley* v. *Pirk*, 10 Mod. 12; 1 Salk. 137; *Lyddall* v. *Dunlap*, 1 Wils. 4; *Bridgeman* v. *Lightfoot*, Cro. Jac. 761; *Tremeere* v. *Morison*, 1 Bing. N. C. 97.

(*o*) *Tilney* v. *Norris*, 1 Salk. 309; 1 Lord Raym. 553; Carth. 519; *Tremeere* v. *Morison*, 1 Bing. N. C. 97.

(*p*) *Tremeere* v. *Morison*, 1 Bing. N. C. 89; 4 Moore & Scott, 603; and see *Hopwood* v. *Whaley*, 6 Dowl. & L. 342.

premises are out of repair, the intestate having been bound by the lease to keep them in repair (*q*). An administrator of a lessor may be obliged to contribute as owner towards the rebuilding of a party wall under the old building act, though no otherwise owner than as administrator, and though he has no assets to meet the expense (*r*). Where there was a lease by deed, and on the death of the lessee her son applied to the lessor to become tenant on the same terms as the lessee, and was accepted; it was held, in an action for use and occupation against the son, to whom jointly with another letters of administration had been granted to the estate of his mother after the commencement of the action, that it was a question for the jury, whether the defendant occupied as assignee of the lease, or upon a fresh taking (*s*).

SECT. 11.—*Sale of Interest in Real Property.*

(a) *Operation of the Statute of Frauds.*

What Cases are within the Statute of Frauds.

Upon the operation of the statute 29 Car. II. c. 3, s. 4 (*t*), commonly called the Statute of Frauds, it has been decided that a sale of lands, though by auction, is within the enactment (*u*); but that the statute does not invalidate an executed parol contract, so as to prevent a party to it from maintaining an action for a breach of part of it, where that breach does not relate to an interest in land, although the contract itself stipulates that the defendant shall be substituted as tenant, in the stead of the plaintiffs, of premises in their occupation (*x*). But in a similar case, where the action was to enforce payment of the sum stipulated to be given as the price of the interest in the land, it was held not to be an executed contract, and that there ought to be an agreement in writing (*y*). So an unexecuted agreement to let a house and to sell certain furniture and fixtures therein, and to do certain alterations within the house, is within the statute; and as the occupation of the premises is the principal subject-matter, an action cannot be maintained for breach of the other parts of the contract (*z*). A verbal agreement made on the 25th of September, for the sale of a then growing crop of potatoes, was considered not to be a contract or sale within the fourth section of the statute, but a sale of goods, wares and merchandize within the seventeenth section (*a*); but a contract

(*q*) *Hornidge* v. *Wilson*, 11 Ad. & El. 645; 3 Per. & Dav. 641; *Rubery* v. *Stevens*, 4 Barn. & Adol. 241; 1 Nev. & Man. 182; *Reid* v. *Lord Tenterden*, 4 Tyr. 111.

(*r*) *Thacker* v. *Wilson*, 3 Ad. & El. 142; 4 Nev. & Man. 658; 1 Har. & Wol. 131.

(*s*) *Drury Lane Theatre Company* v. *Chapman*, 1 Car. & Kir. 14.

(*t*) See this enactment, ante, 58, and also as regards its operation, in connection with the first and second sections, in respect of demises of land.

(*u*) *Walker* v. *Constable*, 1 Bos. & Pul. 306; 2 Esp. 659; *S. P. Stansfield* v. *Johnson*, 1 Esp. 101.

(*x*) *Price* v. *Leyburn*, 1 Gow, 109.

(*y*) *Cocking* v. *Ward*, 1 Com. B. Rep. 858.

(*z*) *Vaughan* v. *Hancock*, 3 Com. B. Rep. 766; *Mechelen* v. *Wallace*, 7 Ad. & El. 49; 2 Nev. & Per. 224; Will. Wol. & Dav. 468.

(*a*) *Evans* v. *Roberts*, 5 Barn. & Cres. 829; 8 Dowl. & Ryl. 611; see also *Sainsbury* or *Stanbury* v. *Matthews*, 4 Mees. & Wels. 343; 1 Horn. & Hurl. 459; *Jones* v. *Flint*, 10 Ad. & El. 753; 2 Per. & Dav. 594.

with an off-going tenant for crops and tillage, in consideration of taking a farm (*b*), and a contract with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, have been held to be contracts or sales of an interest in or concerning land, and void by the fourth section of the statute, because not reduced into writing (*c*): and where *A.* agreed with *B.* to let him have land rent free, on condition that *A.* should have a moiety of the two succeeding crops, it was held that the agreement need not be in writing under the statute (*d*). Where a lessee agreed to relinquish possession of a house to a person, and to suffer him to become tenant for the residue of a term, in consideration of a sum of money being paid towards completing some repairs, it is an agreement within the statute (*e*). Where, after a lease was granted, the lessee applied to the landlord to enlarge the premises, agreeing to pay 10*l.* per cent. *per annum* on the money laid out, which was accordingly done; it was held that this was not an agreement within the statute (*f*).

(b) *Sales by Auction.*

Operation of the Particulars and Conditions of Sale.

Where the particulars of sale by auction of several lots described one as subject to the same rights of way as were then enjoyed under existing leases of certain houses, one of which leases was to be seen; and a plan annexed showed one right of way to those houses over that lot, but not another, and it also showed another right of way over that lot to a second adjoining lot, and the same person bought these two lots by two biddings, but a single contract was entered into for the whole, it was held that he might rescind the contract as to both lots, and that it was not a case for the application of a compensation provision as to misdescription of the premises (*g*). Where the particulars of sale of premises in Covent-garden stated, that under the lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter," and the original lease when produced appeared to prohibit the business of a brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruiterer, herb-seller, coffee-house keeper, working hatter and many others, and the sale of coals, potatoes or any provisions, it was held that there was such a material discrepancy between the particulars and the lease as to entitle a purchaser

(*b*) *Falmouth* (*Earl*) v. *Thomas*, 1 Cromp. & Mees. 89; 3 Tyr. 26.

(*c*) *Crosby* v. *Wadsworth*, 6 East, 602; 2 Smith, 559. It has been also held in a similar case that trespass cannot be maintained against the vendor for taking away the vendee's horse and cart from the close, which had been sent for the purpose of carrying away the grass, as it was in substance an action charging the defendant on the contract; *Carrington* v. *Roots*, 2 Mees. & Wels. 248; Mur. & Hurl. 14.

(*d*) *Poulter* v. *Killingbeck*, 1 Bos. & Pul. 397; and see *Bristow* v. *Waddington*, 2 Bos. & Pul. 452.

(*e*) *Buttemere* v. *Hayes*, 5 Mees. & Wels. 456; see also *Cocking* v. *Ward*, 1 Com. B. Rep. 858.

(*f*) *Hoby* v. *Roebuck*, 2 Marsh. 433; 7 Taunt. 157; *Donellan* v. *Read*, 3 Barn. & Adol. 899; and see *Lambert* v. *Norris*, 2 Mees. & Wels. 333; Mur. & Hurl. 29.

(*g*) *Dykes* v. *Blakes*, 4 Bing. N. C. 463; 6 Scott, 320; 1 Arn. 209.

to rescind his contract (*h*). Where leasehold premises were sold by auction by the defendant to the plaintiff, under a condition that the defendant should make a good title, it is no defence to an action for not making a good title, that the premises had been assigned by the plaintiff to the defendant by way of mortgage, and that a good title was made, except that the premises were out of repair, of which the plaintiff had full knowledge, and that the lessor had not re-entered, as he was entitled to do (*i*). An auctioneer selling a lease is bound to state a notice given by the landlord of his intention to enter unless the premises are put in repair, although the vendee is aware of the ruinous state of the buildings, and it is alleged that the auctioneer was not apprised of the notice (*k*): and where leasehold premises are sold by auction, and the lease containing the usual covenant to repair is produced and read to the bidders, if any of the buildings demised and described in the lease have been pulled down before the sale, the purchaser is not bound to complete the purchase, and may recover back his deposit, although the building pulled down be not described in the particulars of sale (*l*). Where an original lessee of land subject to a covenant against certain obnoxious trades, with a proviso for re-entry for a breach of such covenant, granted underleases of houses erected on the land, not containing a similar covenant and proviso; it was held that a purchaser by auction of houses erected on part of this land, and of the improved ground-rents of the houses so underlet, might recover back his deposit-money from the auctioneer, the omission of the proviso in the underleases not having been specified in the conditions or mentioned at the time of the sale (*m*). In the conditions of sale of the lease of a public-house it was described as "a free public-house," and the lease contained a covenant that the lessee and his assigns should take their beer from a particular brewer; though the lease was entirely read over by the auctioneer at the time of the sale, who said mistakenly that it was a free public-house, and that the covenant about the beer had been decided to be bad; it was ruled that a purchaser who heard the lease read over was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit (*n*).

(c) *Title of the Vendor.*

What Title to Real Property is considered good.

In every contract for the sale of an existing lease there is an implied undertaking by the seller (if the contrary be not expressed) to make out the lessor's title to demise (*o*), and without showing such title, the seller cannot maintain an action at law against the buyer for refusing

(*h*) *Flight* v. *Booth*, 1 Bing. N. C. 370; 1 Scott, 190.
(*i*) *Barnett* v. *Wheeler*, 7 Mees. & Wels. 364.
(*k*) *Stevens* v. *Adamson*, 2 Stark. 422.
(*l*) *Granger* v. *Worms*, 4 Camp. 83.
(*m*) *Waring* v. *Hoggart*, 1 Ryan & Moo. 39.
(*n*) *Jones* v. *Edney*, 3 Camp. 285.
(*o*) *Hall* v. *Betty*, 4 Man. & Gran. 410; 5 Scott, N. R. 508.

to complete the purchase (*p*). Where a lessee in possession contracted to sell the residue of his term, being three years and a quarter, at the rent of 42*l.* per annum, the vendee paying 30*l.* for the fixtures, as per list; it was held, that it was not to be inferred from the short residue of the term, the small value of the property, and the absence of any premium for the lease, that the vendee intended to waive his right to call for the production of the lessor's title (*q*). When it is stipulated that the vendor shall not be obliged to produce the lessor's title, the vendee may, notwithstanding, insist upon defects in the lessor's title, which he has discovered aliunde (*r*). Where a person, who had contracted to purchase the lease of a house, and subsequently discovered that it was originally leased jointly with another house, and that the lessor could enter for breach of covenants in respect of either house, it was held he was not bound to complete the purchase (*s*). Under a contract for the purchase of the residue of an old term, a purchaser is not bound to accept a similar new lease; for the former differs in value from the latter, the residue of an old term being in certain respects more advantageous (*t*); but a purchaser cannot refuse to perform an agreement for the sale of "the unexpired term of eight years' lease and goodwill," on the ground that only seven years and seven months of the term remained (*u*). If assignments of a lease to the vendor and to former assignees have not been registered, and the licence of the landlord to the assignment obtained at the time the contract of sale is made, it is no impeachment of the validity of the vendor's title (*x*).

What is incumbent on the Seller to perfect it.

It is incumbent on the vendor of a lease which contains a restriction against alienation, to prove that he has obtained the lessor's consent to the assignment (*y*); and it is also incumbent on him, and not on the purchaser, to procure the lessor's licence for the assignment (*z*). A purchaser is not compellable to accept a title to premises formerly subject to an incumbrance, the discharge of which is shown only by

(*p*) *Souter* v. *Drake*, 5 Barn. & Adol. 992; 3 Nev. & Man. 40; see also *De Medina* v. *Norman*, 9 Mees. & Wels. 820; 2 Dowl. N. S., 239.

(*q*) *Souter* v. *Drake*, 5 Barn. & Adol. 992; 3 Nev. & Man. 40.

(*r*) *Shepherd* v. *Keatley*, 1 Cromp. M. & Ros. 117; 4 Tyr. 571.

(*s*) *Blake* v. *Phinn*, 3 Com. B. Rep. 976; see also *Penniall* v. *Harborne*, 11 Queen's B. Rep. 368.

(*t*) *Mason* v. *Corder*, 7 Taunt. 9; 2 Marsh. 332. By agreeing to grant a lease, a party does not impliedly engage for a general warranty, nor undertake to deliver an abstract of his title; *Gwillim* v. *Stone*, 3 Taunt. 433; nor that he has a good title to the fee-simple and will deliver a *written* abstract; *Temple* v. *Brown*, 6 Taunt. 60.

(*u*) *Belworth* v. *Hassell*, 4 Camp. 140.

(*x*) *Stowell* v. *Robinson*, 3 Bing. N. C. 928; 5 Scott, 196; 3 Hodges, 197.

(*y*) *Mason* v. *Corder*, 7 Taunt. 9; 2 Marsh. 332. A contract was made for the purchase of a public-house; 50*l.* were paid as a deposit; 70*l.* more were to be paid on the landlord's consent being obtained to a change of the tenancy. The purchaser sent some furniture to the house and resided in a part of it, the vendor still remaining in it; it was held, that the contract was conditional on a valid consent of the landlord being given; and that a verbal consent, which was revoked before any change of tenancy had occurred, was not binding; that there had been no partial enjoyment of the object of the contract; and therefore that, on failure of the condition, the 50*l.* might be recovered as money had and received; *Wrighton* v. *Newton*, 2 Cromp. M. & Ros. 124; 1 Gale, 67.

(*z*) *Lloyd* v. *Crisp*, 5 Taunt. 249.

presumption: thus where a leasehold was sold, subject to a ground rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by an existing deed, but only by the acceptance of a mesne landlord, and presumption; it was held that the purchaser was not bound to accept the title (*a*). Where the plaintiff stated in his declaration, in an action for not completing a purchase, that he was possessed of a certain lease for years, which he put up to sale, and which the defendant purchased, it was held that he was bound to prove the execution of the original lease as well as the mesne assignments to himself (*b*).

(d) *Rights and Liabilities of the Parties.*

With respect to the Title Deeds and Title.

Whoever is entitled to the land is entitled to the title deeds affecting it (*c*); therefore, if the vendor of a leasehold estate deliver the conveyance as an escrow, to take effect on payment of the residue of the purchase money, the property in the title deeds of the estate is so vested in the vendee, that the vendor obtaining possession of them and pawning them, confers on the pawnee no right to detain them after tender of the residue of the purchase money (*d*). Where a man agrees to purchase premises on an assurance that the person of whom he purchases has a long term in them, and on the faith of such assurance enters, at a considerable expense, into the possession of them, he shall not, on his refusing to complete his purchase (on account of the seller having a shorter term), be charged in an action for use and occupation (*e*).

(e) *Valuation of Leaseholds and Reversions.*

Mode of Valuation of Property.

In order to show the value of real property, particularly leasehold estates, and to enable those persons who intend either to purchase or sell to form their judgment, the following tables have been extracted from a very accurate and useful work (*f*) upon the subject. The first table shows the value of leases, estates or annuities for terms of years certain, in number of years' purchase of the *clear* annual rent, at the several rates of 3, 4, 5, 6, 7, 8, 9 and 10 per cent. interest, which the purchaser may thereby make of his money. The clear annual rent must in all cases be ascertained, by deducting from the gross rent of the estate, or value of the annuity, the ground rent, all taxes and other annual charges, which would fall upon the purchaser.

(*a*) *Barnwell* v. *Harris*, 1 Taunt. 430.

(*b*) *Laythorpe* v. *Bryant*, 1 Bing. N. C. 421; 1 Hodges, 19; 1 Scott, 327. A sale made on a Sunday is void, if made by a person in the ordinary exercise of his calling, by statute 29 Car. II. c. 7. But the courts require that it should be strictly within that limitation; *Drury* v. *Defontaine*, 1 Taunt. 131; *Bloxome* v. *Williams*, 3 Barn. & Cres. 232; 5 Dowl. & Ryl. 82; 1 Car. & Pay. 294; *Williams* v. *Paul*, 6 Bing. 653.

(*c*) *Harrington* v. *Price*, 3 Barn. & Adol. 170.

(*d*) *Hooper* v. *Ramsbottom*, 6 Taunt. 12; 1 Marsh. 114.

(*e*) *Hearn* v. *Tomlin*, Peake, 191.

(*f*) Tables for the purchasing of Estates, &c. by William Inwood, Architect and Surveyor (1845). To arrive at as near an approximation as possible to the true value, by the use of vulgar fractions only, without decimals, the algebraical signs + and — have been used; the sign + signifying that the value is a little more than that stated, and the sign — that it is a little less.

TABLE

OF THE

VALUE OF LEASES, ESTATES OR ANNUITIES,

FOR A NUMBER OF YEARS CERTAIN,

TO MAKE THE FOLLOWING RATES PER CENT. (*i*)

Years.	Years' Purch. at 3 per cent.	Years' Purch. at 4 per cent.	Years' Purch. at 5 per cent.	Years' Purch. at 6 per cent.	Years' Purch. at 7 per cent.	Years' Purch. at 8 per cent.	Years' Purch. at 9 per cent.	Years' Purch. at 10 per cent.
½	½—	½—	½—	½—	½—	½—	½—	½—
1	1—	1—	1—	1—	1—	1—	1—	1—
2	2—	2—	1¾+	1¾+	1¾+	1¾+	1¾+	1¾—
3	2¾+	2¾+	2¾—	2¾—	2½+	2½+	2½+	2½—
4	3¾—	3¾—	3½+	3½—	3½—	3¼+	3¼—	3¼—
5	4½+	4½—	4¼+	4¼—	4+	4—	4—	3¾+
6	5½—	5¼—	5+	5—	4¾+	4½+	4½+	4¼+
7	6¼—	6+	5¾+	5½+	5½—	5¼—	5+	4¾+
8	7+	6¾—	6½—	6¼—	6—	5¾—	5½+	5¼+
9	7¾+	7½—	7+	6¾+	6½+	6¼—	6—	5¾+
10	8½+	8+	7¾—	7¼+	7+	6¾—	6½—	6¼—
11	9¼+	8¾+	8¼+	8—	7½—	7¼—	6¾+	6½—
12	10—	9½—	8¾+	8½—	8—	7½+	7¼—	6¾+
13	10¾—	10—	9½—	8¾+	8¼+	8—	7½—	7+
14*	11¼+	10½+	10—	9¼+	8¾—	8¼—	7¾+	7¼+
15	12—	11+	10½—	9¾—	9+	8½+	8+	7½+
16	12½+	11¾—	10¾+	10+	9½—	8¾+	8¼+	7¾+
17	13¼—	12¼—	11¼+	10½—	9¾+	9+	8½+	8+
18	13¾+	12¾—	11¾—	10¾+	10+	9¼+	8¾+	8¼—
19	14¼+	13¼—	12+	11¼—	10¼+	9½+	9—	8¼+
20	15—	13½+	12½—	11½—	10½+	9¾+	9¼—	8½+
25	17½—	15½+	14+	12¾+	11¾—	10¾—	9¾+	9+
30	19½+	17¼+	15¼+	13¾+	12½—	11¼+	10¼+	9½—
35	21½—	18¾—	16¼+	14½—	13—	11¾—	10½+	9¾—
40	23+	19¾+	17¼—	15+	13¼+	12—	10¾+	9¾+
45	24½+	20¾—	17¾+	15½—	13½+	12+	11—	9¾+
50	25¾—	21½—	18¼+	15¾+	13¾+	12¼—	11—	10—
60	27¾—	22½+	19—	16¼—	14+	12½—	11+	10—
70	29+	23½—	19¼+	16½—	14¼—	12½—	11+	10—
80	30¼—	24—	19½+	16½+	14¼—	12½—	11+	10—
90	31+	24¼+	19¾+	16½+	14¼+	12½—	11+	10—
100	31½+	24½+	19¾+	16½+	14¼+	12½—	11+	10
Perpetual.	33¼+	25	20	16¾—	14¼+	12½	11+	10

* EXAMPLE.—A lease or annuity for 14 years, to make 5 per cent., and to get back the principal, is worth a little less than 10 years' purchase of the clear annual rent; at 3 per cent., a little more than 11¼ years' purchase; at 8 per cent., a little less than 8¼ years' purchase; and so on.

(*i*) Inwood, Table 1.

TABLE

OF

THE PRESENT VALUE OF REVERSIONS

IN YEARS' PURCHASE (*k*).

The following table shows the present value of a reversion in years' purchase of the *clear* annual rent, after a given term not exceeding 60 years, at 3, 4, 5, 6, 7, 8, 9 and 10 per cent. interest.

After these Years.	Years' Purch. at 3 per cent.	Years' Purch. at 4 per cent.	Years' Purch. at 5 per cent.	Years' Purch. at 6 per cent.	Years' Purch. at 7 per cent.	Years' Purch. at 8 per cent.	Years' Purch. at 9 per cent.	Years' Purch. at 10 per cent.
1	32¼+	24+	19+	15¾−	13¼+	11½+	10¼−	9+
2	31½−	23+	18¼−	14¾+	12½−	10¾−	9¼+	8¼+
3	30½+	22¼−	17¼+	14−	11¾+	10−	8½+	7½+
4	29½+	21¼+	16½−	13¼−	10¾+	9¼−	7¾+	6¾+
5	28¾+	20½+	15¾−	12½−	10¼−	8½+	7¼−	6¼−
6	28−	19¾+	15−	11¾	9½+	7¾+	6¾−	5¾−
7	27+	19	14¼−	11+	9−	7¼+	6+	5¼−
8	26¼+	18¼+	13½+	10½−	8¼+	6¾+	5½+	4¾−
9	25½+	17½+	13−	9¾+	7¾+	6¼+	5+	4¼−
10	24¾+	17−	12¼+	9¼+	7¼+	5¾+	4¾−	3¾+
11	24+	16¼−	11¾−	8¾+	6¾+	5¼+	4¼+	3½+
12	23½−	15½+	11¼−	8¼+	6¼+	5−	4−	3¼−
13	22¾−	15+	10½+	7¾+	6−	4½+	3½+	3−
14*	22+	14½−	10+	7¼+	5½+	4¼+	3¼+	2¾−
15	21½−	14−	9½+	7−	5¼−	4−	3+	2½−
16	20¾+	13¼+	9¼−	6½+	4¾+	3¾−	2¾+	2¼−
17	20¼−	12¾+	8¾−	6¼−	4½+	3½−	2½+	2−
18	19½+	12¼+	8¼+	5¾+	4¼−	3¼−	2¼+	1¾+
19	19	11¾+	8−	5½+	4−	3−	2¼−	1¾−
20	18½−	11½−	7½+	5¼−	3¾−	2¾−	2−	1½−
25	16−	9½−	6−	3¾+	2¾−	1¾+	1¼+	1−
30	13¾−	7¾−	4¾−	3−	2−	1¼−	¾+	½+
35	11¾+	6¼+	3¾−	2¼−	1¼+	¾+	½+	⅓+
40	10¼−	5¼−	2¾+	1½+	1−	½+	⅓+	¼−
45	8¾+	4¼+	2¼−	1¼−	¾−	½−	¼−	⅐−
50	7½+	3½+	1¾−	1−	½−	¼+	⅙+	1/12+
55	6½+	3−	1¼+	¾−	⅓+	⅙+	1/10−	1/20+
60	5¾−	2½−	1+	½+	¼−	⅛	1/16	1/30

* EXAMPLE.—A reversion of an estate after a 14 years' term, is worth in present money, at 5 per cent., a little more than 10 years' purchase of the clear annual rent; at 3 per cent., a little more than 22 years' purchase; at 8 per cent., a little more than 4¼ years' purchase; and so on.

(*k*) Inwood, Table 13.

TABLE

OF

THE COMPARATIVE VALUE

OF

LIFEHOLD AND LEASEHOLD ESTATES(*g*).

The following Table will show the relative value, at 5 per cent. interest, of estates held for a term of life, or for a term of years certain.

Age.	Equal to a Leasehold Estate for a Term certain.			
	One Life.	Two joint Lives.	Longest of Two Lives.	Longest of Three Lives.
	Years.	Years.	Years.	Years.
10	29	21	43	51
20	25	17	37	46
30*	21	15	33	39
40	18	12	27	32
50	15	10	22	26
60	11	7	16	19
70	7	4	11	13

* EXAMPLE.—An estate held on a single life, aged 30, is equal in value to a leasehold estate for a term certain of 21 years, at 5 per cent.: one on two joint lives, aged 30, to a term certain of 15 years: one on the longest of two lives, aged 30, to a term certain of 33 years: and one held on the longest of three lives, aged 30, to a term certain of 39 years.

(*g*) Inwood, Table 26.

CHAPTER VII.

TERMINATION OF THE CONTRACT.

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SECT. 1.—*Effluxion of Time.*

Means of terminating the Contract generally.

WITH respect to the termination of a demise:—a lease for a term may be determined by either of these circumstances occurring, viz. by the period expiring during which the premises were leased: by cancellation of the instrument of demise; by surrender of the term; by merger in the fee; or by forfeiture for the breach of some contract express or implied:—a tenancy from year to year may be determined by either party giving to the other of them a notice to quit; and in some cases a tenancy may be determined by the death of either of the parties (*a*).

Termination by Effluxion of Term.

The most ordinary means by which a lease is determined is by the period expiring for which the premises were demised; this may take place either at the final conclusion of the period for which they were held, or upon the happening of any contingency upon which the duration of the contract was made to depend. Thus, if a lease be granted to hold during forty years, if *J. S.* shall so long live; by the first mode it will terminate at the end of forty years if *J. S.* so long live; and by the latter, upon the happening of the death of *J. S.* within the forty years. Under-leases by tenants for years are necessarily determined when the original lease is ended by effluxion of time.

Where there is an Option to determine the Term.

Where there is a proviso that one or both parties may determine a lease for a term at the end of any stated period, on giving a certain

(*a*) As to the rights and liabilities of the parties on the termination of the contract, see post, Book II. Chap. VI.

notice, a notice must be given in strict conformity with the proviso, or the lease will continue, and if by deed, the parties will still be liable on the covenants (*b*). But a notice to determine a crown lease given by two out of three of the Commissioners of the Woods and Forests, is good by the statute 10 Geo. IV. c. 50, s. 92, though the clause in the lease required that it should be given by the Commissioners for the time being (*c*). Where a person held under an agreement for a lease for twenty-one years, determinable at the end of the first seven and fourteen, the tenancy cannot be determined at the end of the first seven years without a notice to quit, or a surrender in writing (*d*). If a tenant hold under an agreement for a lease at a yearly rent, whereby it is stipulated that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself when he comes of age, the son must make his election in a reasonable time, as, for example, a week or a fortnight after he comes of age; the delay of a year is unreasonable (*e*).

SECT. 2.—*Cancellation of the Instrument of Demise.*

Termination by Cancellation of the Deed.

A second means by which a lease may be or rather might have been determined, is by cancelling the deed by which it is made. Whatever doubts may have been formerly entertained as to the effect of erasing or otherwise cancelling a lease for years, since the statute of frauds (*f*) it has been expressly decided that a lease cannot be determined by mere cancellation of the indenture, for that the surrender by deed or note in writing, or by act and operation of law, was especially prescribed in lieu thereof (*g*).

SECT. 3.—*Surrender of the Term.*

(a) *How made generally.*

What a surrender is.

A surrender is the yielding up an estate for life or years to him who has the immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement: the party making the surrender is called the surrenderor, and the party to whom it is made the surrenderee. It differs from a release in this respect, that the release operates by the greater estate descending upon the less; whereas a surrender is the falling of a less estate

(*b*) See *Cadby* v. *Martinez*, 11 Ad. & El. 720; 3 Per. & Dav. 386. The form of the notice should be similar to a notice to quit; see post, Sect. 6, p. 280.

(*c*) *Coombes* v. *Dutton*, 5 Mees. & Wels. 462.

(*d*) *Chapman* v. *Towner*, 6 Mees. & Wels. 100.

(*e*) *Doe* d. *Bromfield* v. *Smith*, 2 Term Rep. 436.

(*f*) 29 Car. II. c. 3. See the next section.

(*g*) *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*), 6 East, 86; 2 Smith, 166; *Doe* d. *Courtail* v. *Thomas*, 9 Barn. & Cres. 288; *Wootley* v. *Gregory*, 2 You. & Jer. 536; and see *Bolton* v. *Carlisle* (*Bishop*), 2 H. Black. 263.

into a greater. If a lessee reserve to himself any interest in or part of the estate, it is no surrender (*h*). It is the same if he lease to his lessor for the lessor's life, for there is a possibility of his having it again.

How a Surrender may be made generally.

By the Statute of Frauds (*i*) it is provided, "that no leases, estates or interests, either of freehold or of term of years, or any uncertain interest not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, &c., shall be assigned, granted or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law." By statute 8 & 9 Vict. c. 106, s. 3, it was enacted, that "a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing," made after 1st October, 1845, "shall be void at law unless made by deed" (*k*). It has been held, under the Statute of Frauds, that a lease for years cannot be surrendered by merely cancelling the indenture without writing, because the intent of that statute was to take away the manner parties formerly had of transferring interests in lands by signs, symbols and words only; and therefore as a livery and seisin on a parol feoffment was a sign of passing a freehold before that statute, but is now taken away by the statute, so cancelling a lease, which was a sign of a surrender before that statute, is now taken away, unless there be a writing under the hand of the party (*l*). Where a lease appeared to have had the names of the parties torn off, it was held that it was neither a surrender by operation of law, nor primâ facie evidence of a surrender by deed or note in writing (*m*).

When a Surrender may be made on Condition.

A lessee may surrender upon condition, and if the condition be broken, the particular estate shall be revested (*n*); therefore, if a lessee for years surrender his whole term to the original lessor upon condition, he may, upon non-performance of the condition, re-enter and revive the term (*o*).

At what Time a Surrender may be made.

A lessee of a lease for years to begin presently cannot, till entry or waiver of the possession by the lessor, merge or drown the term by any express surrender, because till entry there is no reversion wherein the possession may drown; but if the lessee had entered and assigned

(*h*) Com. Dig. tit. *Surrender*, (H); Bac. Abr. tit. *Leases*, (S 3); Co. Litt. 337.

(*i*) 29 Car. II. c. 3, s. 3.

(*k*) This statute repealed the 7 & 8 Vict. c. 76, by which it was enacted, sect. 4, that "no surrender in writing of any freehold or leasehold land shall be valid as a surrender, unless the same shall be made by deed; but any agreement in writing to surrender any such land shall be valid and take effect as an agreement to execute a surrender." This enactment was in force from the 31st December, 1844, until the 2nd October, 1845.

(*l*) *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*), 6 East, 86; 2 Smith, 166; Co. Litt. 338, n. 1; *Wootley* v. *Gregory*, 2 You. & Jer. 536.

(*m*) *Doe* d. *Courtail* v. *Thomas*, 9 Barn. & Cres. 288; 4 Man. & Ryl. 218.

(*n*) Co. Litt. 218 b.

(*o*) *Lloyd* v. *Langford*, 2 Mod. 176; Bac. Abr. tit. *Leases*, (S 3).

his estate to another, such assignee before entry might have surrendered his estate to the lessor, because by the entry of the lessee the possession was severed and divided from the reversion, which possession, being by assignment transferred to the assignee, may without other entry be surrendered and drowned in the reversion (*p*): but it is not necessary that the surrenderor of a lease, to begin at a future day, should be in possession in order to make a surrender before the period of commencement: thus, if a lease be to commence at Michaelmas next, and the lessee take a new lease before Michaelmas, it is a surrender in law of the first lease (*q*). As to surrender of leases in futuro or future interests, there is this distinction however to be observed, that a lessee for years of a term to begin at a day to come cannot surrender it by an actual surrender before the day of the term begin, but he may by a surrender in law (*r*).

(b) *By Deed or Note in Writing.*

What is a sufficient Surrender by Deed or Note in Writing generally.

It has been held, that the Statute of Frauds does not make a deed, absolutely necessary to a surrender, for it directs it to be made either by deed or note in writing, which note in writing, though not a deed, must be properly stamped (*s*). In order to make a good surrender of lands by deed, and to make them pass by such a surrender, these things are requisite (*t*):—1. That the surrenderor be a person able to grant and make, and the surrenderee a person capable and able to take and receive a surrender, and that they both have such estates as are capable of a surrender: and for this purpose that the surrenderor have an estate in possession of the thing surrendered at the time of the surrender made, and not a bare right thereunto only. 2. That the surrender be to him who has the next immediate estate in remainder or reversion, and that there be no intervening estate coming between. 3. That there be a privity of estate between the surrenderor and surrenderee. 4. That the surrenderee have a higher and greater estate

(*p*) Bac. Abr. tit. *Leases*, (S 2).

(*q*) Shep. Touch. 302.

(*r*) Shep. Touch. 304; *Ives* v. *Sams*, Cro. Eliz. 522; *Hutchin* v. *Martin*, Cro. Eliz. 604.

(*s*) *Farmer* d. *Earl* v. *Rogers*, 2 Wils. 26. The stamp required to be affixed to a deed of surrender upon the sale of lands or other property, is of the same amount as upon a conveyance upon the sale of lands or other property; see ante, Chap. IV., Sect. 10, p. 106. By statute 55 Geo. III. c. 184, schedule, tit. *Surrender*, surrenders (not otherwise charged in the schedule nor expressly exempted from all stamp duty) of any term or terms of years, or of any freehold or uncertain interest in any lands, hereditaments or heritable subjects, not being of copyhold or customary tenure, are charged with a duty of 1*l.* 15*s.* And where the same, together with any schedule, receipt or other matter put or indorsed thereon or annexed thereto, shall contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.* shall be affixed. A surrender, in consideration of 120*l.* and of a new lease to be granted, requires only an ad valorem stamp of 1*l.* 10*s.*, and not an agreement stamp also; *Doe* d. *Phillips* v. *Phillips*, 11 Ad. & El. 796; 3 Per. & Dav. 603.

(*t*) The words commonly used to make a surrender are "surrender, grant and yield up." An instrument in this form: "We do hereby renounce and disclaim, and also surrender and yield up all right, &c.," a tenancy from year to year being in existence, has been held a surrender and not a disclaimer; *Doe* d. *Wyatt* v. *Stagg*, 5 Bing. N. C. 564; 7 Scott, 690.

in the thing surrendered than the surrenderor hath, so that the estate of the surrenderor may be drowned therein. 5. That he have the estate in his own right, and not in the right of another. 6. That he be sole seised of this estate in remainder or reversion, and not in joint-tenancy (*u*). In a surrender of a freehold lease there is no occasion for livery of seisin, for there is a privity of estate between the surrenderor and surrenderee, the particular estate of the one and the remainder of the other being one and the same estate; livery therefore having been once made at the creation of it, there is no necessity for having it afterwards. If a lease for years be made to a corporation aggregate they cannot make an actual surrender thereof but by deed under their common seal (*x*).

Particular instances of Surrender by Deed or Note in Writing.

Where a lease came into the hands of the original lessor by an agreement entered into between him and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually, towards the good-will already paid by such assignee," it was adjudged that such agreement operated as a surrender of the whole term (*y*). An agreement between a landlord and tenant for the latter to give up possession, and the former to take the stock, &c. at a valuation, and to make compensation for fallows, &c., to pay all taxes, and permit the tenant to keep a part of the messuage and some of the out-houses up to a certain day without paying rent or taxes, was held to operate as a surrender of the term (*z*): but where one being in possession of premises as tenant from year to year, under an agreement for a lease for fourteen years, and the rent being in arrear, entered into an indenture with his landlords, whereby, reciting such tenancy and arrears of rent accrued, *and that he had agreed to quit and to deliver up the premises to them*, and that a valuation should be made of his effects on the premises by two indifferent persons to be chosen, &c., and that the same should in the meantime be assigned and delivered up to a trustee for the landlord; and the deed assigned his effects on the premises to such trustee, on trust to have the valuation made, and out of the amount to retain the arrears of rent, and pay the residue to the tenant; it was held, that the tenant not having in fact quitted the possession, nor any valuation having been made of his effects, such agreement to quit, &c. being conditional, and the condition not performed, nor the agreement in any manner acted upon, did not operate as a surrender of the tenant's legal term from year to

(*u*) Shep. Touch. 303; 2 Black. Com. 336. This position appears to be perfectly inconsistent with what is said by the same writer in another place; Shep. Touch. 308; for he there distinctly lays it down, that if a tenant for life, with remainder to two persons as joint tenants in fee, surrender to one alone, it will enure to both jointly.

(*x*) Bac. Abr. tit. *Corporations*, (E 3).

(*y*) *Smith* v. *Mapleback*, 1 Term Rep. 441.

(*z*) *Williams* v. *Sayer*, 3 Brod. & Bing. 70; 6 Moore, 226; and see *Parmenter* v. *Webber*, 8 Taunt. 593; 2 Moore, 656.

year (*a*). Where one tenant in common of a reversion agreed in writing with another, who was possessed of a term in the whole of the land, to give him a sum on a certain day, when either a sale or a partition of the estate was to be made, as a compensation for quitting possession, and the other agreed to give up possession on a day subsequent to that fixed for the payment; it was held that the instrument did not operate as a surrender when signed (*b*). A written notice given by the tenant of his intention to quit at a time when he believed his tenancy to expire, but which is afterwards discovered not to be the time, does not operate as a surrender (*c*).

(c) *By Acceptance of a new Lease.*

Surrender by Acceptance of a new Lease generally.

Surrenders by act and operation of law, or implied surrenders, are excepted in the Statute of Frauds, and remain as they did at common law; if the lease, which is to draw out such surrender, be in writing pursuant to that statute (*d*). Of this sort are surrenders created by the acceptance of a new lease from the reversioner either to begin presently, or at any distance of time during the continuance of the first lease; for the acceptance of a new good lease implies the surrender of a former (*e*); and operates as a surrender by act and operation of law, but not if the second lease be voidable, or actually void (*f*), or if there be a mere agreement for a future lease, and not an actual demise (*g*). The reason why such acceptance of a new lease operates as a surrender of the first is, because the lessee, by accepting the new lease has been party to an act, the validity of which he is afterwards estopped from disputing, and which would not be valid if the first lease continued to exist, for he would be estopped from saying that the lessor had not power to make the new lease; and as the lessor could not grant the new lease until the first lease was surrendered, the acceptance of the new lease is of itself a surrender of the first (*h*).

What is a sufficient new Lease.

If a lessee for twenty years take a lease for ten years to begin at Michaelmas, there is no doubt but that the term of twenty years is surrendered or determined immediately; for by the lessee's acceptance of the new lease, he admits that the lessor is in a situation to demise to him, notwithstanding the existence of the other lease; and indeed by such acceptance, the lessor has power to make a new lease during the former (*i*): but where a lessee for twenty-one years took a lease of the same lands for forty years, to begin immediately after the death

(*a*) *Coupland* v. *Maynard*, 12 East, 134.

(*b*) *Weddall* v. *Copes*, 1 Mees. & Wels. 50; 1 Gale, 432; Tyr. & Gr. 430.

(*c*) *Lyon* v. *Reed*, 13 Mees. & Wels. 285; *Doe* d. *Murrell* v. *Milward*, 3 Mees. & Wels. 328; 1 Horn. & Hurl. 79.

(*d*) Shep. Touch. 300; Com. Dig. tit. *Surrender*, (L 1); Perk. chap. 9.

(*e*) *Davison* d. *Bromley* v. *Stanley*, 4 Burr. 2110; but see *Wootley* v. *Gregory*, 2 You. & Jer. 536.

(*f*) See post, 254.

(*g*) *Foquet* v. *Moore*, 7 Exch. Rep. 870; and see *Cannon* v. *Hartley*, 19 Law J., C. P., 323; *Badeley* v. *Vigurs*, 23 Law Times, 297.

(*h*) *Lyon* v. *Reed*, 13 Mees. & Wels. 285.

(*i*) *Ives* v. *Sams*, Cro. Eliz. 522; *Hutchins* v. *Martin*, Cro. Eliz. 604.

of *J. S.*; it was held that this was not any present surrender of the first term, because *J. S.* might wholly outlive that term, and then there would be no union to work a surrender: and it was considered that being in equilibrio in the meantime, whether he would survive it or not, the first term should not be hurt till that contingency happened; but that if *J. S.* died within the first term, then what remained of it was surrendered and gone by the taking place of the second (*j*). Where the lessee for years of a house accepts a grant of the custody of the same house, it is a surrender; for the custody of a thing which was let before, is another interest in the same thing leased, and cannot stand with the first lease (*k*): and if the first lease be of the land itself, and the second lease of the vesture of the same land, it is a surrender of the first lease: so it is if a lessee accept a grant of common, or rent out of the same land, to commence at a certain day within the term (*l*). If the king make a demise for years, the acceptance of a new lease is no surrender of the first lease (*m*): so if a lessee accept a grant of a thing consistent with the lease of the land, it is no surrender; as if the lessee of a manor accept the grant of a bailiwick, or the stewardship of the same manor; or if he accept the office of park-keeper of the same park for his life, it is no surrender, for the subsequent grant is merely collateral, and not of the thing itself (*n*): but where a lessee for years of an advowson was presented to the advowson by the lessor, it was adjudged to be a surrender of his term.

In what Form a new Lease may be made.

A recital in a second lease, that it was granted in part consideration of the surrender of a prior lease of the same premises, is not a surrender by deed or note in writing of such prior lease; it not purporting in the terms of it to be of itself a surrender or yielding up of the interest (*o*). Where there was a lease of lands by indenture for twenty-one years, with a proviso that it should be determinable by the lessee or lessor at the end of the first seven or fourteen years, and a memorandum was indorsed six years after the execution of the lease, "of its being agreed between the parties previously to the execution, that the lessor shall not dispossess, nor cause the lessee to be dispossessed, of the said estate, but to have it for the term of twenty-one years from this present time;" which was signed by the parties, and stamped with a lease-stamp, but not sealed; it was held, that the lessor might, notwithstanding, determine the lease at the end of the first fourteen years; for the memorandum did not operate as a new lease and surrender of the first lease (*p*).

(*j*) Bac. Abr. tit. *Leases*, (S 53).

(*k*) *Gibson* v. *Searl*, Cro. Jac. 177.

(*l*) Com. Dig. tit. *Surrender*, (I 1); *Mellows* v. *May*, Cro. Eliz. 874.

(*m*) *Brook* v. *Goring*, Cro. Car. 197.

(*n*) *Gie* v. *Rider*, 1 Sider. 75; *Gibson* v. *Searl*, Cro. Jac. 176, 184; *Earl of Arundel* v. *Lord Gray*, 2 Dyer, 200 b; and see *Woodward* v. *Aston*, 1 Ventr. 296.

(*o*) *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*), 6 East, 86; 2 Smith, 166; but see *Doe* d. *Egremont* (*Earl*) v. *Courtenay*, 11 Queen's B. Rep. 702.

(*p*) *Goodright* d. *Nicholls* v. *Mark*, 4 Maule & Selw. 30.

An agreement between the lessor and a stranger, that the lessee shall have a new lease, is no surrender (*q*): and if a lessee accept a new lease in trust for another it is no surrender (*r*).

Between whom it must be made.

Effect of an invalid new Lease.

No *implied* surrender by the grant of a new lease will be binding, if the new lease be absolutely void; for the condition of the surrender fails; and it is not reasonable that an acceptance of a bad lease should be an implied surrender of a good one (*s*): so if a surrender be intended for a particular purpose, and that purpose which is the only motive of it fails, the surrender ought to fail too: if therefore the new lease do not pass an interest according to the contract and intention of the parties, an acceptance of it is not an implied surrender of the old lease (*t*). The acceptance of a voidable lease which is afterwards made void contrary to the intention of the parties, but which has operated to pass some part of the term contracted for, is not a surrender of a valid former lease inconsistent therewith. Therefore where a tenant for life, with a power of leasing, made a lease of part of some land, which was not a good execution of the power, in consideration of the surrender of two prior leases of the whole of the land, and in order to effectuate an agreement entered into between the lessee and another person for the sale of the remaining part of the land, which the lease recited that it was intended to lease to the vendee by indenture of even date, and which was done; it was held, after the death of the tenant for life, that this new lease as to the premises thereby demised did not operate as a surrender of the two prior leases (*u*). So where a tenant for life, with power of leasing, granted a lease in "consideration of the surrendering up," of a former lease, "which surrender is hereby made and accepted," it was held, the new lease not being a good execution of the power, and therefore voidable by the remainderman, did not operate as a surrender of the prior lease (*x*). Where a voidable bishop's lease, which had been granted in consideration of a surrender by deed executed a few days before of a prior lease, was avoided by the successor; it was held, that the first lease was not revived by such avoidance (*y*).

Effect of a new Lease of Part only.

If a lessee for years accept a new lease by indenture of part of the lands, it is a surrender for that part only, and not for the whole, because there is no inconsistency between the two leases for any more than that part only which is so doubly leased: and though a contract for years cannot be so divided or severed, as to be avoided for part of

(*q*) *Porris* v. *Allen*, Cro. Eliz. 173.

(*r*) Com. Dig. tit. *Surrender*, (H L 1).

(*s*) *Zouch* d. *Abbott* v. *Parsons*, 3 Burr. 1807; *Wilson* v. *Sewell*, 4 Burr. 1980; *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*), 6 East, 86; 2 Smith, 166; *Davison* d. *Bromley* v. *Stanley*, 4 Burr. 1980.

(*t*) Com. Dig. tit. *Estates*, (G 13).

(*u*) *Doe* d. *Biddulph* v. *Poole*, 11 Queen's B. Rep. 713; and *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*), 6 East, 86; 2 Smith, 166.

(*x*) *Doe* d. *Egremont* (*Earl*) v. *Courtenay*, 11 Queen's B. Rep. 702; overruling *Doe* d. *Egremont* (*Earl*) v. *Forwood*, 3 Queen's B. Rep. 627.

(*y*) *Doe* d. *Murray* v. *Bridges*, 1 Barn. & Adol. 847.

the years and to subsist for the residue, either by act of the party or act in law; yet the land itself may be divided or severed, and he may surrender one or two acres, either expressly or by act of law, and the lease for the residue will stand good and untouched (*z*). If then there be two lessees for life, or years, and one of them take a new lease for years, it is a surrender of his moiety (*a*).

(d) *By other Act and Operation of Law.*

General Rule.

The term "surrender by operation of law," is properly applied to cases where the owner of a particular estate has been party to some act, not merely that he has assented to an act done by the reversioner, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist (*b*). Such surrender is the act of the law, and takes place independently of, and even in spite of, the intention of the parties (*c*). The acts in pais, which bind parties by way of estoppel, are acts of notoriety, not less formal and solemn than the execution of a deed, as, for instance, livery, entry, acceptance of an estate, and the like (*d*).

Interest put an end to by mutual Consent.

A tenancy from year to year cannot be determined unless there be either a legal notice to quit, or a surrender in writing (*e*): and therefore a tenancy from year to year, created by parol, is not determined by a parol license from the landlord to the tenant, to quit in the middle of a quarter, and the tenant's quitting the premises accordingly (*f*): but where upon a tenancy from year to year, determinable at a quarter's notice, the lessor licensed the tenant to quit in the middle of a quarter, and the tenant accordingly quitted, and the lessor accepted possession; it was held to be a surrender by operation of law, destroying the right to rent for the whole or any part of the current quarter (*g*). The tenant of a house, three cottages, and a stable and yard, let at an entire rent for a term, before the expiration of it, assigned all the premises, the house and cottages being in the possession of under-tenants; the landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter; the assignee took possession of the stable and yard only; the occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord re-let them; the tenant paid no rent after the assignment, but the landlord received rent from the under-tenants, and before the expiration of the term, he advertised the

(*z*) Bac. Abr. tit. *Leases*, (D 3).

(*a*) Shep. Touch. 302.

(*b*) *Lyon* v. *Reed*, 13 Mees. & Wels. 285; but see *Bessell* v. *Landsberg*, 7 Queen's B. Rep. 638.

(*c*) *Lyon* v. *Reed*, 13 Mees. & Wels. 285.

(*d*) I. id. But the observations of the court on former decisions made in this case were not assented to by the Court of Queen's Bench in *Nickells* v. *Atherstone*, 10 Queen's B. Rep. 944; although the court expressed their entire concurrence in the decision of the case itself.

(*e*) *Doe* d. *Read* v. *Ridout*, 5 Taunt. 519.

(*f*) *Mollett* v. *Brayne*, 2 Camp. 103; *S. P. Thompson* v. *Wilson*, 2 Stark. 379.

(*g*) *Grimman* v. *Legge*, 8 Barn. & Cres. 324; 2 Man. & Ryl. 438; and see *Brown* v. *Burtinshaw*, 7 Dowl. & Ryl. 603; Bac. on Leases, 211.

whole of the premises to be let or sold; it was held that this was a surrender by operation of law of all the premises (*h*). In another case it was held, that if a landlord in the middle of a quarter accept from his tenant the key of the house demised, under a parol agreement that upon her then giving up the possession the rent shall cease, and she never afterwards occupy the premises, he cannot recover in an action for the use and occupation of the house, for the time subsequent to his accepting the key (*i*). Where two persons demised a house by lease in writing, one of whom, after signing the lease, never further interfered, and the other, before the first quarter's rent became due, accepted the key from the tenant's wife; it was held that there was a sufficient surrender by the tenant which bound both the lessors, the wife of the tenant acting as his agent, and the lessor, who accepted the key, as the agent of the other (*k*). Where a lessee quitted in the middle of his term apartments which he had taken for a year, and the lessor let them to another person, so that the lessee could not have come back if he had chosen; it was held, that by so doing, the lessor dispensed with the necessity of a written surrender (*l*): and therefore where the defendant took premises for a year certain, but quitted at the end of the first quarter, and the plaintiff then let the premises for a portion of the remaining three-quarters to another tenant at a less rent, and afterwards sued the defendant for the difference; it was held, that by reletting the premises, the plaintiff had assented to the determination of the original tenancy, and dispensed with the necessity of a legal surrender. Where the owner of a ferry demised it for a year, but after a few weeks the lessee finding it unprofitable, agreed instead to become servant to the owner, and received daily wages for attending to the ferry for him, it was held to be a surrender by act and operation of law (*m*). Where a tenant from year to year agreed to buy the freehold of the land, it was held, that the agreement, not being absolute, but conditional on a good title being found, did not operate as a surrender of the tenancy by operation of law (*n*).

Acceptance of another Tenant in lieu.

A tenancy from year to year cannot be surrendered by the mere agreement of the landlord to accept a third person in the place of his tenant, unless such agreement be in writing, or the third person actually take possession (*o*): in the latter case it has been held, that a parol agreement between a landlord and tenant from year to year, that another tenant should be substituted in his place, who was accordingly

(*h*) *Reeve* v. *Bird*, 1 Cr. M. & Ros. 31; 4 Tyr. 612.

(*i*) *Whitehead* v. *Clifford*, 5 Taunt. 518; see *Cannon* v. *Hartley*, 19 Law J., N. S., C. B., 323.

(*k*) *Dodd* v. *Acklon*, 6 Man. & Gran. 672; 7 Scott, N. R. 415.

(*l*) *Walls* v. *Acheson*, 3 Bing. 462; 11 Moore, 379; 2 Car. & Pay. 268.

(*m*) *Peter* v. *Kendal*, 6 Barn. & Cres. 703.

(*n*) *Doe* d. *Gray* v. *Stanion*, 1 Mees. & Wels. 695; 2 Gale, 154; Tyr. & Gr. 1065; *Tarte* v. *Darby*, 15 Mees. & Wels. 601.

(*o*) *Taylor* v. *Chapman*, Peake, Add. Cases, 19.

substituted, is a sufficient surrender, according to the statute of frauds, to determine the former tenancy (*p*). Where *A.* being tenant from year to year underlet the premises to *B.*, and the original landlord, with the assent of *A.*, accepted *B.* as his tenant, but there was no surrender in writing of *A.*'s interest; it was held that these circumstances constituted a valid surrender of *A.*'s interest by act and operation of law within the statute of frauds (*q*). Where two persons being tenants from year to year of two closes under different lessors agreed verbally to exchange them, which they did, and then the arrangement was mentioned to a person who was steward of both the lessors, and who expressed his assent to it, it was held that this was evidence of new demises, and of a surrender by operation of law of the previous interests of the tenants (*r*). The soundness of these decisions has been somewhat questioned in a late case, and although the Court of Exchequer considered that they might be supported, on the ground that the occupation by a new tenant would have the effect of an eviction by the landlord, yet it was decided that the principle of those decisions could not be extended further (*s*). A tenant from year to year died, his widow remained in possession, and continued paying the rent to the landlord, with the knowledge of a person who, above a year after, took out administration; the widow still continued in possession for a year, paying the rent as before; it was held that this did not amount to a surrender by operation of law of the tenancy from year to year (*t*). A tenant quitted possession of premises, and, on being applied to for rent, stated in a letter to his landlord, that he hoped his landlord would be able to let them to some other person on better terms; this the landlord did a few days after, and the new tenant entered and paid rent; it was held that these facts amounted to a surrender, but the court declined to consider the effect of the letter as evidence of a surrender by a note in writing within the statute of frauds, 29 Car. II. c. 3, s. 3 (*u*). Where *W.* and *H.*, who were partners, by agreement, in March, 1827, became tenants to the plaintiff, and at Midsummer, 1828, *W.* retired from the partnership, and in January, 1829, *H.* entered into partnership with *S.*; and the plaintiff gave receipts for rent as received from *H.* after *W.* retired, and as received from *H.* and *S.* after *S.* became a partner; and also gave *H.* a letter to his attorney, signifying that a lease might be made to *H.* and *S*, but which was kept by *H.* and not acted upon, and no lease

(*p*) *Stone* v. *Whiting*, 2 Stark. 235. A plea that three executors had agreed to accept a third person as tenant in lieu of the defendant, is not proved by evidence that *one* of the plaintiffs had made the agreement; *Turner* v. *Hardey*, 9 Mees. & Wels. 770.

(*q*) *Thomas* v. *Cook*, 2 Barn. & Adol. 119; 2 Stark. 408; but see *Mathews* v. *Sewell*, 8 Taunt. 270; 2 Moore, 262.

(*r*) *Bees* v. *Williams*, 2 Cromp. M. & Ros. 581; 1 Gale, 332; Tyr. & Gr. 23.

(*s*) *Lyon* v. *Reed*, 13 Mees. & Wels. 285.

(*t*) *Doe* d. *Hull* v. *Wood*, 14 Mees. & Wels. 682.

(*u*) *Nickells* v. *Atherstone*, 10 Queen's B. Rep. 944.

was prepared; it was held that *W.* remained liable for the rent accruing in the time of *H.* and *S* (*x*). Where a tenant from year to year by a Lady-day holding, agreed by *parol* with his landlord's agent to quit at the ensuing Lady-day, which was within half a year; and the premises were re-let by auction, at which the tenant attended and bid, but the new tenant was not let into possession; it was held, that the tenancy was not determined, there not having been a surrender by operation of law, within the meaning of the statute of frauds (*y*). Where premises had been let to *B.* for a term determinable by a notice to quit, and pending the term *A.*, the landlord, agreed to let *C.* stand in *B.*'s place, and *C.* offered to pay rent; it was held, in an action for use and occupation against *C.*, that he could not set up as a defence that *B.*'s term had not been determined either by a notice to quit, or a surrender in writing (*z*). In one case at Nisi Prius it was held by Lord Kenyon, that if a landlord attest a notice given by a lessee to his under-tenant to pay rent to the landlord, and have a knowledge of its contents, it is a termination of the tenancy of the lessee, and a discharge to him to that time; but that it would be otherwise, if the landlord have no knowledge of the contents of the notice (*a*). Where a sole tenant from year to year, before the termination of his tenancy, entered into an agreement with his landlord for a lease to be granted to him and another jointly, and *both* entered upon and occupied the premises jointly; it was held, that the first tenancy was determined though the lease was never executed pursuant to the agreement (*b*). It has been considered that if a lessee re-demise his whole term to his lessor, it is a surrender in law, and as fully as if it had been actually surrendered, notwithstanding a reservation of rent has been made (*c*).

(e) *Operation of.*

Operation of.

Formerly if a lessee for years, who had underlet for a less term, surrendered his term to his lessor, whereby his term for years was extinguished, it followed that the reversion on the under-lease being gone, the incidents thereto, as the rent reserved by the under-lease and the covenants therein were gone also (*d*): but this surrender would not operate on the rights of the under-tenant; and therefore where a tenant for life leased for years, and afterwards surrendered to the owner of the fee, the estate for years was held not to be extin-

(*x*) *Graham* v. *Wichelo*, 1 Cromp. & Mees. 188; 3 Tyr. 201; and see *Woodcock* v. *Nuth*, 8 Bing. 170; 1 Moore & Scott, 317.

(*y*) *Doe* d. *Huddleston* v. *Johnston*, 1 M'Clel. & Y. 141; and see *Johnstone* v. *Huddleston*, 4 Barn. & Cres. 922; 7 Dow. & Ryl. 411; and *Doe* d. *Murrell* v. *Milward*, 3 Mees. & Wels. 328; 1 Horn. & Hurl. 79.

(*z*) *Phipps* v. *Sculthorpe*, 1 Barn. & Ald. 50; but see *Hyde* v. *Moakes*, 5 Car. & Pay. 42.

(*a*) *Harding* v. *Crethorne*, 1 Esp. 57.

(*b*) *Hamerton* v. *Stead*, 3 Barn. & Cres. 478; 5 Dow. & Ryl. 206.

(*c*) *Lloyd* v. *Langford*, 2 Mod. 175.

(*d*) *Threr* v. *Barton*, Moor, 94; *Webb* v. *Russell*, 3 Term Rep. 393; Shep. Touch. 301; *Burton* v. *Barclay*, 7 Bing. 756; see also post, Sect. 4, p. 264.

guished (*e*). However, the statute 4 Geo. II. c. 28, s. 6 (*f*), enabled a lessee to surrender his lease for the purpose of taking a new one without a surrender of an under-lease, and it saved to the lessee all the same remedies against the under-lessee for rents, covenants and duties, and to the original lessor the same remedies for rents and duties reserved by the new lease, so far as they exceed not the rents and duties reserved in the former one, out of which the under-lease was derived, as if the original lease were still kept on foot. And now by the statute 8 & 9 Vict. c. 106, s. 9 (*g*), it is enacted, that if a reversion expectant on a lease is surrendered, the estate which confers, as against the tenant, the next vested right to the tenements, shall be deemed the reversion for the purpose of preserving the incidents to and obligations on the reversion. Where a lease containing a personal covenant for the payment of rent is surrendered, the personal covenant is independent of the estate in the property, and as to rent previously due, is not affected by the surrender, but the lessor remains a specialty creditor for the rent which accrued due before the surrender (*h*).

(f) *By and to whom made.*

Who are capable of surrendering or taking.

Those persons who are unable to grant are unable to surrender; and such persons as are disabled to take by a grant, are disabled to take by a surrender; it may therefore be stated generally, that such persons as may be grantees may be surrenderees (*i*). The surrenderee must, however, be the immediate reversioner; if therefore *A*. let to *B*. for ten years, who lets to *C*. for five years, *C*. cannot surrender to *A*. by reason of the intermediate interest of *B*.: but in such case *B*. may surrender to *A*., and afterwards *C*. likewise, because then his lease for five years is become immediate to the reversion of *A* (*k*). If a husband have a lease or estate for years in right of his wife, he alone, or he and his wife together, may surrender it; but if the husband have an estate for life in right of his wife, who is tenant in dower or otherwise, and he alone, or he and she together, surrender it, the surrender is good only during the life of the husband, except it be made by fine. One joint tenant cannot surrender to another joint tenant. One executor may surrender an estate or leases for years, which the executors have in the right of their testator (*l*). Where the lessee of premises, under a covenant of re-entry, if the rent should be in arrear twenty-eight days, died in bad circumstances, and his brother administered de son tort, and then after having agreed with the landlord to give him possession, and suffer the lease to be cancelled, on his abandoning the rent, which was twenty-eight days in arrear, took out letters of

(*e*) *Doe* d. *Beadon* v. *Pyke*, 5 Maule & Selw. 146.

(*f*) See this statute, post, Chap. VIII., p. 307.

(*g*) See this statute, post, 265.

(*h*) *Att.-Gen.* v. *Cox*, 3 Ho. of Lords, 240.

(*i*) Shep. Touch. 303.

(*k*) Bac. Abr. tit. *Leases*, (S 2).

(*l*) Shep. Touch. 303.

administration; it was held, that the agreement of the brother as administrator de son tort did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made any formal claim in respect of the forfeiture, nor taken a regular surrender of the lease (*m*). Where a lessee, who had paid rent sometimes to a trustee and sometimes to a cestui que trust, gave up possession on the last day of the term, but before it was ended, to the person who had been trustee, and not to the party then having the legal title; it was held, that as the act was equivocal, it did not amount to either a surrender or to a forfeiture (*n*). An infant may make a surrender in law by the acceptance of a new lease, if such new lease increase his term or decrease his rent; but a surrender by an infant lessee by deed is absolutely void. A surrender of a lease cannot be made to sequestrators from the Court of Chancery; it must be to the lessor, or to a party legally entitled under him (*o*).

(g) *What Estate.*

What Estate a Surrender may operate on.

As to what estate a surrender may operate upon, it was once doubted whether years could merge in years; but it seems to be now settled that if a term in reversion be greater than a term in possession, the lesser will merge in the greater (*p*). Though the reversion were for a less number of years, yet the surrender would be good, and the first term drowned: thus, if one were the lessee for twenty years, and the reversion expectant thereupon were granted to another for a year, who granted it over to the lessee for twenty years, it would operate as a surrender of the twenty years' term, in the same manner as if he had taken a new lease for a year from his lessor; for the reversionary interest coming to the possession drowns it, and the number of years is not material; for as a lessee may surrender to him who has the reversion in fee, so he may to him who has the reversion for any lesser term: it was held, therefore, that where a lessee for twenty years made a lease for ten years, and the lessee for ten years surrendered to his lessor, viz. to the lessee for twenty years, that the surrender was good; and that the lessor should have so many of the years as were then to come of his former term of twenty years (*q*). Whether a lease for years in possession may be surrendered so as to be merged in a lease in remainder, be the term in remainder greater or less than the term in possession, seems to be nowhere settled; an estate for life, however, cannot, it is conceived, be surrendered to or merged in a reversion, if it be only for years (*r*).

(*m*) *Doe* d. *Hornby* v. *Glenn*, 1 Ad. & El. 49; 3 Nev. & Man. 837.

(*n*) *Ackland* v. *Lutley*, 9 Ad. & El. 879; 1 Per. & Dav. 636.

(*o*) *Cornish* v. *Searell*, 8 Barn. & Cres. 471; 1 Man. & Ryl. 703.

(*p*) Bac. Abr. tit. *Leases*, (S 1, 2); *Challoner* v. *Davis*, 1 Lord Raym. 402; *Hughes* v. *Robotham*, Cro. Eliz. 302; Poph. 30. As to merger, see post, 264.

(*q*) Ibid.

(*r*) Ibid.

How a Surrender must be alleged in Pleading.

(h) *How pleaded.*

In respect to pleading a surrender: if a surrender be by acceptance of a new lease, it is not good to say that the lessee being possessed of a former lease, the lessor demised to him; but it should be that the lessee surrendered, and then the lessor demised, or that the lessor entered and demised (*s*). So, regularly, a lessee ought to plead that he surrendered the estate and land; but if he plead a surrender of a lease, it is sufficient to say "the demise aforesaid." Regularly, he ought to show, that the lessor assented to the surrender, where the other party pleads, or brings an action in disaffirmance of it; but the omission will be aided after verdict. When it is pleaded that the lessor agreed to the surrender, it shall be intended that he entered; and it is not usual to plead a re-entry upon a surrender, because it is admitted; any more than when a feoffment is pleaded, to plead livery and seisin thereof. In debt for rent a plea of an agreement to deliver up the premises, stating that they were delivered up and accepted accordingly, was held good after verdict, not as setting up a surrender of the tenancy, but as a valid excuse for non-payment of the rent (*t*).

What Circumstances will induce the Presumption generally.

(i) *When presumed.*

A surrender may in certain circumstances be presumed to have been made, where evidence of the fact is not to be had: indeed, the court will not require positive proof of a surrender in any case, where there is sufficient presumption of it (*u*). But such presumption of the surrender must arise from some facts or circumstances; length of time is nothing; and in favour of a defendant in ejectment who showed no title, the Court of Common Pleas refused to presume a surrender of a mortgaged term, from the circumstance of a decree for sale some time before, when there had been sales under the decree, and the defendant had not purchased under it, and there was no evidence of further proceedings in Chancery (*x*). *A.* having granted a lease to *B.* for twenty-one years, before the expiration of that term granted another lease of the same premises to *C.*; no surrender in writing of *B.*'s interest was shown, but the lease granted to him was produced from *A.*'s custody with the seals torn off, and it was proved to be the custom to send in the old leases to *A.*'s office before a renewal was made; it was held, that this was evidence for the jury to presume a surrender of *B.*'s interest by act and operation of law within the statute of frauds (*y*). An acceptance of a surrender of a lease is not to be presumed from the circumstance of the rent having been paid by a third

(*s*) Com. Dig. tit. *Surrender*, (N).

(*t*) *Gore* v. *Wright*, 8 Ad. & El. 118; 3 Nev. & Per. 243; 1 Will. Wol. & Hod. 266; *Smith* v. *Lovell*, 10 C. B. 6; and see 1 Wms. Saund. 236.

(*u*) *Goodtitle* d. *Bridges* v. *Chandos* (*Duke*), 2 Burr. 1072.

(*x*) *Doe* d. *Hammond* or *Harrop* v. *Cooke*, 6 Bing. 174; 3 Moore & Pay. 411.

(*y*) *Walker* v. *Richardson*, 2 Meeas. & Wels. 882; Mur. & Hurl. 251; but see *Lyon* v. *Reed*, 13 Mees. & Wels. 285.

person, and not by the original tenant (z). A surrender of a lease may be presumed in order to let in the statute of limitations (a).

With respect to satisfied Outstanding Terms.

Where an alleged outstanding term appears to have done the duty for which it was created, the jury are at liberty to presume a surrender of it (b); and where it is the interest of the owner of the inheritance that a satisfied term should be considered as a surrender, and it appears that no beneficial purpose can be answered by the continuance of the term, a surrender may be presumed (c). Where the legal estate has been vested in a trustee, and there is no direct evidence of a conveyance or surrender to the cestui que trust, a jury may, under circumstances, presume such conveyance or surrender (d): thus where an estate is directed to be conveyed, it has been held that a jury may within four years from the time when the estate was directed to be conveyed, presume that it has been so conveyed by the trustee (e). In the case of a satisfied term, where acts were done or omitted by the owner of the inheritance and persons dealing with him as to the land, which ought not reasonably to be done or omitted if the term existed in the hands of the trustee, and there does not appear to be any thing to prevent a surrender from having been made, those acts are evidence from which a jury may presume such surrender (f). On the other hand, where a term of years becomes attendant upon the inheritance, either by operation of law or by a special declaration upon the extinction of the objects for which it was created; the enjoyment of the land by the owner of the reversion, thus become the cestui que trust of the term, may be accounted for by the union of the two characters of cestui que trust and inheritor; and there appears, therefore, to exist no circumstances from which a jury can imply a surrender; the mere fact of a term being satisfied furnishes no ground from which a jury can presume it surrendered (g); there ought to be some dealing with the term to authorize such a presumption (h). Where a term has been expressly assigned to attend the inheritance, and there has been no act or omission inconsistent with the existence of the term, there is still less ground to presume a surrender from the mere lapse of time and silence of the party who possesses the inheritance (i). The recognition of the term, as subsisting at a late period (k): the fact that it would have been contrary to the duty of the trustees to surrender

(z) *Copeland* v. *Watts*, 1 Stark. 96.

(a) *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 126.

(b) *Bartlett* v. *Jones*, 5 Dowl. & Ryl. 526; and see now the statute 8 & 9 Vict. c. 112.

(c) *Doe* d. *Burdett* v. *Wrighte*, 2 Barn. & Ald. 710, 720.

(d) *Lade* v. *Halford*, B. N. P. 110; *Goodtitle* d. *Jones* v. *Jones* (*in error*), 7 Term Rep. 45; but see *Day* v. *Williams*, 2 Cromp. & Jer. 460.

(e) *England* d. *Syburn* v. *Slade*, 4 Term Rep. 682.

(f) *Doe* d. *Putland* v. *Hilder*, 2 Barn. & Ald. 782, 791; but see *Day* v. *Williams*, 2 Cromp. & Jer. 460.

(g) *Evans* v. *Bignal*, 6 Ves. 185.

(h) *Cholmondeley* v. *Clinton*, cited Sugd. Vend. & Purch. 1148.

(i) See Sugd. Vend. & Purch. 1130; Roscoe, Law of Real Property, 259; *Doe* d. *Blacknell* v. *Plowman*, 2 Barn. & Adol. 573; *Doe* d. *Lord Egremont* v. *Langdon*, 12 Queen's B. Rep. 711.

(k) *Doe* d. *Graham* v. *Scott*, 11 East, 478.

the estate (*l*): or that the original enjoyment of the party who sets up the presumed conveyance was consistent with the fact of there having been no conveyance (*m*), are all circumstances from which a jury may infer that no conveyance has taken place.

SECT. 4.—*Merger in a larger Estate.*

What amounts to a Merger of Term.

Another means by which a lease for years may be determined is by way of merger: that is, when there is a union of the freehold or fee and the term of years in one person at the same time; in this case the greater estate merges or drowns the lesser, because they are inconsistent and incompatible (*n*): thus if a lease for years be made to commence after the death of *A.*, and the grantee of the inheritance afterwards make a lease for years to *B.*, and then the lessee of the future interest assign to the grantee of the inheritance, the future interest is drowned in the inheritance (*o*). It may be laid down as a general rule, that whenever the particular estate and that immediately in reversion are of the same quality—that is, either both legal or both equitable—and by any act or event subsequent to the creation of the particular estate become for the first time vested in one person, their separate existence will cease and a merger will take place. It was formerly doubted whether a particular estate would merge in a reversion of a shorter duration than itself; but this point was settled by the decision in the case of *Hughes* v. *Robotham* (*p*), when it was laid down that though the reversion be for a less number of years, yet the first term will be merged; as if one be lessee for twenty years, and the reversion expectant thereon be granted to another for one year, who grants it to the lessee, it will operate as a merger of the twenty years' term, and the term for one year will begin to run (*q*). This latter consequence, however, only happens where both the terms are granted by the same person; and does not apply where a termor for years grants another term, as in ordinary mortgages by demise; in that case the sub-term, when it comes into the possession of the termor or his assignee, is merged, and the reversion of the first term comes into play for all the remaining portion of its duration. Where a fee-farm rent is bought in by the person who is seised in fee of the lands out of which it issues, it is merged in the inheritance (*r*). Where a lessee made an under-lease for all his term, except a few days, and then granted that under-lease and the rent reserved to his lessor for the term mentioned in the under-lease, the chattel interest is not

(*l*) *Keene* d. *Byron* (*Lord*) v. *Deardon*, 8 East, 248, 267.

(*m*) *Doe* d. *Fenwick* v. *Read*, 5 Barn. & Ald. 232.

(*n*) Bac. Abr. tit. *Leases*, (R); 2 Black. Com. 177.

(*o*) *Salmon* v. *Swan*, Cro. Jac. 619.

(*p*) Cro. Eliz. 302; Poph. 30; ante, 261.

(*q*) Cruise, Dig. 96; Burton, Conv. 287; *Stevens* v. *Bridges*, 6 Madd. 66.

(*r*) *Atcherley* v. *Vernon*, 10 Mod. 525.

merged in the fee (s). Where a lessee of premises for a term of twenty-one years, which would expire at Michaelmas, 1809, in December, 1799, took a further lease of the same premises for sixty years, to commence from Michaelmas, 1809; and the lessor died in December, 1800, and devised the premises in question to *A.* the lessee for his life, who by lease and release in 1806 conveyed his life estate to *B.*: it was held that *A.*'s interest in the lease of 1799, which was to commence in 1809, was not merged in his estate for life (t). Sir Edward Coke lays it down as a general rule that a person cannot have a term for years in his own right, and a freehold in autre droit, but that his own term shall drown in the freehold; but a man may have a term of years in autre droit, and a freehold in his own right; and it seems to be agreed, that if a man, being possessed of a term of years in right of his wife, purchase the inheritance, the term for years, though in right of his wife, is merged and extinct, because the purchase was the express act of the husband, and therefore amounts in law to a disposition of the term, by reason of the merger consequent thereupon: but a bare intermarriage of a woman who is a termor with the reversioner will not merge the term, because by the intermarriage the term is cast upon the husband by act of law, without any concurrence or immediate act done by him to obtain the same; and therefore in such case the law will preserve the term in the same plight as it gave it to the husband, till he by some express act destroys it or gives it away (u). Where, however, the husband himself is lessee for life, and intermarries with the lessor, this merges his own term, because he thereby draws to himself the immediate reversion, in nature of a purchase by his own voluntary act, and so undermines his own term; whereas in the other case, the term existing in the woman until the marriage, is not thereby so drawn out of her or annexed to the freehold as to merge therein; because that attraction which is only by act of law consequent upon the marriage, would, by merging the term, do wrong to a married woman, and so take the term out of her, though the husband did no express act for that purpose, which the law will not allow (x).

Operation of the Merger of a Term.

Formerly if a tenant for a term of years leased for a less term, and assigned his reversion, and the assignee took a conveyance of the fee, by which his former reversionary interest was merged; the covenants of the under-lease incident to that reversionary interest were thereby extinguished (y): but by statute 8 & 9 Vict. c. 106, s. 9, it is now enacted (z), "that when the reversion expectant on a lease, made

(s) *Burton* v. *Barclay*, 7 Bing. 745; 5 Moore & Pay. 785.

(t) *Doe* d. *Rawlings* v. *Walker*, 5 Barn. & Cres. 111.; 7 Dowl. & Ryl. 487.

(u) Co. Litt. 338 b; *Platt* v. *Shap*, Cro. Jac. 275.

(x) See also ante, Chap. VI., Sect. 9, p. 230, as to the marriage of lessors and lessees.

(y) *Webb* v. *Russell*, 3 Term Rep. 393; *Thorne* v. *Woolcombe*, 3 Barn. & Adol. 586.

(z) This statute repealed the stat. 7 & 8 Vict. c. 76, s. 12, which enacted, "that where the reversion of any land expectant

either before or after the passing of this act, of any tenements or hereditaments, of any tenure, shall, after the 1st of October, 1845, be surrendered or merged, the estate, which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease." In conclusion, it may be mentioned, that a court of law cannot merge an estate, unless it is found in the same person, and acquired (subject to some exceptions) in the same right; but courts of equity look into the beneficial interests and views of parties, and do not regard whether the estate is strictly in the same person or in different persons; hence it is a general rule in the latter courts, that where the owner of an estate becomes entitled to a charge upon it, secured by a term of years, such term shall sink for the benefit of the heir; but exceptions to this rule are admitted in several instances.

Sect. 5.—*Forfeiture.*

(a) *How incurred generally.*

Breach of Implied or Express Conditions.

A fifth mode by which a demise may be determined, is by forfeiture of the lease; such forfeiture may be incurred either by breach of those conditions which are always implied and understood to be annexed to the estate; or of those which may be agreed upon between the parties, and expressed in the lease (*a*); the lessor, having the jus disponendi, may annex whatever conditions he pleases to his grant, provided they be not illegal, unreasonable, or repugnant to the grant itself; and upon the breach of these conditions may avoid the lease (*b*). Of the first description may be reckoned any act of the lessee, by which he disaffirms or impugns the title of his lessor; for to every lease the law tacitly annexes a condition, that if the lessee do any thing which may effect the interest of his lessor, the lease shall be void, and the lessor may re-enter: besides, every such act necessarily determines

on a lease shall be merged in any remainder or other reversion or estate, the person entitled to the estate into which such reversion shall have merged, his heirs, executors, administrators, successors and assigns, shall have and enjoy the like advantage, remedy and benefit against the lessee, his heirs, successors, executors, administrators and assigns, for non-payment of the rent, or for doing waste or other forfeiture, or for not performing conditions, covenants or agreements contained and expressed in his lease, demise or grant, against the lessee, farmer or grantee, his heirs, successors, executors, administrators and assigns, as the person who would for the time being have been entitled to the mesne reversion which shall have merged, would or might have had and enjoyed if such reversion had not been merged." This enactment was in force from the beginning of the year 1845 until the first day of October inclusive in the same year.

(*a*) A forfeiture may be incurred for breach of the terms of an agreement for a lease for years, under which a person holds as tenant from year to year; *Doe* d. *Thomson* v. *Amey*, 12 Ad. & El. 476. See ante, 184.

(*b*) *Roe* d. *Hunter* v. *Galliers*, 2 Term Rep. 137.

the relation of landlord and tenant; since to claim under another, and at the same time to controvert his title,—to affect to hold under a lease, and at the same time to destroy that interest out of which the lease arises,—would be the most palpable inconsistency (*c*). Where a tenant delivered up possession of the premises and the lease, in fraud of his landlord, to a person who claimed under a hostile title, with the intention of enabling him to set up that title, not with the intention that he should hold under the lease; it was held that the term was forfeited (*d*). Where a lessee, who had paid rent sometimes to a trustee and sometimes to a cestui que trust, gave up possession on the last day of the term, but before the term was ended, to the person who had been trustee, and not to the party then having the legal title; it was held, that as the act was equivocal, it did not amount either to a surrender or a forfeiture of the term (*e*).

By what Acts a Forfeiture may be incurred.

Besides incurring a forfeiture by the breach of express provisoes, which will be hereafter considered, a lessee may incur a forfeiture of implied conditions either by matter of record or by act in pais: by matter of record, where he sues out a writ, or resorts to a remedy which claims or supposes a right to the freehold; or where, in an action by his lessor grounded upon the lease, he resists the demand under the grant of a higher interest in the land; or where he acknowledges the fee to be in a stranger: for having thus solemnly protested against the right of his lessor, he is estopped by the record from claiming an interest under him (*f*): by act in pais, where he aliens the estate in fee (*g*), by feoffment or grant, even, in the former case, where the lessor was himself present at the time of livery (*h*). Where a forfeiture may be incurred by a grant or deed, it is necessary that the deed be a valid instrument, for if by reason of any defect it be void, it will not work a forfeiture of the estate (*i*): but granting a lease of the land for more years than he himself has is no forfeiture, because it is only a contract between him and his under-lessee (or rather assignee), which cannot possibly prejudice the interest of the original lessor, and does not even pretend to usurp or touch the freehold or inheritance. A proviso in a lease for re-entry on a condition broken can only operate during the term and vanishes when *that* ends (*k*).

Time and Place of Performance of Condition.

Where a time certain is appointed in a proviso or condition for the transaction of any business generally, neither agent nor patient is bound to attend at any other time; and if it is provided that any thing

(*c*) Bac. on Leases, 119.

(*d*) *Doe* d. *Ellerbrock* v. *Flynn*, 1 Cromp. M. & Ros. 137; 4 Tyr. 619.

(*e*) *Ackland* v. *Lutley*, 9 Ad. & El. 879; 1 Per. & Dav. 636.

(*f*) See post, p. 285, and Sect. 7.

(*g*) So a tenant by the curtesy, in tail, after possibility of issue extinct, in dower, for life, for years, by statute, or eligit, guardian, &c. hold their estates subject to a condition in law, that if they alien the land in fee, or claim a greater estate in a court of record than their own, they forfeit the estate, and he in remainder or reversion may enter; Shep. Touch. 125.

(*h*) *Rees* v. *Ervington*, Cro. Eliz. 322.

(*i*) *Denn* d. *Dolman* v. *Dolman*, 5 Term Rep. 641.

(*k*) *Johns* v. *Whitley*, 3 Wils. 127.

be done on a day certain, but no hour of the day be specified wherein the same shall be done, in this case the party must attend such a length of time before sunset as may be convenient in which to transact the business. If a place be limited and agreed on by the parties where the condition is to be performed, the party who is to perform is not obliged to seek the party to whom it is due elsewhere, nor is he to whom it is to be performed *obliged* to accept of the performance elsewhere; but he *may* accept it at another place, and it will be good (*l*).

Effect of the Statute of Limitations.

The recent Statute of Limitations as to real property, 3 & 4 Will. IV. c. 27, which operates as a bar to other rights of entry, bars the party who has a right to enter for a forfeiture, but who neglects to do so for more than twenty years after his right has accrued (*m*).

Estate of Party entering.

It may be laid down for a general rule that he who enters for a condition broken shall be seised in his first estate, or of that estate which he had at the time of the estate made upon condition; and therefore that he may avoid all mesne charges and incumbrances (*n*).

(b) *Construction of Provisoes.*

Construction of Provisoes for Re-entry in Leases.

Provisoes for re-entry in leases are to be construed like other contracts, not with the strictness of conditions at common law (*o*): therefore where there is a proviso in a lease, that on non-payment of rent the term shall cease, the lessor, and not the lessee, has the option of determining a lease upon a breach made (*p*). Where a proviso for re-entry was insensible, the Court refused to decide its meaning, and nonsuited the plaintiff in an ejectment for a forfeiture (*q*). Where a proviso in a lease, after stating that in certain events the term should cease, determine and be utterly void, continued, "and it shall be lawful to and for [the landlord] to re-enter;" it was held to give the landlord a right to enter or not at his election (*r*). A proviso that if buildings should not be completed on a certain day "it shall be lawful for the lessors into the demised premises or any part thereof in the name of the whole [omitting the words 'to re-enter'] and repossess," would seem to give a right of re-entry (*s*). A proviso in a lease, that, upon breach of any of the covenants therein on the part of the lessee, the lessor may re-enter on the premises, "and the same have again, as if the said lease had never been made," means, that the lease is to

(*l*) Bac. Abr. tit. *Conditions*, (O 4).

(*m*) See post, Book III., Chap. VII., Sect. 4, (b); and *Doe* d. *Tarrant* v. *Hellier*, 3 Term Rep. 162.

(*n*) Co. Litt. 202; Bac. Abr. tit. *Conditions*, (O 4).

(*o*) *Doe* d. *Davis* v. *Elsam*, Mood. & Malk. 189. See also ante, 84, 86, 100.

(*p*) *Reid* v. *Parsons*, 2 Chit. 247; and see *Doe* d. *Green* v. *Baker*, 8 Taunt. 241; 2 Moore, 189.

(*q*) *Doe* d. *Wynham* v. *Carew*, 2 Queen's B. Rep. 317; 1 Gale & Dav. 640. In *Doe* d. *Darke* v. *Bowditch*, 8 Queen's B. Rep. 973, the court construed a very obscure clause.

(*r*) *Arnsby* v. *Woodward*, 6 Barn. & Cres. 519; 9 Dowl. & Ryl. 536; see also *Rede* v. *Farr*, 6 Maule & Selw. 121; and *Jones* v. *Carter*, 15 Mees. & Wels. 718.

(*s*) *Hunt* v. *Bishop*, 8 Exch. Rep. 675.

be void from and after re-entry by the lessor, and does not deprive him of the right of bringing an action of covenant for rent which accrued previously; and this principle equally applies to a covenant for repairs or other services to be rendered by the lessee (*t*). An agreement of demise contained a clause that if the rent should be unpaid for ten days, or if the lessee should not observe all the conditions, &c., then it should be lawful for the lessor to enter upon and take possession of the premises, and to expel the lessee, without any legal process, and as effectually as a sheriff might do on a recovery in ejectment; and that, in case of such entry and an action being brought, the defendant might plead leave and licence in bar; it was held, that the lessee's right to possession as tenant continued until the lessor had availed himself of the licence given (*u*). An agreement to let a house and for the lessee to make certain alterations, and if they were not done that the lessor might retake possession, and that the agreement should be null and void, is voidable only at the election of the lessor if the lessee does not make the alterations (*x*). Where in an agreement enuring as a lease, there was a clause in the following form, "it is stipulated and conditioned that the lessee shall not underlet:" it was held, that these words created a condition, upon a breach of which the lessor might maintain ejectment, without an express clause of re-entry (*y*). If by a written agreement premises are let for a term, "at and under the rent of 80*l.*," it is an agreement by the lessee to pay that rent; and therefore if there be a power of re-entry in case of breach of "any of the agreements therein contained," the lessor has a right of re-entry on non-payment of rent, although there is no express agreement to pay rent (*z*). Where the lessee covenanted to pay the rent, and not to assign without the leave of the lessor, and there was a proviso for re-entry if the rent was in arrear, or if all or any of the covenants *thereinafter* contained on the part of the lessee should be broken; and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor that upon the lessee paying the rent, and performing all and every the covenants *thereinbefore* contained on his part to be performed, he should quietly enjoy; it was held, that the lessor could not re-enter for breach of the covenant not to assign, for that the proviso was restrained by the word *thereinafter* to subsequent covenants, and though there were none such, yet the Court could not reject the word (*a*). A proviso giving a power of re-entry if the lessee "shall do or cause to be done any act, matter or thing contrary to and in breach of any of the covenants," does not apply to

(*t*) *Hartshorne* v. *Watson*, 4 Bing. N. C. 178; 5 Scott, 506; 1 Arn. 15; 6 Dowl. 404.

(*u*) *Kavanagh* v. *Gudge*, 7 Man. & Gran. 316; 6 Scott, N. R. 508; 7 Scott, N. R. 1025; 1 Dow. & Low. 928.

(*x*) *Doe* d. *Nash* v. *Birch*, 1 Meeс. & Wels. 402; 2 Gale, 26; Tyr. & Gr. 769.

(*y*) *Doe* d. *Henniker* v. *Watt*, 8 Barn. & Crea. 308; 1 Man. & Ryl. 694.

(*z*) *Doe* d. *Rains* v. *Kneller*, 4 Car. & Pay. 3.

(*a*) *Doe* d. *Spencer* v. *Godwin*, 4 Maule & Selw. 265.

a breach of the covenant to repair, the omission to repair not being *an act done* within the proviso (*b*). Where a lease contained two clauses for re-entry, the one, in case the yearly rent of 300*l.* were in arrear thirty days after it became payable, and the other, in case the yearly rent were in arrear, which was stated to be payable half-yearly, at *Lady-day* and *Michaelmas;* it was held, that the landlord had a right to re-enter on non-payment of each half-year's rent, as the former clause contained the description of the amount to be annually paid, and the latter the times for payment (*c*). Where a lease contained a proviso for re-entry, if the lessee committed waste to the value of 10*s.*, and the lessor re-entered, and brought ejectment in consequence of the tenant's having pulled down some old buildings of more than 10*s.* value, and substituted others of a different description; it was held, that the waste contemplated in the proviso was waste producing an injury to the reversion, and that it was a question for the jury whether, under all the circumstances, such waste to the value of 10*s.* had been committed (*d*). Where there was, amongst others, a covenant not to carry off hay under a penalty, and a clause followed which enumerated all the covenants except that, and provided for re-entry upon breach of any of the covenants, it was held that the penalty did not prevent the clause of re-entry from applying to the hay covenant, the words being large enough (*e*). A proviso giving a power of re-entry if the defendant made default in performance of any of the clauses by the space of thirty days after notice, does not apply to the breach of a negative covenant not to allow alterations in or permit new buildings on the premises without permission (*f*). Where a lease contained a clause of re-entry, in case the term of years thereby granted should be *extended or taken in execution;* and before the end of the term, the sheriff entered the premises under a writ of extent against the lessee at the suit of the crown, held an inquisition, and seized the lessee's interests into the king's hands; it was held, that this proceeding was a *taking in execution* within the latter clause of the condition, and that the term was determined and forfeited to the lessor (*g*): and where the condition was, amongst other things, to be void "if the lessee should incur any debt on which any judgment should be signed, entered up or given against him, and on which any writ of fieri facias, or other writ of execution, should be issued, and the tenant gave a warrant of attorney, on which judgment was entered up and execution issued and the tenant's goods were taken, and the lessor entered, it

(*b*) *Doe* v. *Abdy* v. *Stevens*, 3 Barn. & Adol. 299; and see *Doe* d. *Spencer* v. *Godwin*, 4 Maule & Selw. 265.

(*c*) *Doe* d. *Rudd* v. *Golding*, 6 Moore, 231.

(*d*) *Doe* d. *Darlington* (*Earl*) v. *Bond*, 5 Barn. & Cress. 855; 8 Dowl. & Ryl. 738.

(*e*) *Doe* d. *Antrobus* v. *Jepson*, 3 Barn. & Adol. 402.

(*f*) *Doe* d. *Palk* v. *Marchetti*, 1 Barn. & Adol. 715.

(*g*) *Rex* v. *Topping*, 1 M'Clel. & Yon. 544.

was held that he was entitled to the emblements (*h*). A proviso was, that in case the lessee should commit an act of bankruptcy, whereon a commission or fiat in bankruptcy should or might be issued, and under which he should be *duly* found and declared a bankrupt, the term should determine; the tenant became bankrupt, and was found and declared a bankrupt, but there was not a proper petitioning creditor's debt on which the fiat was founded; it was held by two judges, against the opinion of Parke, B., that the lessee was not *duly* found and declared a bankrupt within the meaning of the proviso (*i*). A proviso was, that if the lessee, his executors, administrators or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him by confession or otherwise, or suffer any extent, process or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended, &c., the estate should determine, and the lessor have a power to re-enter; the tenant died during the term, and by his will devised the premises to his executors on trust, and the surviving executor became a bankrupt; it was held, that the lessor's right of re-entry thereupon accrued (*k*). The non-payment of a debt mentioned in an insolvent's schedule is not a continuing insolvency, so as to constitute a new forfeiture of a similar lease, the former forfeiture by the insolvency having been waived (*l*). Where a lease of coal mines reserved a royalty rent for every ton of coal raised, and contained a proviso that the lease should be void altogether, if the tenant should cease working at any time within two years; but after the working had ceased more than two years the lessor received rent; it was held, that the lease was not absolutely void by the lessee's ceasing to work, but voidable only at the option of the lessor; and that he might avoid the lease upon any cessation to work, commencing two years before the day of the demise in the ejectment (*m*). A lease for three lives contained a proviso, that if the lessee, his heirs, &c., should, during the continuance of the term, happen to become insolvent, and unable in circumstances to go on with the management of the farm, the demise should from thenceforth cease and be absolutely void; the Court doubted whether the attainder of the tenant for felony, was a forfeiture of the lease; but held, that

(*h*) *Davis* v. *Eyton*, 7 Bing. 154; 4 Moore & Pay. 820.

(*i*) *Doe* d. *Lloyd* v. *Ingleby*, 15 Mees. & Wels. 465.

(*k*) *Doe* d. *Bridgeman* v. *David*, 1 Cromp. M. & Ros. 405; 5 Tyr. 125; *S. C.* nom. *Doe* d. *Williams* v. *Davies*, 6 Car. & Pay. 614.

(*l*) *Doe* d. *Gatehouse* v. *Rees*, 4 Bing. N. C. 384; 6 Scott, 161; 1 Arn. 159.

(*m*) *Doe* d. *Bryan* v. *Bancks*, 4 Barn. & Adol. 401; Gow, 220; and see *Doe* d. *Boscawen* v. *Bliss*, 4 Taunt. 735. Trespass. Plea of a licence to dig mines. Replication, that the licence was subject to a condition "that if the grantee should neglect to work the mines for a certain time, or should fail in the performance of the covenants, the indenture and the liberties and licences thereby granted should cease, determine and be utterly void and of no effect;" held, on demurrer, that the word "void" in the proviso meant *voidable* at the election of the grantor; and therefore that it was necessary for the plaintiff to allege that the grantor, or some person claiming under him, had by some act evinced an intention to avoid the licence; *Roberts* v. *Davey*, 4 Barn. & Adol. 664; 1 Nev. & Man. 443.

if it was a breach of the condition, it was not a continuing breach, but was contemporaneous with the conviction (*n*). In a lease for years, if a person should so long live, there was a covenant to produce that person, or if he should be in a foreign country, to make it appear by a good and sufficient certificate that he was living, with a proviso for re-entry on default; the person having gone to Brazil, an affidavit that the deponent had three years before seen him, and had often heard from him since, and was convinced that he was alive nine months before when the deponent left Brazil, was held not to be a sufficient certificate within the covenant, and that therefore a forfeiture was incurred (*o*). Under a clause of forfeiture in case that no sufficient distress can be found upon the premises, every part of the premises must be searched (*p*). Where a lessee has broken his covenant to pay rates and taxes, the lessor may avail himself of the proviso for re-entry without proof of any demand made (*q*).

(c) *Who may avail themselves of a Forfeiture.*

Generally.

A lessee cannot avail himself of his own act to vacate a lease, on the principle that a man shall not be permitted to take advantage of his own wrong (*r*). No one can re-enter for a forfeiture, but the person who would be entitled to the rent if there had not been any lease (*s*): but a lessor who has demised his whole interest, subject to a right of re-entry on breach of a condition, may enter on the condition being broken, though he have no reversion (*t*). A lease granted under a power contained in a settlement reserved a right of entry to the lessor and his assigns; it was held, that "assigns" meant assigns of the settlor; and that although the right of re-entry could not be well reserved to the lessor, yet that the owners of the reversion under the settlement for the time being were entitled to the advantage of it as "assigns" (*u*). Where a forfeiture by tenant for years in levying a fine had not been taken advantage of by the entry of the then reversioner to avoid the lease, it was held, that it could not be taken advantage of after the reversion had been conveyed away, in an ejectment upon the several demises of the grantor and grantee of such a reversion (*x*). A right of entry cannot in general be reserved to a stranger to the estate (*y*): but in a proviso in a lease for twenty-one years, that it

(*n*) *Doe* d. *Evans* or *Griffith* v. *Pritchard*, 5 Barn. & Adol. 765; 2 Nev. & Man. 489.

(*o*) *Randle* v. *Lory*, 6 Ad. & El. 218.

(*p*) *Rees* d. *Powell* v. *King*, Forrest, 19; 2 Brod. & Bing. 514.

(*q*) *Davis* v. *Burrell*, 10 C. B. 821.

(*r*) 4 Jarm. Prec. 364, 3rd edit.; *Rede* v. *Farr*, 6 Maule & Selw. 121; 1 Wms. Saund. 287 d; *Reid* v. *Parsons*, 2 Chit. 247; *Doe* d. *Bryan* v. *Bancks*, 4 Barn. & Ald. 401; Gow, 220; *Doe* d. *Nash* v. *Birch*, 1 Mees. & Wels. 402; Tyr. & Gr. 769; 2 Gale, 26; *Jones* v. *Carter*, 15 Mees. & Wels. 718.

(*s*) *Hotley* v. *Scott*, Lofft, 319 a; and see *Doe* d. *Barney* v. *Adams*, 2 Cromp. & Jer. 232; 2 Tyr. 289; *Doe* d. *Barker* v. *Goldsmith*, 2 Cromp. & Jer. 674; 2 Tyr. 710.

(*t*) *Doe* d. *Freeman* v. *Bateman*, 2 Barn. & Ald. 168.

(*u*) *Greenaway* v. *Hart*, 23 Law J., N. S., C. P., 115.

(*x*) *Fenn* d. *Matthews* v. *Smart*, 12 East, 444.

(*y*) *Doe* d. *Barber* v. *Lawrence*, 4 Taunt. 23.

might be lawful for either party, his *executors or administrators*, to determine the lease on notice to the other, the words "*his heirs, executors or administrators*," have been held to extend to the *devisee* of the lessor (*z*).

Assignee of the Reversion.

At common law, no one but the grantor could re-enter for a forfeiture; and no grantee or assignee of the reversion could take the benefit or advantage of a condition for re-entry; it was, therefore, enacted by statute 32 Hen. VIII. c. 34 (*a*), that all persons, grantees of the reversion of any lands from the king, or grantees or assignees of any common person, their heirs, executors, successors and assigns, shall have like advantage against the lessees, &c., by entry for non-payment of rent, or for doing waste or other forfeiture; and the same remedy by action only for not performing other conditions, covenants and agreements contained in the said leases, as the lessors or grantors themselves had.

(d) *Entry of Lessor.*

Entry generally.

There is this difference between freehold leases—as for life or lives, —and chattel interests—as terms for years,—that the former are not absolutely void by the breach of any condition, but merely voidable, and are therefore not determined until the lessor re-enters, that is, brings an ejectment for the forfeiture; and even though the clause of the condition should be, that for non-payment of the rent, or the like, the lease shall cease and be void; for it is a rule, that where an estate commences by livery, it cannot be determined before entry; but in the case of leases for years, the lease is void ipso facto on breach of the condition, without any entry (*b*).

Entry by Corporations aggregate.

A corporation aggregate cannot, without deed, authorize their servant or agent to enter into land on their behalf for a condition broken;

(*z*) *Roe* d. *Bamford* v. *Hayley*, 12 East, 464.

(*a*) On this statute it may be observed, 1. That as the words are *against* lessees, it does not extend to covenants upon estates in fee or in tail, but only upon leases made for life or years. 2. That an assignee of part of the estate of the reversion may take advantage of the condition; as if there be a lessee for life, &c., and the reversion be granted for life; so if there be a lessee for years, &c., and the reversion be granted for years, the grantee for years may take advantage of the condition in respect of the word "executors" in the act. 3. That a grantee of part of the reversion may not take advantage of the condition; as if the lease be of three acres, reserving a rent upon condition, and the reversion be granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for it is entire and against common right, except indeed in the case of the king. 4. That whoever comes in by the act of the party,—as by bargain and sale of the reversion,—or by grant of the reversion in fee to the use of *A.*,—is an assignee within the statute; but such as come in merely by act of law, as the lord by escheat, or are in of another estate, shall not take the benefit of the statute. 5. That the grantee shall not take advantage of a condition before he has given notice to the lessee, but he may of a covenant. 6. That the grantee or assignee shall take advantage of such conditions only as are incident to and for the benefit of the reversion; as rent, waste, repairs, making fences, scouring ditches, preserving woods, and such like; and not for the payment of any sum in gross, the delivery of corn, wood, or the like: so, "other forfeiture" relates to such things as are incident to the reversion and run with the land; Co. Lit. 215 b. See further as to this statute, post, Book III., Chap. II., Sect. 3, (c).

(*b*) 1 Inst. 214. See more on this subject, post, Book III., Chap. VII., Sect. 2.

though this does not seem to have been always free from doubt: in one place it is said, that a man cannot justify as a servant to a corporation without showing a deed of retainer, and it is contrasted with the case of a man avowing as bailiff to a corporation, which may be done without deed: in another place, where it is reported to have been said by Littleton, that it was the opinion of all the judges in the Common Pleas and King's Bench, that an assignment of auditors by a commonalty is good without deed, it is added, "and so of a justification by their commandment:" in a third place, it is said to be the better opinion, that he who pleads the freehold of a dean and chapter, and that he entered by their commandment, ought to show a command in writing; and the same of a servant of a mayor and commonalty. A distinction has been made between a corporation which has a head, as a mayor and commonalty, and a corporation without a head; in the first case it is said, that a man may justify entering into land by the commandment of the mayor without writing; in the latter, that a command to enter must be by writing. Rolle lays it down as clear law, "that a corporation aggregate cannot command their bailiff to enter into land of their own leasing for years, for a condition broken, without deed; for such commandment without deed is void:" and this is consonant to the principle, that where the interest or title of the corporation is concerned, their officer must be appointed by deed (*c*).

(e) *Demand of Rent.*

When a Demand of Rent is necessary.

Where the lessor has the remedy of re-entry for the non-payment of rent, an actual demand of the rent must (unless there be a provision to the contrary) be made previously to the entry, otherwise it is tortious, and trespass will lie, because a condition of re-entry is in derogation of the grant (*d*); and the estate at law being once defeated, is not to be restored by any subsequent payment (*e*); therefore where a landlord has a right to re-enter for non-payment of rent, he cannot recover in ejectment at common law, unless he demand the rent on the day when it becomes due (*f*). He may, however, recover by the

(*c*) 1 Roll. 514. It has been held that, in trespass against a corporation for a seizure of goods by their agent, it is not necessary to show the authority of the agent under seal; *Maund* v. *The Monmouthshire Canal Company*, 1 Car. & Mar. 606. See also, ante, p. 9.

(*d*) *Hill* v. *Kempshall*, 7 C. B. 975; Bro. Abr. *Demand*, pl. 19; *Doe* d. *Scholefield* v. *Alexander*, 2 Maule & Selw. 525; *Doe* d. *Chandless* v. *Robson*, 2 Car. & Pay. 245; *Doe* d. *Earl of Jersey* v. *Smith*, 7 Price, 325.

(*e*) Shep. Touch. 148; 6 Term Rep. 459; Co. Lit. 201 b; 1 Roll. Abr. pl. 1, 2, 6; 5 Co. Rep. 407; Freeman, 242; *Smith* v. *Spooner*, 3 Taunt. 246. Also as to the necessity of a demand of the rent there is a difference between a condition and a limitation; for instance, if a tenant for life (having a power to lease for a certain number of years for so long as the lessee, his executors or assigns shall duly pay the rent reserved) make a lease pursuant to the power, the tenant is at his peril obliged to pay the rent without any demand of the lessor, because the estate is limited to continue only so long as the rent is paid, and therefore, for the non-performance according to the limitation, the estate must determine; a demand, however, had better be made for the reason before stated; Bac. Abr. tit. *Conditions*, (O 2).

(*f*) *Doe* d. *Forster* v. *Wandless*, 7 Term Rep. 117. But where lands were devised

statute 4 Geo. II. c. 28, s. 2, in cases where half a year's rent is in arrear and there is no sufficient distress on the premises, though no demand is made for the rent, as that statute substitutes the service of the declaration in ejectment for the demand of rent at common law in such cases (*g*). There are so many difficulties in making the necessary demand of rent at common law, that the courts have of late years been much inclined to get rid of the necessity of such demand (*h*);

in fee, charged with an annuity, and power was given to the annuitant to distrain, if the annuity were in arrear for twenty days after the day of payment being lawfully demanded; power was also given, if it should be in arrear for forty days, to enter and enjoy the lands, and to take the profits, until the annuitant should be thereby paid and satisfied all the arrears, with all costs, or until the person entitled to immediate possession should pay all the arrears and costs; it was held, that upon the annuity being forty days in arrear, the annuitant might bring ejectment without making any demand; *Doe* d. *Bias* v. *Horsley*, 1 Adol. & El. 766; 3 Nev. & Man. 567.

(*g*) *Doe* d. *Lawrence* v. *Shawcross*, 3 Barn. & Cres. 752; 5 Dowl. & Ryl. 711; *Doe* d. *Gooch* v. *Knowles*, 1 Dow. & Low. 198. See post, Book III., Chap. VII., Sect. 2.

(*h*) A clear idea of the formalities necessary in making a demand of rent at common law may be gathered from the following extracts from a note of Mr. Serjeant Williams to his edition of Saunders' Reports (1 Saund. 287, note 16), where the law upon the subject is well digested. He says, "that where a condition of re-entry is reserved for non-payment of rent, several things are required by the common law to be previously done by the reversioner to entitle him to re-enter. 1. A demand must be made of the rent;" [where there are several demises at distinct rents separate demands must be made for each, though they be both reserved in the same lease; Vaugh. 71. Where a demand is necessary, it may be made by an agent having sufficient authority, which authority he is not bound to show unless required to do so; *Roe* d. *West* v. *Davies*, 7 East, 363; and a demand of rent due from the lessee to the lessor, though made of a stranger, if made upon the land, is a sufficient demand, and need not be general, to sustain ejectment for a forfeiture for non-payment of rent being lawfully demanded; *Doe* d. *Brooks* v. *Brydges*, 2 Dowl. & Ryl. 29.] "2. The demand must be of the precise rent due, for if a penny more or less be demanded it will be ill." [What remains payable after the land-tax, or a ground-rent demanded of and paid by the tenant, or any other part of the rent agreed upon has been lawfully deducted by the tenant, will of course constitute the rent due; *Sapsford* v. *Fletcher*, 4 Term Rep. 511. In ejectment to recover demised premises for non-payment of rent, under the usual proviso for re-entry on non-payment for twenty-one days, it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the twenty-first day at one o'clock: held, that only one quarter's rent should have been demanded, and that at sunset; *Doe* d. *Wheeldon* v. *Paul*, 3 Car. & Pay. 613.] "3. It must be made precisely upon the day on which the rent is due and payable by the lease to save the forfeiture; as where the proviso is, 'that if the rent shall be behind and unpaid by the space of thirty or any other number of days after the day of payment, it shall be lawful for the lessor to re-enter,' a demand must be made on the thirtieth or other last day. 4. It must be made a convenient time before sunset. 5. It must be made upon the land, and at the most notorious place of it; therefore if there be a dwelling-house upon the land, the demand must be at the front or fore-door, though it is not necessary to enter the house, notwithstanding the door be open; but if the tenant meet the lessor either on or off the land at any time of the last day of payment, and tender the rent, it is sufficient to save a forfeiture; for the law leans against forfeitures. 6. When a place is appointed where the rent is payable, the demand must be made at such place, and no other. 7. A demand of rent must be made in fact, and be averred in pleading, although there should be no person on the land ready to pay it. 8. If, after these requisites have been performed by the reversioner, the tenant neglect or refuse to pay the rent, then the reversioner is entitled to re-enter; [for if the lessor or his sufficient attorney remain upon the land the last day on which the rent ought to be paid until it be so dark that he cannot see to tell the money, and the money thus demanded be not paid, this is a denial in law, though there are no words of denial, upon which a re-entry may be made; 1 Inst. 201; 4 Co. Rep. 73.] "However it is to be observed, that no *actual* entry is necessary to be made by him into the land; but it is sufficient to bring an ejectment only; though it was held otherwise until Lord Hale's time, when it was decided that the entry confessed by the defendant in the ejectment was sufficient without any actual entry, which decision has been adhered to ever since. It follows as a necessary inference from what has been premised, that a demand made after or before the last day on which the lessee has to pay the rent, in order to prevent a forfeiture, or off the land,

it has been accordingly laid down, where the power of re-entry is given to the lessor for non-payment without any further demand, that the lessee by the contract has undertaken to pay it, whether it be demanded or not, and by dispensing with the demand, has put himself under the necessity of making an actual proof that he was ready to tender and pay the rent (*i*). So it has been held, where a lease contained a proviso, that if the rent was in arrear for twenty-one days, the lessor might re-enter, although no legal or formal demand should be made, that the rent having been in arrear for twenty-one days, the lessor might maintain ejectment without an actual re-entry or demanding the rent (*j*); and that in an action of debt by the lessor on a bond conditioned for payment of rent, which was made payable on a day certain at the mansion-house of the lessor, the plaintiff may assign for breach non-payment of the rent at the day and place, without showing a demand of the rent (*k*). Even where a lease contained a proviso that if the rent were in arrear twenty-one days next after the day of payment, being lawfully demanded, the lessor might re-enter; it was held that (there being no sufficient distress on the premises) the lessor might, under the statute 4 Geo. II. c. 28, s. 2, re-enter without a demand (*l*). But where the condition was, that on non-payment of half a year's rent the landlord might enter on the premises for the same *till it be fully satisfied*, it was held he could not enter under the statute 4 Geo. II. c. 28, s. 2, without a demand (*m*).

(f) *What is a Waiver.*

What amounts to a Waiver generally.

Courts of law always lean against forfeitures, as courts of equity relieve against them; therefore whenever a landlord means to take advantage of any breach of covenant, so as that it should operate as

will not be sufficient to defeat the estate."

"The same requisites which are deemed necessary in order to entitle the lessor to re-enter, are also necessary in order to entitle him to recover a nomine pœnæ, as it is called, which is not considered so much a remedy for the recovery of the rent as a penalty to oblige the tenant to a punctual payment of it; therefore where there is a proviso that if the rent be in arrear for the space of thirty days next after the days of payment, the lessee shall forfeit ten shillings a day by way of penalty; in that case, in order to entitle the lessor to recover the penalty, there must be a demand of the rent in like manner in every respect as we have before seen is required in case of re-entry for non-payment of rent. A distinction is taken between a power to re-enter, or a nomine pœnæ, and a power to distrain; as where a rent is granted payable, &c., and in default of payment, if it be demanded, the grantee may distrain; in this case it is held not to be necessary to make a demand on the day, as in the case of a re-entry or a nomine pœnæ, but he may demand the rent at any time after." See more upon the subject of nomine pœnæ, post, Book II., Chap. I., Sect. 3.

In cases of conditions of re-entry there is a difference between leases for *lives* and leases for *years*; and with respect to the latter there is also a difference between *them*, which arises entirely from the manner in which the condition of re-entry is expressed in the lease.

(*i*) Bac. Abr. tit. *Conditions*, (O 2). It would, however, be advisable for the lessor even in this case to demand the rent, as the payment should be on the land, provided no place be fixed for the purpose; and a tenant may be prepared to prove that he was on the land at the day the rent became due ready to pay.

(*j*) *Doe* d. *Harris* v. *Masters*, 2 Barn. & Cres. 490; 4 Dowl. & Ryl. 45.

(*k*) *Rede* v. *Farr*, 6 Maule & Selw. 121.

(*l*) *Doe* d. *Scholefield* v. *Alexander*, 2 Maule & Selw. 525.

(*m*) *Doe* d. *Darke* v. *Bowditch*, 8 Queen's B. Rep. 973; 15 Law J., N. S., Q. B., 266.

a forfeiture of the lease, he must take care not to do any thing which may be deemed an acknowledgment of the tenancy, and so operate as a waiver of the forfeiture; as distraining for the rent due subsequent to the forfeiture, or bringing an action for the payment of it after the forfeiture has accrued, or accepting such rent (*n*). An entry by the lessor, admitted by the consent rule or by the service of the declaration in ejectment for a forfeiture, was held to be an exercise by the lessor of his option to determine a lease, even though no judgment was entered in the ejectment; and the lessor could not afterwards commence an action on covenants subsequently broken (*o*). There is a distinction in the case of a lease for years between a clause by which on a breach of covenant the lease is made absolutely void, and a clause which in such case merely gives the lessor power to re-enter; in the former case if the lessor make a legal demand of the rent, and the lessee neglect or refuse to pay, or if the lessee be guilty of any breach of the condition of re-entry, the lease is *void* and absolutely determined, and cannot be set up again by acceptance of rent due after the breach of the condition, or by any other act; but if, on the other hand, the clause be, that for non-payment of the rent, it should be lawful for the lessor to re-enter, the lease is only *voidable*, and may be affirmed by acceptance of rent accrued afterwards or other act, if the lessor had notice of the breach of the condition at the time (*p*). Indeed it is undoubted law, that though an acceptance of rent or other act of waiver may make a voidable lease good, it cannot make valid a deed or a lease which was actually void at first; but where a lease for years contains the common proviso, "that it shall and may be lawful for the lessor to re-enter," or a proviso "that the term shall cease and determine if the lessor please," the lease will be only voidable by a breach of covenant; and the forfeiture may be waived by a subsesequent acknowledgment of a tenancy (*q*). Where there was a continuing covenant to insure and continue insured in a particular form, an approval by the lessor of a policy in a different form and acceptance of rent for several years afterwards is no waiver of a forfeiture by this breach of the covenant subsequent to the last payment of rent (*r*).

Lessor must have Notice of Forfeiture.

In order to render acceptance of rent or any other act a waiver of a forfeiture, the lessor must have notice of the forfeiture at the time; for it has been established in many cases that such act will not operate as

(*n*) Bull. N. P. 96; *Doe* d. *Tarrant* v. *Hellier*, 3 Term Rep. 162; Bac. on Leases, 226.

(*o*) *Jones* v. *Carter*, 15 Mees. & Wels. 718; *Duppa* v. *Mayo*, 1 Wms. Saund. 287 a, (*n*).

(*p*) *Doe* d. *Bryan* v. *Bancks*, 4 Barn. & Ald. 401; *Gow*, 220; *Kinnersley* v. *Orpe*, 1 Doug. 57; Co. Lit. 215, n.

(*q*) *Doe* d. *Bristow* v. *Old*, Ad. Eject. 155.

(*r*) *Doe* d. *Muston* v. *Gladwin*, 6 Queen's B. Rep. 953; *Doe* d. *Baker* v. *Jones*, 5 Exch. Rep. 498; post, 279. So where a lease has been rendered voidable by fraud, the right to avoid it may be waived by a demand of rent; *Doe* d. *Wigan* v. *Poulton*, 14 Law Times, 347.

a waiver of the forfeiture, or as a confirmation of the tenancy, unless the landlord had notice that a forfeiture was incurred at the time, except the condition be of such a nature as to be equally within the knowledge of both the lessor and lessee (*s*). The act which is insisted on as amounting to a waiver is matter of evidence only, as to quo animo it was done, to be left to the jury under the circumstances of the case (*t*). Where a lessor was too ill to attend to business, and it did not appear that he knew of a forfeiture, his son, who collected the rents, was held not to have authority to waive a forfeiture (*u*).

Waiver by acceptance of rent.

If a lessor accept rent in arrear after a forfeiture has been incurred, it waives and bars his right to enter for the forfeiture, even in cases where originally the right to enter was merely optional, and he might have refused to avail himself of the forfeiture altogether if he had pleaded (*x*): thus in an action of ejectment, where it appeared that a prebend had let land for years rendering rent, and there was a proviso for re-entry on non-payment, and the rent was demanded, but was not paid, and two days afterwards the lessor received the rent of the lessee, and gave him an acquittance; it was clearly held that the bare receipt of the rent *after* the day was no bar, for it was a duty due to him; but that a distress for the rent, or the receipt of rent due at a subsequent day, or an acquittance with a recital that he was his tenant, would have been a bar; for those acts affirm the lessee to have had lawful possession. A forfeiture of a lease by a lessee's insolvency is waived by acceptance of rent from him after his discharge under the insolvent act (*y*). Where a lease was made to one for life, rendering rent at Michaelmas, with a clause of re-entry for non-payment, and the rent being in arrear, the lessor brought an action for it; it was held, that, notwithstanding the action, he might still enter for a breach of the condition, for the action for the rent did not affirm the lease, because it should be intended to be brought as for a duty due upon a contract (*z*): so if he had taken an insufficient distress for rent which accrued before the forfeiture, he might afterwards have entered for a breach of the condition, because the distress would under those circumstances have been no waiver (*a*). A right of re-entry is waived by acceptance of the reserved rent, though from a stranger (*b*). If ejectment be brought on a forfeiture of a lease, and after the bringing of such ejectment the landlord accept rent, it is no waiver of the forfeiture (*c*): but quære whether the acceptance of rent which accrued

(*s*) *Roe* d. *Gregson* v. *Harrison*, 2 Term Rep. 425.

(*t*) *Doe* d. *Cheney* v. *Batten*, Cowp. 243.

(*u*) *Doe* d. *Nash* v. *Birch*, 1 Mees. & Wels. 402; 2 Gale, 26; Tyr. & Gr. 769.

(*x*) *Arnsby* v. *Woodward*, 6 Barn. & Cres. 519; 9 Dowl. & Ryl. 536.

(*y*) *Doe* d. *Gatehouse* v. *Rees*, 4 Bing. N. C. 384; 6 Scott, 161; 1 Arn. 159.

(*z*) Cro. Eliz. 3; *Anon.*, 3 Salk. 3.

(*a*) *Brewer* d. *Onslow* v. *Eaton*, 3 Dougl. 230; 6 Term Rep. 220.

(*b*) *Doe* d. *Evans* or *Griffith* v. *Pritchard*, 5 Barn. & Adol. 765; 2 Nev. & Man. 489.

(*c*) *Doe* d. *Moorecraft* v. *Meux*, 4 Barn. & Cres. 606; 7 Dowl. & Ryl. 98; 1 Car. & Pay. 346. See also *Jones* v. *Carter*, 15 Mees. & Wels. 718.

due subsequently to a forfeiture by not repairing within three months after notice, is not an absolute waiver; it would seem that it is not, particularly if the premises are not repaired at the time of the action being brought (*d*). Acceptance of rent accruing due before the expiration of the three months has been held not to be a waiver (*e*). The forfeitures above spoken of, which are waived by receipt of rent, are those which are single and complete, and which are not in the nature of continuing forfeitures, for the acceptance of rent is no waiver of the subsequent breach of a continuing covenant broken in the first instance before the acceptance of the rent (*f*). Therefore where a lessee was bound under penalty of forfeiture to repair within a reasonable time, and after the breach the lessor accepted rent; it was held, that the reasonable time for reparation did not commence afresh after such acceptance of rent (*g*). In ejectment for a forfeiture incurred by using rooms in a house in a manner prohibited by the lease, it was held that such user was a continuing breach, and that the landlord was not, by receiving rent, precluded from taking advantage of the forfeiture, provided the user continued after such receipt of rent (*h*). So with respect to continuing forfeitures where the lessee is bound from time to time to keep the premises in repair, and he omits for an unreasonable time but afterwards repairs them, there the receipt of rent waives the previous forfeiture (*i*). It is doubted whether a mere demand of rent is a waiver of a forfeiture (*k*).

Waiver by other Act.

A distress and continuance in possession might be a waiver of a forfeiture existing at the time (*l*); but a distress is only an acknowledgment of a tenancy to the day of the distress, and a waiver of any forfeiture to that time (*m*). Where the plaintiff, after the service of the writ of summons in ejectment for non-payment of rent, distrained for rent which subsequently became due; and by the notice of distress stated that such distress was made without prejudice to the year's rent due on the 25th of March, and for which ejectment proceedings were then pending; it was held, that such distress did not operate as a waiver of the ejectment (*n*). A forfeiture incurred by breach of a covenant to repair generally, is waived by a notice given by the landlord, under a special covenant that he should enter and do the repairs, and distrain for the expenses (*o*). If a lessee exercise a trade on the demised premises by which his lease is forfeited, the landlord does not,

(*d*) *Pryett* d. *Harris* v. *Jeffreys*, 1 Esp. 393.

(*e*) *Doe* d. *Rankin* v. *Brindley*, 4 Barn. & Adol. 84; 1 Nev. & Man. 1.

(*f*) *Doe* d. *Muston* v. *Gladwin*, 6 Queen's B. Rep. 953.

(*g*) *Doe* d. *Baker* v. *Jones*, 5 Exch. Rep. 498; and see the judgment of Alderson, B., ibid.

(*h*) *Doe* d. *Ambler* v. *Woodbridge*, 9 Barn. & Cres. 376; 4 Man. & Ryl. 383.

(*i*) Per Alderson, B., in *Doe* d. *Baker* v. *Jones*, 5 Exch. Rep. 504, supra.

(*k*) *Doe* d. *Nash* v. *Birch*, 1 Mees. & Wels. 402; 2 Gale 26; Tyr. & Gr. 769.

(*l*) *Doe* d. *Taylor* v. *Johnson*, 1 Stark. 411; and see *Zouch* d. *Ward* v. *Willingale*, 1 H. Black. 311.

(*m*) *Doe* d. *Flower* v. *Peck*, 1 Barn. & Adol. 428.

(*n*) *Bailey* v. *Mason*, 2 Ir. Rep. 582, N. S.

(*o*) *Doe* d. *Reutzen* v. *Lewis*, 5 Ad. & El. 277; 2 Har. & Wol. 162; 6 Nev. & Man. 764; and see *Roe* d. *Goatley* v. *Paine*, 2 Camp. 520.

by merely lying by and witnessing the act for six years, waive the forfeiture (*p*), as some positive act of waiver is necessary; but if he permit the tenant to expend money in improvements, it would seem that it is evidence to be left to a jury of his consent to the alteration of the premises: and if a lessor after a forfeiture advise a person to purchase the term of his lessee, he cannot maintain an ejectment for a forfeiture against such purchaser; but he may do so if the party have an interest, viz. an annuity secured on the premises, and the advice is merely "to take to them" (*q*). If *A.*, tenant for life, subject to forfeiture, with a remainder over to *B.*, lease to *C.* for a term, and afterwards apprehending that he has forfeited, acquiesce in *B.*'s claim to and receipt of the rent from *C.*, his executor may, on showing that he acquiesced under a false apprehension, recover from *C.* the amount of the rent erroneously paid to *B.*; for in order to constitute a confirmation of the payment, some act must appear to have been done by *A.* with the knowledge of his own situation (*r*). Where land was demised with a covenant by the lessee to build and complete thereon houses within a year, and a proviso that if he did not, the lease should be void; the houses not being completed, it was held, that the forfeiture was not waived by the steward of the lessor having permitted the lessee to employ workmen in completing the houses for a short period after the forfeiture (*s*): so a forfeiture by omission to repair after notice is suspended but not waived by an agreement to allow further time to repair (*t*). *A.* demised land with a covenant by the lessee to finish certain houses thereon and with a power of re-entry in case of default, and by another indenture between *A.* and the plaintiff reciting that *A.* had made under-leases of the land in question; *A.* assigned the land to the plaintiff subject to the under-leases; the Court inclined to think that if the condition had been broken, the assignment, subject to the under-leases, would have been a waiver of the forfeiture although the forfeiture was not known to *A.* (*u*).

SECT. 6.—*Notice to quit.*

(a) *When necessary.*

Where a Notice to quit is necessary ordinarily.

Where there is a tenancy from year to year subsisting, it can only be put an end to by a notice to quit, which may be given by either party; and must be given six months previously to the expiration of the current year of tenancy, so as to expire at the same period of the year in which the tenant entered upon the premises: this rule is to be invariably followed in all cases, except where there is some special

(*p*) *Doe* d. *Sheppard* v. *Allen*, 3 Taunt. 78.

(*q*) *Doe* d. *Sore* v. *Eykins* or v. *Ekins*, 1 Car. & Pay. 154; Ryan & Moo. 29.

(*r*) *Williams* v. *Bartholomew*, 1 Bos. & Pul. 326.

(*s*) *Doe* d. *Kensington* (*Lord*) v. *Brindley*, 12 Moore, 37.

(*t*) *Doe* d. *Rankin* v. *Brindley*, 4 Barn. & Adol. 84; 1 Nev. & Man. 1.

(*u*) *Hunt* v. *Bishop*, 8 Exch. Rep. 675; and see *Hunt* v. *Remnant*, 9 Exch. Rep. 635.

agreement between the parties to a different effect; or it would seem where a particular local custom intervenes. This section will point out in what cases a notice to quit is necessary—what should be its form, and how it should be served—at what period of the year it should expire—and what acts amount to a waiver of its effect.

Where there a Tenancy less than a Year.

In the absence of evidence of any contract or usage requiring a notice to quit, where there has been a weekly hiring of furnished apartments, it seems uncertain whether a notice is necessary; but it has been held by one judge that a quarterly hiring necessarily requires a quarter's notice (*x*); and as the notice to quit must have reference to the terms of the letting, it would seem that a quarterly letting would require a quarterly notice, a monthly letting a month's notice, and a weekly letting a week's notice (*y*).

Not necessary where no relation of Landlord and Tenant subsists.

It need scarcely be observed, that where the relation of landlord and tenant does not in fact subsist, a notice to quit is out of the question (*z*). It is not necessary, therefore, previously to bringing an ejectment on the demise of one partner against another, after a dissolution of the partnership, for a house agreed to be occupied by the partners during its continuance (*a*): so where the lessor agreed to manage a farm for the lessee, the latter "allowing him and his family to reside and have the use of the dwelling-house and furniture free of rent," and either party was to put an end to the agreement on giving three months' notice or paying three months' wages, it is not necessary to give a notice to quit (*b*). Nor is it necessary to be given to one who had got into possession of a house without the privity of the landlord, although they afterwards entered into a negociation for a lease, but differed as to the terms (*c*): nor to a vendee in possession, who has agreed to pay the purchase-money by instalments, where the vendor was not to be compelled to convey, if default were made in any payment of any of the instalments (*d*). And where the vendor of a term, before the whole of the purchase-money was paid, agreed with the purchaser that the latter should have possession of the premises till a given day, paying the reserved rent in the meantime, and that if he did not pay the residue of the purchase-money on that day, he should forfeit the instalments already paid, and not be entitled to an assignment of the lease; and the purchaser being thus put into possession, and the residue of the purchase-money not paid at the day appointed; it was held that the vendor might maintain ejectment with-

(*x*) *Towne* v. *Campbell*, 3 Com. B. Rep. 921; see also *Huffell* v. *Armistead*, 7 Car. & Pay. 56; *Doe* d. *Parry* v. *Hasell*, 1 Esp. 94; *Doe* v. *Scott*, 6 Bing. 362; *Doe* v. *Bayley*, 5 Car. & Pay. 67; 6 East, 121, n.

(*y*) Addison on Contracts, 2nd Edit. 456, 478.

(*z*) As to what constitutes a tenancy, see ante, p. 58, and Chap. V., p. 178.

(*a*) *Doe* d. *Waithman* v. *Miles*, 1 Stark. 181; *Doe* d. *Colnaghi* v. *Bluck*, 8 Car. & Pay. 464.

(*b*) *Doe* d. *Hughes* v. *Derry*, 9 Car. & Pay. 494.

(*c*) *Doe* d. *Knight* v. *Quigley*, 2 Camp. 505.

(*d*) *Doe* d. *Moore* v. *Lawder*, 1 Stark. 308; and see *Right* d. *Lewis* v. *Beard*, 13 East, 210.

out any notice to quit or demand of possession (*e*). Although tithes be let by parol only, still it seems the holder is entitled to a notice to put an end to the agreement (*f*).

Where the Tenant abandons possession.

If a pauper, who has occupied a parish-house by sufferance, leave it for a time, the parish officers may lawfully enter and take possession without giving any notice to quit (*g*). Where a regular notice to quit has expired, and the tenant has abandoned the premises, leaving only a few articles of furniture therein, the landlord may peaceably, in his absence, and when no person is in the house, break open the door and take possession (*h*).

Where there is Beneficial Occupation.

There being no implied covenant in the lease of a house, that it will endure during the term (*i*), or that it is reasonably fit for habitation (*k*), a tenant may not quit on the premises becoming unsafe and useless for want of repairs, which the landlord is not bound to perform, without putting an end to the tenancy by the necessary notice to quit. If there is a default or fraud on the part of the landlord the case may perhaps be otherwise (*l*). It has, however, been held, that even if a landlord is bound to do repairs, the tenant cannot quit if the repairs are not done (*m*). In a case where a furnished house alone was let, which was uninhabitable by reason of bugs, it was held that the tenant might quit immediately (*n*): but where an unfurnished house was infested with bugs, which was let together with a garden, it was held that he could not (*o*).

Where the Period of the Demise is fixed.

Where the term of a lease is to end on a precise day, there is no occasion for a notice to quit previously to bringing an action of ejectment, because both parties are equally apprised of the determination of the term (*p*): so where a party occupies under an agreement for a lease during the whole term for which the lease was to be granted, the lease never having been executed, a notice to quit is not necessary at the end of such term, as the agreement is evidence of the expiration of the tenancy as well as of the other terms of the holding (*q*). Where a tenant from year to year died leaving a widow and an only son,

(*e*) *Doe* d. *Leeson* v. *Sayer*, 3 Camp. 8; see also ante, Chap. V., Sect. 7, p. 205.

(*f*) *Doe* d. *Morgan* v. *Church*, 3 Camp. 71.

(*g*) *Wildbore* v. *Rainsforth*, 8 Barn. & Cres. 4; 2 Man. & Ryl. 185; *S. P. Fox* v. *Oakley*, Peake, Ad. Ca. 214.

(*h*) *Turner* v. *Meymott*, 1 Bing. 158; 7 Moore, 574; *Taunton* v. *Costar*, 7 Term Rep. 431; *Hillary* v. *Gay*, 6 Car. & Pay. 284; *Wright* v. *Burroughes*, 3 Com. B. R. 689; 4 Dow. & Low. 438.

(*i*) *Arden* v. *Pullen*, 10 Mees. & Wels. 321.

(*k*) *Hart* v. *Windsor*, 12 Mees. & Wels. 68; *Sutton* v. *Temple*, 12 Mees. & Wels. 52, overruling *Edwards* v. *Etherington*, Ry. & Mood. 268: 7 Dowl. & Ryl. 117; *Collins* v. *Barrow*, 1 Mood. & Rob. 112, and *Salisbury* v. *Marshall*, 4 Car. & Pay. 65.

(*l*) See *Arden* v. *Pullen*, 10 Mees. & Wels. 321, and *Sutton* v. *Temple*, 12 Mees. & Wels. 52.

(*m*) *Surplice* v. *Farnsworth*, 7 Man. & Gran. 576; 8 Scott, N. R. 307.

(*n*) *Smith* v. *Marrable*, 11 Mees. & Wels. 5; 1 Car. & Mar. 479; 2 Dowl. N. S. 810.

(*o*) *Hart* v. *Windsor*, 12 Mees. & Wels. 68. See also ante, Chap. IV., Sect. 6, p. 97, &c., and post, Book II., Chap. IV., Sect. 2, (a), and Book III., Chap. IV., Sect 1, (b).

(*p*) *Cobb* v. *Stokes*, 8 East, 358; *S. P. Messenger* v. *Armstrong*, 1 Term. Rep. 54; and *Right* d. *Flower* v. *Darby*, 1 Term. Rep. 162.

(*q*) *Doe* d. *Tilt* v. *Stratton*, 4 Bing. 446; 1 Moore & Pay. 183; 3 Car. & Pay. 164; and see *Doe* d. *Bromfield* v. *Smith*, 6 East, 530; 2 Smith, 570.

an infant, and the widow remained in possession, and subsequently married, and her second husband obtained a lease of the premises so held by the deceased for a term of seven years, during the minority of the infant, the landlord was held to be entitled, on the expiration of that term, to maintain an ejectment without notice to quit (*r*). Where a person held under an agreement for a lease for twenty-one years, determinable at the end of the first seven and fourteen years, a notice to quit at the end of the first seven years is necessary (*s*).

Where the Tenant holds on after the End of his Lease.

If the tenant continue in possession for a year after his lease has expired, or rent has been received, a notice must be given before he can be turned out (*t*); for where by consent of both parties the tenant continues in possession after the expiration of his term, the law implies a tacit renovation of the contract; and in such cases the tenant holds upon the former terms (*u*). No fresh notice is however necessary where a tenant, after having given a notice, holds over for a year and pays double rent according to the statute 11 Geo. II. c. 19, s. 18 (*x*).

Where the Tenant is in under a void Demise.

Where the lessee holds under a void demise no notice is necessary; but where a lease granted by a tenant for life, under a limited power of leasing, which exceeded his power, was void, and not capable of being confirmed by the remainderman, yet the remainderman received money *as rent* after the death of the tenant for life, it was held to be an admission of a tenancy from year to year, and that a notice to quit must be given before any ejectment could be brought (*y*). Where a tenant in tail having received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessee in possession under a void lease granted by the tenant for life under a power, the rack-rent value of which was 30*l.* a year; it was held, that he could not maintain an ejectment, at least after laying his demise on a prior day, without giving the lessee some notice to quit, so as to make him a trespasser after such recognition of a lawful possession, either in the relation of tenant, or at least as continuing by sufferance till notice (*z*); so though a lease be void by the Statute of Frauds as to the duration of the term, it is considered that the tenant holds under the terms of the lease in other respects; and therefore that the landlord can only put an end to the tenancy at the expiration of the year (*a*).

Where a Death has taken place.

It once was doubted if the landlord or tenant died, whether the same notice to his executors or administrators was necessary as would have been requisite had he lived; and it was even suggested that a

(*r*) *Armstrong* v. *Loughnane*, 2 Ir. Law Rep. 72, N. S.

(*s*) *Chapman* v. *Towner*, 6 Mees. & Wels. 100.

(*t*) *Doe* d. *Hollingsworth* v. *Stennett*, 2 Esp. 717.

(*u*) *Right* d. *Flower* v. *Darby*, 1 Term Rep. 162. See ante, 182.

(*x*) *Booth* v. *Macfarlane*, 1 Barn. & Adol. 904.

(*y*) *Doe* d. *Martin* v. *Watts*, 7 Term Rep. 83; 2 Esp. 501; *S. P. Doe* d. *Tucker* v. *Morse*, 1 Barn. & Adol. 365.

(*z*) *Denn* d. *Brune* v. *Rawlings*, 10 East, 261; and see *Roe* d. *Brune* v. *Prideaux*, 10 East, 158; and *Whiteacre* d. *Boult* v. *Symonds*, 10 East, 13.

(*a*) *Doe* d. *Rigge* v. *Bell*, 5 Term Rep. 471. See ante, 59, 61.

month's notice in such case would suffice (*b*); but it is now settled that in the case of a tenancy from year to year as long as both parties please, if the tenant die, his personal representatives have the same interest in the land which their testator or intestate had, and are therefore entitled to the same notice to quit; for such tenancy is a chattel interest, and whatever chattel the deceased had must vest in them as his legal representatives (*c*). This principle is so settled that it has been adjudged that the executor of a tenant from year to year of an estate under 10*l.* a year may gain a settlement by residing on it forty days; on the ground (inter alia) that he resided on an estate of his own, and continued there forty days irremovable; and that he had a permanent interest (whether beneficial or not was immaterial for this purpose) in it while his office of executor continued. Lawrence, J., observed, that it was settled in the case of *Doe* d. *Shore* v. *Porter*, that if a tenant who held from year to year died intestate, his administrator has the same interest in the land that the intestate had; then what was the interest of the pauper's testator? he had a right to continue on the estate another year, unless six months' notice to quit were given; and of course the pauper, his executor, had the same right (*d*). In a case where a tenant died intestate, in the possession of certain premises, and his widow, after continuing to occupy them for several years, and paying rent to the landlord, married a second time, and her husband entered into possession and paid rent for several years to the landlord; and upon the death of the wife, the personal representative of the first husband obtained administration of his estate and effects, and brought an action of ejectment to eject the second husband: it was held, that the action was maintainable, without giving a formal notice to quit (*e*). Where a tenant from year to year died, and a regular notice was served on the widow, who remained in possession, it was held that the landlord might recover in ejectment, unless it were shown that some other person, and not the widow, was the executor or administrator of the tenant, and that it was not incumbent on the landlord to show that the widow was either (*f*). With respect to the propriety of a notice to quit in these cases, the right and the remedy must be reciprocal; as the representative capacity of executor or administrator is not affected by the testator or intestate having been in the situation of either landlord or tenant. The devisees of a landlord may maintain ejectment against the heir of a tenant at will without giving him notice to quit or demanding possession (*g*).

(*b*) *Gulliver* d. *Tasker* v. *Burr*, 1 W. Black. 596.

(*c*) *Doe* d. *Shore* v. *Porter*, 3 Term Rep. 16; *S. P. Parker* d. *Walker* v. *Constable*, 3 Wils. 25; *James* v. *Dean*, 11 Ves. jun. 391.

(*d*) *Rex* v. *Stone* (*Inhab.*), 6 Term R. 295.

(*e*) *Doe* v. *Bradbury*, 2 Dowl. & Ryl. 706.

(*f*) *Rees* d. *Mears* v. *Perrott*, 4 Car. & Pay. 230; Littledale, J.

(*g*) *Doe* d. *Burgess* v. *Thompson*, 5 Ad. & El. 532; 1 Nev. & Per. 215; 2 Har. & Wol. 451.

Where other Change of the Parties has taken place.

Where the reversion has been conveyed by the lessor during the existence of a tenancy from year to year, the tenant is entitled to a notice to quit before he can be ejected by the grantee of the reversion (*h*). Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given (*i*). Where an ejectment was brought on the demise of an infant, which action was compromised, and the tenant in possession attorned to the infant; though the infant, on coming of age, did not accept rent, or do any act to confirm the tenancy, yet as the former ejectment was brought at his suit, and for his benefit, he was not allowed to consider the tenant as a trespasser, and bring a new ejectment without giving notice to quit (*k*). Where a tenant came into possession of premises in 1816, it was held, that the lessor of the plaintiff in ejectment, who claimed under an elegit, and inquisition issued in 1818, but founded on a judgment recovered prior to 1816, need not give a notice previously to bringing the ejectment (*l*). A person who held glebe lands as tenant to one incumbent, and continues in possession under his successor without disturbance for eight months, must be presumed to hold as tenant to the latter, and cannot be dispossessed without a notice to quit (*m*).

Where the Tenant has Disclaimed his Lessor's Title.

No notice to quit is necessary where the tenant does an act which amounts to a disavowal of the title of the lessor (*n*); as where the tenant has attorned to some other person, or answered an application for rent by saying that his connection as tenant with the party applying has ceased (*o*): but a refusal to pay rent to a devisee in a will which was contested, is not such a disavowal of the title as to entitle such devisee to maintain an ejectment without giving a previous notice (*p*). In the case of an adverse possession it is not necessary to give a notice to quit to the tenants in possession: where, therefore, a party defended an action of ejectment as landlord, and the occupiers suffered judgment by default; it was held that the defendant could not object that the occupiers had not received notice to quit from the lessors of the plaintiff, who claimed adversely to the party under whom the tenants occupied. In such cases, as the tenant sets his landlord at defiance, the latter may consider him either as his tenant or as a trespasser; and in the latter case need not give him a notice to quit before he brings an action of ejectment (*q*).

(*h*) *Birch* v. *Wright*, 1 Term Rep. 378.

(*i*) *Maddon* d. *Baker* v. *White*, 2 Term Rep. 159.

(*k*) *Doe* d. *Miller* v. *Noden*, 2 Esp. 530.

(*l*) *Doe* d. *Putland* v. *Hilder*, 2 Barn. & Ald. 782.

(*m*) *Doe* d. *Cates* v. *Sommerville*, 9 Dowl. & Ryl. 100.

(*n*) *Doe* d. *Williams* v. *Pasquali*, Peake, 196; *S. P. Doe* d. *Jefferies* v. *Whittick*, Gow, 195; Bull. N. P. 96; Esp. N. P. 463; *Doe* d. *Calvert* v. *Frowd*, 4 Bing. 557; 1 Moore & Pay. 480; *Doe* d. *Phillips* v. *Rollings*, 4 Com. B. Rep. 188.

(*o*) *Doe* d. *Grubb* v. *Grubb*, 10 Barn. & Cres. 816; 5 Man. & Ryl. 666.

(*p*) See post, Sect. 7, and ante, 280.

(*q*) *Doe* d. *Cheese* v. *Creed*, 2 Moore & Pay. 648; *S. P. Doe* d. *Foster* v. *Williams*, Cowp. 622.

In case of Mortgages.

It is not necessary for a mortgagee to give a notice previously to bringing an ejectment, either to the mortgagor, or to a tenant who claims under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee (*r*): nor where the tenant was let into possession after the original mortgage was made, but before an assignment of it for the purpose of bringing an ejectment (*s*): so a mortgagee need not give notice to a tenant to quit before bringing his ejectment, if he mean only to get into the receipt of the rent and profits of the estate, though the mortgage be made subsequently to the tenant's lease; but in such case he shall not be suffered to turn the tenant out of possession by the execution (*t*). A tenant from year to year, *before* a mortgage, or grant of the reversion, is entitled to a notice to quit before he can be ejected by the mortgagee or grantee: thus where a tenant held from the 22nd of November as a yearly tenant, and a mortgagee who became such in July was desirous of ousting him; it was held to be too late to give notice for the tenant to quit at the end of the current year; for the tenant, at the time that the mortgagee's title accrued, had as permanent an interest in the estate till the 22nd of November, as if it had been leased to him by deed till that period (*u*). Where a mortgage deed contained a covenant that if the principal sum remained unpaid on a given day, the mortgagee might enter; and that if not paid within a certain number of days from the day fixed for payment, he might sell without the concurrence of the mortgagor; it was held, that the mortgagee might maintain ejectment against the mortgagor, although he remained in possession, without giving him notice to quit or demanding possession (*x*). Where a mortgage deed conveyed lands, provided that if a certain sum and interest were paid on a certain day the deed should be void, but if the mortgagor should not pay, the mortgagee, after giving one month's notice, might enter and sell or make leases, and there was a covenant also that no sale or lease should be made until after one month's notice to pay the principal and interest; it was held, that ejectment might be maintained by the mortgagee after non-payment on the day named, without giving a notice (*y*). Where a mortgage deed contained a covenant that the mortgagor during his occupation should pay half-yearly a rent, rather larger than the interest, and that the mortgagee should have power to distrain, provided that this reservation should not prejudice the mortgagee's right to enter, it was held that, after distraining for one half-year's rent, the mortgagee might yet maintain ejectment

(*r*) *Keech* d. *Warne* v. *Hall*, 1 Dougl. 21. See also ante, 196, 197.

(*s*) *Thunder* d. *Weaver* v. *Belcher*, 3 East, 449.

(*t*) Bull. N. P. 96.

(*u*) *Birch* v. *Wright*, 1 Term Rep. 380. If there has been the privity of the mortgagee, the case may perhaps be otherwise; *Evans* v. *Elliott*, 9 Ad. & El. 342; 1 Per. & Dav. 256; 1 Will. Wol. & Hod. 744.

(*x*) *Doe* d. *Fisher* v. *Giles*, 5 Bing. 421; 2 Moore & Pay. 749; see also *Doe* d. *Reglance* v. *Lightfoot*, 8 Mees. & Wels. 553.

(*y*) *Doe* d. *Parsley* v. *Day*, 2 Queen's B. Rep. 147. See also ante, 203.

after a subsequent default, without giving a notice to quit (*z*). Where there was an agreement between *P.* and *W.* for the sale of lands to the latter, to be completed on the 25th of March; and before that day, *W.* agreed to let to the defendant from that day, and the defendant was let into possession before the day by consent of *P.*, upon notice to him of the agreement to let; and on the 29th of May a conveyance was executed as of the 25th of March, subject to a term redeemable on payment by *W.* of the purchase money with interest, with a power to *P.* to enter for default of payment by *W.*; it was held that *P.* might bring ejectment for default of payment without giving the defendant any notice to quit (*a*).

(b) *Form and Service.*

Necessity of being in Writing.

A parol notice to quit by a tenant under a parol lease is sufficient (*b*); though given on behalf of a corporation (*c*): but where a power is given to a party to determine a lease on giving a notice in *writing*, he cannot determine it by giving a *verbal* notice (*d*). In all cases, however, the notice to quit had better be in writing, so that the contents of it may be readily proved, and no dispute may arise as to the sufficiency of its terms (*e*). Prior to the passing of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, it was advisable that it should not be actually attested by any one; for if it were attested, no other witness could prove the accuracy of the copy but the person who attested it, and he might possibly not be in the way: thus it had been held, that a notice to quit in writing, signed by the party giving it, and attested by a witness, must be proved by calling that witness, or his absence must be accounted for. But attention to this point is now of less importance, as by the 26th section of that act, where any instrument is attested, to the validity of which attestation is not requisite (and notices to quit are of this description), it may be proved by admission or otherwise, as if there had been no attesting witness.

By whom to be given.

Joint-Tenants, &c.

A notice to quit signed by one of several joint-tenants on behalf of the others, is sufficient to determine a tenancy from year to year as to all (*f*); and where the joint-lessors are partners in trade, a notice to quit in the names of all, signed by one only, is clearly valid (*g*): but a notice to quit by joint-tenants had better be signed by all the joint-tenants: although if such notice be given by an agent on behalf

(*z*) *Doe* d. *Garrod* v. *Olley*, 12 Ad. & El. 481; 4 Per. & Dav. 275; see also *Doe* d. *Snell* v. *Tom*, 4 Queen's B. Rep. 615; 3 Gale & Dav. 637.

(*a*) *Doe* d. *Parker* v. *Boulton*, 6 Maule & Selw. 148.

(*b*) *Timmins* v. *Rowlinson*, 3 Burr. 1603; 1 W. Black. 533; *S. P. Doe* d. *Macartney* (*Lord*) v. *Crick*, 5 Esp. 196.

(*c*) *Roe* d. *Dean and Chapter of Rochester* v. *Pearce*, 2 Camp. 96.

(*d*) *Legg* d. *Scott* v. *Benion*, Willes, 47.

(*e*) It is not necessary to give a notice to produce the original notice served, in order to give in evidence the copy; *Doe* d. *Fleming* v. *Somerton*, 7 Queen's B. Rep. 58.

(*f*) *Doe* d. *Aslin* v. *Summerset*, 1 Barn. & Adol. 135; *Alford* v. *Vickery*, 1 Car. & Mar. 280.

(*g*) *Doe* d. *Elliott* v. *Hulme*, 2 Man. & Ryl. 433.

of the joint-tenants, it is sufficient, if his authority be subsequently recognized by all of them (*i*). So a notice given by a person authorized by only one of several joint-tenants, is good as to all (*k*). Where a lease for twenty-one years contained a proviso, that in case either landlord or tenant, or their respective heirs or executors, wished to determine it at the end of the first fourteen years, and should give six months' notice in writing *under his or their respective hands*, the term should cease; it was held that a notice, signed by *two only* of *three* executors of the original lessor, to whom he had bequeathed the freehold *as joint-tenants*, expressing the notice to be given *on behalf of themselves and the third executor*, was not good under the proviso, which required it to be given under the hands of all three: neither could such notice be sustained under the general rule of law, that one joint-tenant may bind his companions by an act done for *his benefit*; for non constat that the determination of the lease was for the benefit of the co-joint-tenant, which it was incumbent on the party who wished to avail himself of it to prove; and the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third executor could make it good by relation; nor was his joining in the ejectment evidence of his original assent to bind the tenant by the notice (*l*): but if four joint-tenants jointly demise from year to year, such of them as give a notice to quit may recover their several shares in ejectment on their several demises (*m*). A notice to quit, given in behalf of six persons, has been held a good notice on behalf of two of them only (*n*). After a demise from year to year, the landlord mortgaged the premises to secure the payment of an annuity, and there was a proviso that he should remain in receipt of the rents until sixty days after default in payment of the annuity; a notice given by the mortgagor before default was held a good notice to determine the tenancy (*o*). In ejectment by a corporation against a tenant from year to year, a notice to quit, given by the steward of the corporation, is sufficient, without evidence that he had an authority under seal from the corporation for the purpose (*p*). A notice to quit given to a tenant of lands originally devised to the rector and churchwardens of a parish, and their successors, in trust, signed by the rector and churchwardens, requiring the tenant to deliver up the premises *to the rector and churchwardens for the time being*, is bad (*q*). It seems that a receiver appointed by the Court of Chancery, with a general authority

Mortgagors.

Corporations.

Parish Property.

Receivers.

(*i*) *Goodtitle* d. *King* v. *Woodward*, 3 Barn. & Ald. 689; *S. P. Doe* d. *Jolliffe* v. *Sybourn*, 2 Esp. 677.

(*k*) *Doe* d. *Kindersley* v. *Hughes*, 7 Mees. & Wels. 139.

(*l*) *Right* d. *Fisher* v. *Cuthell*, 5 East, 491; 2 Smith, 83; 5 Esp. 149.

(*m*) *Doe* d. *Whayman* v. *Chaplin*, 3 Taunt. 120.

(*n*) *Doe* d. *Bailey* v. *Foster*, 3 Com. B. Rep. 215.

(*o*) *Doe* d. *Lyster* v. *Goldwin*, 1 Gale & Dav. 463.

(*p*) *Doe* d. *Plymouth* (*Mayor*, &c.) v. *Fillis*, 2 Chit. 170; *S. P. Roe* d. *Rochester* (*Dean*) v. *Pearce*, 2 Camp. 96. See also ante, 203.

(*q*) *Doe* d. *Brooks* v. *Fairclough*, 6 Maule & Selw. 40.

to let the lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit (*r*). A mere agent to receive rents has no implied authority to give a notice to quit (*s*); but an agent to receive rents and let has authority to determine a tenancy (*t*). Where a notice to quit is given by an agent, he ought to have authority to give it at the time when it begins to operate; and a subsequent recognition of the authority will not make the notice good; at all events, the bringing of an ejectment is not a sufficient recognition (*u*). So a notice to quit given by the agent of an agent is not sufficient without a recognition, and bringing an ejectment is not a recognition (*x*). In an ejectment on the title brought by the trustees having the legal estate in the lands, the agent proved that he had been sent by the trustees a number of printed notices to quit signed by them, having blanks for the names of the tenants and the denomination of the lands; in the agent's office one of those notices was filled up with the defendant's name and the lands held by him, and served on the defendant, and no objection made by him; there was no evidence of any specific authority to fill up this notice: it was held (Perrin, J., dissentiente), that this was sufficient evidence to go to the jury that this notice had been served by authority of the trustees (*y*). A notice on an under-tenant given by the original lessor is not good (*z*).

Agents.

Certain premises had been devised to a feme sole previous to her marriage to her separate use, without the intervention of trustees. On her marriage a settlement was executed which did not affect the premises in question, but which settlement contained a covenant by the husband not to interfere with the wife's management of the property; the husband and wife separated: it was held, that a notice to quit signed by the wife in her own name was sufficient to determine a tenancy, the tenant having paid rent to the wife on her individual receipt, and by various letters having acknowledged the tenancy (*a*).

Wife.

A notice signed by the mother of an infant aged eighteen, as his guardian and next friend, is insufficient (*b*).

Guardian.

A notice to quit should be clear and certain in its terms, and not ambiguous or optional: therefore if a notice to quit be in these words, "I desire you to quit, or else that you agree to pay double rent," the tenant having an option, the notice would not be sufficient: but where notice in writing was served on a tenant, and was in the following words, "I desire you to quit possession on Lady-day next, or

What Certainty of Intent is sufficient.

(*r*) *Doe* d. *Marsack* v. *Read*, 12 East, 57.

(*s*) *Doe* d. *Mann* v. *Walters*, 10 Barn. & Cres. 626; 5 Man. & Ryl. 357; *Doe* d. *Lyster* v. *Goldwin*, 2 Queen's B. Rep. 143; 1 Gale & Dav. 463.

(*t*) *Doe* d. *Manvers* (*Earl*) v. *Mizem*, 2 Mood. & Rob. 56.

(*u*) *Doe* d. *Mann* v. *Walters*, 10 Barn. & Cres. 626; 5 Man. & Ryl. 357; *Doe* d. *Lyster* v. *Goldwin*, 2 Queen's B. Rep. 143; 1 Gale & Dav. 463.

(*x*) *Doe* d. *Rhodes* v. *Robinson*, 3 Bing. N. C. 677; 4 Scott, 396; 3 Hodges, 84.

(*y*) *Jack* v. *M'Eniry*, 1 Ir. Law R., N. S., 435.

(*z*) *Pleasant* d. *Hayton* v. *Benson*, 14 East, 234.

(*a*) *Dankert* v. *Wilson*, 13 Ir. Law Rep. 40.

(*b*) *Read* v. *Kennedy*, 2 Ir. Law Rep. 565.

I shall *insist* upon double rent;" the Court held it to be sufficiently positive, and that the latter words were added only by way of threat of the consequence of holding over the possession (*c*). A notice given by the grantor of a licence to mine, that *unless* the grantee kept a certain number of miners at work, as he was bound to do, the grantor *would* re-enter, is not a good notice to avoid the licence, which the grantor was entitled to do (*d*). A notice desiring the tenant to "quit the premises which you hold under me, your term therein having long since expired," does not recognize a subsisting tenancy from year to year, subsequent to the term, but is a mere demand of possession (*e*). A notice to quit and give up possession, but not stating to whom, is sufficient (*f*).

Certainty in Description of the Premises.

A misdescription of the premises is not fatal, if they are otherwise sufficiently designated, so that the party to whom the notice has been given has not been misled (*g*); therefore a notice to quit a farm at *D.*, the farm being in the adjoining township of *H.*, is good, if it does not appear that the tenant was misled (*h*): but a notice to quit a part only of premises leased together, is bad; although where a farm was leased for twenty-one years at a rent of 180*l.* per annum, consisting, as described in the lease, of the Town Barton, and its several parcels, described by name, at the rent of 83*l.*, other closes named, at other rents of 5*l.* 5*s.* and 1*l.*; and the Shippen Barton, and its several parcels, described by name, at 86*l.*; with a power reserved to either party to determine the lease at the end of fourteen years, on giving two years' previous notice; it was held, that a notice by the landlord to his tenant to quit "Town Barton, &c., agreeably to the terms of the covenant between us, on the expiration of the fourteenth year of your term," given in due time, was sufficient (*i*). Where a house, lands and tithes are held under a parol demise at a joint rent, a notice to quit "the house, lands and premises, with the appurtenances," includes the tithes, and is sufficient to put an end to the tenancy (*k*).

To whom the Notice should be directed and given.

It is not necessary that a notice to quit should be directed to the tenant in possession, if proved to have been delivered to him at the proper time (*l*): and if a notice to quit be directed to the tenant by a wrong Christian name, and he keep and do not send it back, it is a waiver of the misdirection, and the lessor may recover on it if there was no other tenant of the name (*m*): and where two tenants hold

(*c*) *Doe* d. *Matthews* v. *Jackson*, 1 Dougl. 175; *Doe* d. *Lyster* v. *Goldwin*, 2 Queen's B. Rep. 143; 1 Gale & Dav. 463.

(*d*) *Muskett* v. *Hill*, 7 Scott, 855; 5 Bing. N. C. 694.

(*e*) *Doe* d. *Godsell* v. *Inglis*, 3 Taunt. 54.

(*f*) *Doe* d. *Bailey* v. *Foster*, 3 Com. B. Rep. 215.

(*g*) *Doe* d. *Cox* v. ——, 4 Esp. 185.

(*h*) *Doe* d. *Armstrong* v. *Wilkinson*, 12 Ad. & El. 743; 4 Per. & Dav. 323; Arn. & Hod. 39.

(*i*) *Doe* d. *Rodd* v. *Archer*, 14 East, 245.

(*k*) *Doe* d. *Morgan* v. *Church*, 3 Camp. 71.

(*l*) *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5. In this case Lord Kenyon said, that it was sufficient to show that the defendant was the tenant to the lessor of the plaintiff, and that the service was on him in that character.

(*m*) *Doe* v. *Spiller*, 6 Esp. 70.

premises in common, a notice to quit to one of them is sufficient to determine the tenancy (*n*): at least it is evidence that the notice reached the other tenant who lived elsewhere (*o*). Where a tenant from year to year under-let part of the premises, and then gave up to his landlord the part remaining in his own possession, the landlord cannot entitle himself to recover against the under-lessee, no notice to quit having been given to the lessee, but only a notice to the under-lessee, and that by the landlord, in his own name, and not in the name of the first lessee (*p*). In ejectment against *S.* and *F.*, where it is shown that *B.*, not a party to the cause, came into possession of the premises under an unperformed contract of sale, and that *S.* and *F.* held under him, notice to quit served upon *S.* and *F.* is sufficient (*q*).

What is a sufficient Service.

The merely leaving a notice to quit at the tenant's house with a servant, without further proof of its having been explained to the servant, or that it came to the tenant's hands, is not sufficient (*r*): but where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery and explanation of a notice to quit to his servant at the dwelling-house, is strong presumptive evidence that the master received the notice, and ought to be left to the jury (*s*);—though such a presumption may of course be rebutted by the evidence of the servant. A delivery of a notice to quit to the servant has very recently been held to be sufficient, though the tenant might not have been informed of it till within the half year after its expiration, especially where the servant might have been called, but was not (*t*). Notice to quit served upon a wife on the premises held by the husband is sufficient (*u*). A notice to quit put under the door of the tenant's house, and afterwards shown to have come into his possession in sufficient time, is well served (*x*). An ejectment against the bailiffs pro tempore of a corporation, cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of a notice to quit on the defendants, the existing bailiffs; for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation: but at any rate such tenancy may be determined by a notice to the corporation to quit, served on its officers (*y*).

(*n*) *Doe* d. *Macartney* (*Lord*) v. *Crick*, 5 Esp. 196.

(*o*) *Doe* d. *Bradford* (*Lord*) v. *Watkins*, 7 East, 551; 3 Smith, 517.

(*p*) *Pleasant* d. *Hayton* v. *Benson*, 14 East, 234.

(*q*) *Roe* d. *Blair* v. *Street*, 2 Ad. & El. 329; 4 Nev. & Man. 42. As to service of notice upon the attorney of the administratrix of the party who had paid rent, see *Doe* d. *Prior* v. *Ongley*, 10 Com. B. 25.

(*r*) *Doe* d. *Burcss* v. *Lucas*, 5 Esp. 153.

(*s*) *Jones* d. *Griffith* v. *Marsh*, 4 Term Rep. 464.

(*t*) *Doe* d. *Neville* v. *Dunbar*, Mood. & Malk. 10.

(*u*) *Doe* d. *Blair* v. *Street*, 2 Ad. & El. 329; *Smith* v. *Clark*, 9 Dowl. 202; Wol. P. C. 44.

(*x*) *Alford* v. *Vickery*, 1 Car. & Mar. 280.

(*y*) *Doe* d. *Carlisle* (*Earl*) v. *Woodman*, 8 East, 227.

When the Notice must expire in ordinary Cases.

(c) *Period of Expiration.*

In the ordinary case of a tenancy from year to year, there must be *half a year's* notice to quit, ending at that period of the year at which the tenancy commenced (*z*): and where the rent is reserved quarterly, it does not dispense with the regular half-year's notice to quit required by law (*a*). There is no distinction in reason between houses and lands, as to the time of giving notice to quit; it is necessary that both should be governed by one rule: there may be cases where the hardship would be felt in determining that the rule did not extend to houses as well as lands; as in the case of a lodging-house in London being let to a tenant at Lady-day to hold from year to year; if the landlord should give notice to quit at Michaelmas, he would by that means deprive the lessee of the most beneficial part of the term, since it is notorious that the spring is by far the most profitable season of the year for those who let lodgings (*b*). The necessity for a proper and regular notice to quit is so strictly adhered to, that even where the landlord has accepted and assented to an insufficient notice, the tenancy is not determined: thus where a tenant who held under a demise from the 26th day of March, for one year then next ensuing, and fully to be complete and ended, and so from year to year, for so long as the landlord and tenant should respectively please, after having held more than one year, gave a parol notice to the landlord less than six months before the 25th day of March, that he would quit on that day, and the landlord accepted and assented to the notice; it was held, on demurrer in replevin, that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing, or by operation of law, within the meaning of the Statute of Frauds (*c*). So where the tenant gave a written notice to quit at Midsummer, and afterwards discovered that his tenancy expired at Christmas, and accordingly gave a fresh notice for that period, it was held that the tenancy was not determined by the first notice (*d*). A notice to quit at old Michaelmas, where the holding is from new Michaelmas, is bad, though given half a year before new Michael-

(*z*) *Right* d. *Flower* v. *Darby*, 1 Term Rep. 159; and see *Doe* d. *Puddicombe* v. *Harris*, 1 Term Rep. 161, n.; *Gulliver* d. *Tasker* v. *Burr*, 1 W. Black. 596. The question when the tenancy commenced often depends on circumstances, which are treated of ante, Chap. V., Sect. 1, p. 178.

(*a*) *Spirley* v. *Newman*, 1 Esp. 266. Whereever a *six months'* notice is mentioned, as is sometimes the case, it means *half a year*, which will expire at the end of the year of tenancy, and not merely the space of six months at any time of the year.

(*b*) In some cases it seems that by a special custom, as well as by special agreement, a different notice may be good or necessary, as three or twelve months; *Doe* d. *Henderson* v. *Charnock*, Peake, 4. It is said that, by the custom of London, where a tenant rents premises at a yearly rent under 40*s*., he is only entitled to a three months' notice to quit; but if his rent exceed that amount, he must have a half year's notice; *Tiler* v. *Seed*, 1 Skin. 649.

(*c*) *Johnstone* v. *Huddlestone*, 4 Barn. & Cres. 922; 7 Dow. & Ryl. 411; and see *Doe* d. *Huddleston* v. *Johnstone*, M'Clel. & You. 141; and *Bessell* v. *Landsberg*, 7 Queen's B. Rep. 638.

(*d*) *Doe* d. *Murrell* v. *Milward*, 3 Mees. & Wels. 328; 1 Horn. & Hurl. 79.

mas (*e*). Although a notice to quit at Michaelmas is primâ facie a notice for new Michaelmas, yet if the holding be from old Michaelmas, it will be a good notice for that time (*f*). Where a holding was from *Michaelmas*, by deed, for twenty-one years, with a covenant for the tenant to determine the demise at the end of the first fourteen, on giving six months' notice; a notice that he should quit on the *24th of June agreeably to the covenants of the lease*, is not good for the following Michaelmas (*g*). A notice on the 29th of September to quit on Lady-day is a good half-year's notice (*h*): so a notice "to quit on or about the end of six calendar months from the 29th of September," was held to be good to determine a holding, commencing on the 25th of March, the word "calendar" being considered surplusage (*i*): and where a notice was given on the 27th of September to quit "at the expiration of the term for which you hold the same," Holroyd, J., permitted evidence to be given of a general custom of the country to let from Lady-day to Lady-day (*k*). A notice to quit "at the expiration of the present year's tenancy" is sufficient, though it does not appear on the face of it to be a six months' notice (*l*). Where there was a taking for a year and six months certain, and the tenant continued in possession after that time; it was held that a notice to quit must be given, expiring at the time of year of the original entry (*m*). But where a person held under a lease for fourteen years and a half, at the end of which time he continued in occupation as yearly tenant to a different landlord, it was held that the notice to quit must be given, expiring at the time of year of the expiration of the lease (*n*). A person held premises under an agreement, which was not binding, for a term of five years and a half from Michaelmas, 1823; before the expiration of that time, negociations for a further lease for seven, fourteen or twenty-one years, at an increased rent, in consideration of the landlord making some improvements, were entered into; no lease was executed, but the tenant continued in occupation and paid the increased rent from Michaelmas, 1828, till 1835: it was held that a notice to quit at Michaelmas was good (*o*). By an agreement of the 19th April, certain premises were let at the yearly rent of 42*l.*, payable quarterly;

(*e*) *Doe* d. *Spicer* v. *Lea*, 11 East, 312; and see *Smith* v. *Walton*, 8 Bing. 235; 1 Moore & Scott, 380.

(*f*) *Furley* d. *Mayor, &c. of Canterbury* v. *Wood*, 1 Esp. 198; and see *Doe* d. *Hinde* v. *Vince*, 2 Camp. 256; *Doe* v. *Brooke*, 2 Camp. 257, n.; and *Doe* d. *Willis* v. *Perrin*, 9 Car. & Pay. 467.

(*g*) *Cadby* v. *Martinez*, 11 Ad. & El. 720; 3 Per. & Dav. 386.

(*h*) *Doe* d. *Harrop* v. *Green*, 4 Esp. 198; *S. P. Roe* d. *Durant* v. *Doe*, 6 Bing. 574; 4 Moore & Pay. 391. In one case, even where the notice was given on the 30th of September, being the day after Michaelmas day, to quit at Lady-day following, Heath, J., held that the notice was sufficient; probably on the principle of its being reasonable notice; and what is reasonable is matter of circumstance; Esp. N. P. 460.

(*i*) *Howard* v. *Wemsley*, 6 Esp. 53; Adam's Eject. 101, 4th ed.

(*k*) *Doe* d. *Milnes* v. *Lamb*, Adam's Eject. 272, 4th ed.

(*l*) *Doe* d. *Gorst* v. *Timothy*, 2 Car. & Kir. 351.

(*m*) *Doe* d. *Robinson* v. *Dobell*, 1 Queen's B. Rep. 806; 1 Gale & Dav. 218.

(*n*) *Doe* d. *Buddle* v. *Lines*, 11 Queen's B. Rep. 402.

(*o*) *Berry* v. *Lindley*, 3 Man. & Gr. 498; 4 Scott, N. R. 61.

the first payment, 7*l.* 13*s.* 6*d.*, to be made on the 24th of June next, being the proportion of rent due up to that time. The lessee was to enjoy at the said rent until one of the parties should give to the other six months' notice to quit; and at the expiration of "*any*" such notice, to leave the premises in as good condition, &c. This was held to be a *half-yearly tenancy*, commencing from the 24th of June; and that a notice to quit given at Midsummer was valid (*p*).

When the time of Entry is doubtful.

Where the period of entry is doubtful, it is always safest to give a general notice to quit at the end of the year of tenancy which shall expire after one half-year from the time of service of the notice (*q*). In one case, where a party took possession of premises on the 1st of August, and at the Michaelmas following paid the half-quarter's rent, and continued afterwards to pay quarterly on the usual feast days; it was held by Parke, J., that in such case a notice to quit at Michaelmas was sufficient, and that although the landlord had at first given a notice, expiring with the half-quarter, it was not necessarily presumable from thence that the tenancy was from year to year, commencing with the half-quarter (*r*).

(*p*) *Doe* d. *King* v. *Grafton*, 19 Law Times, 108; see also 18 Law Times, 347.

(*q*) See the form, post, Book IV., Chap. V., Sect. 1, (c).

(*r*) *Savage* v. *Stapleton*, 3 Car. & Pay. 275. It is said to have been ruled at Nisi Prius, that where notice to quit has been served on the tenant, and the landlord, being ignorant of the time when the tenancy commenced, has given the notice to quit at the wrong time, that the tenant, when the notice is served, ought to inform the landlord of his error and mention the true time; Esp. N. P. 461. The rule, however, is otherwise; for where a notice to quit at Midsummer was given to a tenant holding from Michaelmas, it was held, in the Court of King's Bench, that he might insist on the insufficiency of the notice on the trial of an ejectment, though he did not make any objection at the time that it was served; but said, "I pay rent enough already, and it is hard to use me thus;" for the expression is merely that of an angry man; *Oakapple* d. *Green* v. *Copous*, 4 Term Rep. 361. Generally it may be stated, that if the notice to quit be served personally on the tenant in possession, and he make no objection to it, it is primâ facie evidence to be left to the jury, that the tenancy commenced at the season of the year when the notice to quit expires: *Doe* d. *Clarges* v. *Forster*, 13 East, 405; *S. P. Thomas* d. *Jones* v. *Thomas*, 2 Camp. 647. Although he may thus insist on the insufficiency of the notice at the trial of the ejectment, yet if he prove another commencement of his term than that which it mentions, he may defeat the plaintiff of his right to recover; and if he dispute the time when his tenancy commenced, and the notice to quit does not correspond with it, it is incumbent on him to show the true commencement of his tenancy; for it is sufficient for the plaintiff to prove his having given half a year's notice to quit, and that the ejectment has been brought after that time was expired; *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 7. So where a tenant, on being applied to respecting the commencement of his holding, informed the party that it began on a certain day, and notice to quit on that day was given at a subsequent time; it was held that the tenant was bound by the information which he so gave, and could not be permitted to show that in fact it began at another period. In such case it makes no difference whether the information so given proceeded from mistake or design, as it has equally the mischief of leading the landlord into error, and inducing him to proceed to recover the possession of the term, the commencement of which he had taken from the defendant's own information; *Doe* d. *Eyre* v. *Lambley*, 2 Esp. 635. With this exception, a notice to quit is not primâ facie evidence of the period of the year when the tenancy commenced; *Doe* d. *Ash* v. *Calvert*, 2 Camp. 388. But where a notice was given on the 22nd of March by a landlord to his tenant, to quit at the expiration of the current year; and a declaration in ejectment, laying the demise on the 1st of November, was on the 16th of January following served upon the tenant, who at the time made no objection to the notice to quit, but said he should go out as soon as he could suit himself; this was held to be primâ facie evidence that the tenancy commenced at Michaelmas, and was determined before the day of the demise; *Doe* d. *Baker* v. *Wombwell*, 2 Camp. 559. The custom of the country is also admissible evidence to explain the nature of the holding, as whether a general holding from Michaelmas means *old* or *new* Michaelmas.

Certainty as to Period of Expiration.

A notice to quit "on Lady-day" is good for a holding either from Lady-day old or Lady-day new style (*s*): so it has been held that if a tenant from year to year hold from *old Michaelmas*, a notice to quit "*at Michaelmas*" generally is good (*t*): and where there was a written agreement to demise from the following "*Lady-day*," a notice to quit "on the 6th of *April*" was held good, parol evidence having been adduced to show that by "Lady-day" the parties meant "*old Lady-day*" (*u*). A notice dated on the 27th, and served on the 28th *September*, requiring a tenant to quit "at *Lady-day* next, or at the end of his current year," was held in one case to mean a six months' and not a two days' notice to quit (*x*): but this decision has been since questioned in a case where a notice was held bad which was served on the 21st of October, to quit on the 13th of May next, or upon such other day as the *current* year for which you now hold will expire," the holding being one from a day in November (*y*). A notice served on the 17th June, to quit "on the 11th October now next ensuing, or such other day and time as your said tenancy may expire on," is not a good notice for the Michaelmas in the following year (*z*). A notice delivered to a tenant at *Michaelmas*, 1795, to quit "at *Lady-day* which will be in the year 1795," was holden to be a good notice to quit at *Lady-day*, 1796; for the intention was clear, and 1795 was to be rejected as an impossible year (*a*). So where a yearly tenancy expired in February, and in October, 1833, a notice was given to quit "at the expiration of half a year from the delivery of this notice, or at such other time or times as your *present* year's holding of or in the said messuage, &c. shall expire after the expiration of half a year from the delivery of this notice, it was held a good notice for February, 1835 (*b*). A notice to quit on one of two days is good, if served six months before the day on which the tenancy commenced (*c*): thus where a notice was to "quit possession of the rooms or apartments which you now hold of me on the 25th of *March*, or on the 8th day of *April* next ensuing;" Lord Kenyon held, that it was a sufficient notice to the tenant to quit, if he received it six months before the end of the tenancy; the notice was clearly intended to meet a holding commencing either at *old* or *new* Lady-day; and at whichsoever day it actually commenced, the notice was calculated to meet it, being given

(*s*) *Denn* d. *Willan* v. *Walker*, Peake, Ad. Ca. 194.

(*t*) *Doe* d. *Hinde* v. *Vince*, 2 Camp. 256; *S. P. Doe* v. *Brookes*, 2 Camp. 257, n.; but see *Doe* d. *Spicer* v. *Lea*, 11 East, 312; *Smith* v. *Walton*, 8 Bing. 235; 1 Moore & Scott, 380.

(*u*) *Denn* d. *Peters* v. *Hopkinson*, 3 Dowl. & Ryl. 507.

(*x*) *Doe* d. *Huntingtower* (*Lord*) v. *Cullifford*, 4 Dowl. & Ryl. 249; see also *Doe* d. *Egremont* (*Earl*) v. *Forwood*, 3 Queen's B. Rep. 627.

(*y*) *Doe* d. *Richmond* (*Mayor, &c.*) v. *Morphett*, 7 Queen's B. Rep. 577.

(*z*) *Mills* v. *Goff*, 14 Mees. & Wels. 72.

(*a*) *Doe* d. *Bedford* (*Duke*) v. *Kightley*, 7 Term Rep. 63; 1 Chit. 11 b.

(*b*) *Doe* d. *Williams* v. *Smith*, 5 Ad. & El. 350; 2 Har. & Wol. 176; 6 Nev. & Man. 829. See also *Doe* d. *Kindersley* v. *Hughes*, 7 Mees. & Wels. 139.

(*c*) *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5.

on *new* Michaelmas-day, and the demise laid after the 8th of *April*. Where a house and other premises were part of a considerable estate which the plaintiff had demised, and the defendant not having taken them of him, but of his tenant, the time at which the tenancy commenced was unknown to the plaintiff, who gave a notice to quit "at the end and expiration of the current year of your tenancy which shall expire next after the end of one half-year from the date hereof;" Lord Kenyon held this notice to be sufficient to entitle the plaintiff to recover possession, notwithstanding that no particular day was mentioned, and the plaintiff had a verdict (*d*). So a notice to a weekly tenant to quit at the end of his tenancy next after a week from the date of the notice is sufficient (*e*).

Where Three Months' Notice is sufficient by Agreement.

Where premises are let from year to year upon an agreement that either party may determine the tenancy by a quarter's notice, the notice must expire at the period of the year when the tenancy commenced (*f*): so where premises are taken under an agreement, by which the tenant "is always to quit at three months' notice," the notice must expire either on the same day of the year the tenancy commenced, or on one of the three other corresponding quarter-days (*g*). Where by an agreement in writing, dated 20th May, 1824, the defendant "agreed to let to the plaintiff two upper rooms, and part of a lower room as a workshop and smithy, and to find power for three lathes, &c.; and the plaintiff agreed to pay rent for the above, 61*l.* per year, to be paid quarterly in cash; and that three months' notice should be required from each party;" and took possession of the rooms on the same day, and the defendant found the power, after which, on the 20th of August, the defendant served the plaintiff with a written notice of that date to quit the rooms on the 20th of November following; and the plaintiff did not then object to the notice, but held over after the 20th November, from which day the defendant ceased to find the power; and on the 19th of January, 1825, the plaintiff and defendant settled their accounts up to the 20th of November preceding, when the plaintiff agreed to give up the keys of the room; but afterwards refused to do so, saying, "that the notice was bad;" to which the defendant replied, "then there would soon be another quarter's rent due;" in an action by the plaintiff for damages for the discontinuance of the power by the defendant, it was held that the agreement was a demise of a tenement, creating a tenancy which could not be determined but by a notice ending with the current year, except by custom; and that the plaintiff's agreeing to give up the key when he did, was no acquiescence in the notice served upon him (*h*).

(*d*) *Doe* d. *Phillips* v. *Butler*, 2 Esp. 589.
(*e*) *Doe* d. *Campbell* v. *Scott*, 6 Bing. 362; 4 Moore & Pay. 20.
(*f*) *Doe* d. *Pitcher* v. *Donovan*, 1 Taunt. 555; 2 Camp. 78.
(*g*) *Kemp* v. *Derrett*, 3 Camp. 510.
(*h*) *Brown* v. *Burtinshaw*, 7 Dowl. & Ryl. 603.

Where there are different Periods of Entry on the Premises.

Where house and land are let together to be entered upon at different times; and it does not appear from the terms of the demise, from what time the whole is to be taken as let together; the notice to quit must be given to quit at the period at which the tenant entered upon that part of the premises which forms the principal subject of demise; it is a question of fact for the jury, which is the principal, and which is the accessorial subject of demise, in order for the judge to decide whether the notice to quit the whole were given in time (*i*). Therefore, where a tenant held the land from the 2nd of February, and the house, &c. from the 1st of May, a notice on the 16th of February to quit at the end of his *present* year's holding is good for the following spring, it not being shown by the tenant that the land was not the principal subject of demise (*k*). Where there was an agreement of demise, dated in January, of a dwelling-house and other buildings, for the purpose of carrying on a manufacture, together with certain meadow, pasture and bleaching grounds, watercourses, &c., for a term of thirty-five years, to commence as to the meadow ground from the 25th day of December; as to the pasture from the 25th day of March; and as to the housing, mills and all the rest of the premises, from the 1st of May; reserving the first half-year's rent on the day of Pentecost, and the other half-year's rent at Martinmas; it was held, that the substantial subject of demise being the house and buildings for the purpose of the manufacture, which were to be entered on the 1st of May; that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of December, when the incoming tenant had liberty of entering on the meadow, which was merely auxiliary to the other and principal subject of demise; and consequently that a notice to quit served on the 28th of September (which would have been sufficient with reference even to the 25th of March, the day of entering on the pasture ground, the 29th of September being the corresponding half-yearly day of holding to the 25th of March), to quit *at the expiration of the current year of holding*, was sufficient (*l*). Where a tenant held a farm, as to the arable lands from *Candlemas*, and as to the buildings and pastures from *May-day*, and the rent was payable at *Michaelmas* and *Lady-day*, a notice to quit given six months before *May-day*, but not six months before *Candlemas*, was held insufficient (*m*): but where there was an agreement by a tenant of a farm "to enter on the tillage land at *Candlemas*, and on the house and all other the premises at *Lady-day* following, and that when he left the farm he should quit the same according to

(*i*) *Doe* d. *Heapy* v. *Howard*, 11 East, 498.

(*k*) *Doe* d. *Kindersley* v. *Hughes*, 7 Mees. & Wels. 139. If a good notice to quit is given for the first period, it is doubtful whether the landlord can recover in ejectment the part held from the later period on a demise laid between. *Doe* d. *Davenport* v. *Rhodes*, 11 Mees. & Wels. 600; 1 Dow. & Low. 292.

(*l*) *Doe* d. *Bradford* (*Lord*) v. *Watkins*, 7 East, 551; 3 Smith, 517.

(*m*) *Doe* d. *Grey de Wilton* (*Lord*) v. ——, 2 East, 384, n.

Where the Taking is for a less Period than a Year.

Where there Possession under a void Demise.

a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day and quit at Candlemas, though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can only put an end to the tenancy at Candlemas (*x*).

Where there has been a Change of Circumstances.

No new tenancy is created by a mere agreement for an increase of rent in the middle of the year of a tenancy, and a notice to quit after the receipt of the increased rent must expire at the time when the tenant originally entered (*y*): and where a tenant under a lease continues to hold after the expiration of it, as a tenant at will, and assigns to another, the tenancy of the assignee shall be held to commence at the day on which the original tenancy commenced under the lease, and notice to quit on that day only is good, notwithstanding the assignee came in on a different day (*z*).

(d) *Waiver.*

By Acceptance of Rent.

If a landlord receive or distrain for rent, due after the expiration of a notice to quit, it is a waiver of that notice; so the receipt by the lessor's agent of rent due at Michaelmas is primâ facie a waiver of a notice to quit at Midsummer (*a*); but where rent is usually paid at a banker's, if the banker, without any special authority, receive rent accruing after the expiration of a notice to quit, the notice is not thereby waived: so if the money be not received *as rent*, but as a satisfaction for the injury done by the tenant in continuing on the premises as a trespasser, it will not have such an operation (*b*). Although a notice to quit is in general waived by the receipt of rent due subsequently to such notice; yet the mere acceptance of rent by a landlord subsequently to the time when the tenant ought to have quitted according to the notice given him for that purpose, is not of itself a waiver on the part of the landlord of such notice, but matter of evidence only to be left to the jury, under the circumstances of the case; for the landlord might possibly have accepted the rent under terms, or made an express declaration that he did not mean to waive the notice; and that notwithstanding his acceptance or receipt of the rent, he should still insist upon the possession; or fraud or contrivance might have been practised on the part of the tenant in paying it; the question, therefore, in such cases is, quo animo the rent was received, and what the real intention of both parties was (*c*). So a demand of rent accruing subsequently to the expiration of a notice to

(*x*) *Doe* d. *Rigge* v. *Bell*, 5 Term Rep. 471.

(*y*) *Doe* d. *Bedford* v. *Kendrick*, Ad. Eject. 107, 4th edit.; and see *Doe* d. *Holcombe* v. *Johnson*, 6 Esp. 10. See ante, 185.

(*z*) *Doe* d. *Castleton* v. *Samuel*, 5 Esp. 173. But see the cases in notes (*m*), (*n*) and (*o*), ante, p. 293.

(*a*) *Doe* d. *Ash* v. *Calvert*, 2 Camp. 387.

(*b*) *Goodright* d. *Charter* v. *Cordwent*, 6 Term Rep. 220; *Zouch* d. *Ward* v. *Willingale*, 1 H. Black. 311.

(*c*) *Doe* d. *Cheney* v. *Batten*, Cowp. 243.

quit, is not necessarily a waiver of the notice, but is a question of intention which ought to be left to the jury (*d*).

By giving a Second Notice to quit.

Generally speaking, giving a second notice to quit amounts to a waiver of a notice previously given: thus a second notice to a defendant to quit at Michaelmas, 1811, has been held to be a waiver as to him of a former notice given to the original lessee, from whom he claimed by assignment, to quit at Michaelmas, 1810 (*e*). Where a landlord gave a notice to quit different parts of a farm at different times, which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice was expired, the landlord, apprehending that the witness by whom he was to prove the notice would die, gave another notice to quit at the same respective times in the following year, but continued to proceed with his ejectment, it was held that the second notice was not a waiver of the first (*f*). If, after the expiration of a notice to quit, the landlord give the tenant a fresh notice, that unless he quit in fourteen days, he will be required to pay double value, the second notice is no waiver of the first (*g*): so if a landlord give notice to his tenant to quit at the expiration of the lease, and the tenant hold over, and a second notice be delivered to the tenant, after the expiration of such notice, "to quit on a subsequent day or to pay double rent;" it is no waiver of the first notice (*h*).

By other Acts.

If the landlord has given a notice to quit, and the tenant holds over, the landlord cannot waive his notice and distrain for rent subsequently accruing (*i*). Where a three months' notice was given, the rent being reserved quarterly, and the landlord expressed neither his assent or dissent to admit it, and took the rent up to the time when his tenant quitted; it was construed to be such an acquiescence as amounted to presumptive evidence that the parties intended to dispense with the notice, and was therefore deemed a waiver of it (*k*). If at the end of the year (where there has been a tenancy from year to year) the landlord accept another person as his tenant in the room of the former tenant, without any surrender in writing, such acceptance shall be a dispensation of the notice to quit (*l*). But where there was a notice to quit certain lands upon the 1st May, 1848, signed by a receiver in the Court of Chancery; it was held, that the notice was not waived by a written statement by the receiver made in January, 1849, in the cause to the Master, in which statement the person served with the notice was described as the tenant of the lands, and indebted as such for rent which accrued due on the 1st November,

(*d*) *Blyth* v. *Dennett*, 13 C. B. 178.
(*e*) *Doe* d. *Brierly* v. *Palmer*, 16 East, 53.
(*f*) *Doe* d. *Williams* v. *Humphrey*, 2 East, 237.
(*g*) *Doe* d. *Digby* v. *Steel*, 3 Camp. 117.
(*h*) *Messenger* v. *Armstrong*, 1 Term Rep. 53.
(*i*) *Jenner* v. *Clegg*, 1 Mood. & Rob. 213; *Alford* v. *Vickery*, 1 Car. & Mar. 280; *Williams* v. *Stiven*, 15 Law J. (N. S.) Q. B. 321; 10 Jur. 801. See Book II., Chap. II., Sect. 1.
(*k*) *Shirley* v. *Newman*, 1 Esp. 266.
(*l*) *Sparrow* v. *Hawkes*, 2 Esp. 505.

1848 (*m*). Where a landlord of premises about to sell them, gave his tenant notice to quit on the 11th October, 1806, but promised not to turn him out unless they were sold; and not being sold till February, 1807, the tenant refused on demand to deliver up possession; on ejectment brought, it was held that the promise (which was performed) was no waiver of the notice, as it did not operate as a license to be on the premises, otherwise than subject to the landlord's right of acting on such notice, if necessary; and therefore, that the tenant not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit (*n*).

SECT. 7.—*Disclaimer.*

What amounts to a Disclaimer.

Wherever the tenant disclaims to hold under the title of his landlord —as where he attorns to another person—we have seen that no notice to quit is necessary, on the ground that such an act amounts in fact to a forfeiture of the term (*o*). A denial by parol by a tenant for a term of years of his landlord's title, is not a forfeiture of his term (*p*). The mere payment by the tenant to a third person of the rent reserved by his lease does not amount to a disclaimer of the title of the landlord, so as to operate as a forfeiture of the lease (*q*). A refusal by the tenant to pay rent, on the ground that another person had ordered him not to pay any, is evidence of a disclaimer of the tenancy (*r*). A refusal to pay rent to a devisee in a will which was contested is not a disavowal of the title of such devisee; but where the defendant held premises under a tenant for life, on whose death possession was claimed and rent demanded by the heir at law of the devisor; whereupon the defendant wrote to the attorney of the heir at law, stating that he held as tenant to *J. S.* (the husband of the tenant for life) in right of his wife; that he had never considered the claimant as the landlord of the house; and that he should be ready to pay the arrears to any person who should be proved to be heir at law; but that he must decline taking upon himself to decide upon the claim made on him without more satisfactory proof in a legal manner; it was held that this letter amounted to a disclaimer of the title of the heir at law, and that he might maintain ejectment against the tenant without giving him a previous notice to quit (*s*). A remainder-man, after the death of tenant for life who had made a voidable lease, applied for rent to the tenant, who at first did not refuse to pay, but after some negociation did so, saying that he understood that another

(*m*) *Parsons* v. *Purcell*, 12 Ir. Law Rep. 90.

(*n*) *Whiteacre* d. *Boult* v. *Symonds*, 10 East, 13.

(*o*) Ante, p. 285.

(*p*) *Doe* d. *Graves* v. *Wells*, 10 Ad. & El. 427; 2 Per. & Dav. 396.

(*q*) *Doe* d. *Dillon* v. *Parker*, Gow. 180; *Doe* d. *Williams* v. *Pasquali*, Peake, 196.

(*r*) *Doe* d. *Whitehead* v. *Pittman*, 2 Nev. & Man. 673.

(*s*) *Doe* d. *Calvert* v. *Frowd*, 4 Bing. 557; 1 Moore & Pay. 480.

person was entitled to the estate; held that the remainder-man might maintain ejectment without notice to quit or demand of possession, there being a disclaimer of the remainder-man's title (*t*): so where a tenant, upon being applied to for rent, said that his connection as tenant with the party applying had ceased many years, it was held to be evidence of an antecedent disclaimer (*u*). A tenant who held under an agreement by *H.* for a lease for seven years, or for a lease for lives, on being applied to for possession by the attorney of the assignee of *H.* under an impression that the seven years were expired, said, "I hold on a lease for lives, and as long as they live I will not give up possession; you know I have an agreement:" the attorney then demanded a quarter's rent, which was due, but the tenant refused it, saying, "I hold under *H.* and was directed by him to pay the superior landlord, and I will do so; how do I know he may not come and make a demand on me:" held, that this was not a disclaimer of the title of the assignee (*x*). Lands were devised to trustees for a term of years, in trust, among other things, to permit the devisor's widow to take the rents during her life; a tenant from year to year continued in possession for three years after the death of the devisor, and paid rent to the widow; he then received from her a notice to quit, when he said he did not think she would turn him out of possession, as she had promised he should continue tenant from year to year; held, some evidence of disclaimer of the title of the trustees (*y*). Where several persons joined in letting land, and it was agreed that the rent should be paid to an agent for them, and afterwards one of the lessors, to whom alone in fact the land belonged, demanded rent of the tenant, who said "you are not my landlord;" it was left to the jury to say whether he intended that the relation of landlord and tenant did not exist between them, or merely that the rent was to be paid to the agent (*z*). The writ in ejectment may be dated on the day on which the disclaimer is made (*a*). An admission of a disclaimer made after the day of the demise in ejectment, but not amounting to an admission that such disclaimer took place before the day when the admission was made, was held not to have the effect of determining a tenancy (*b*). In ejectment against two persons as landlord and tenant, an admission by the tenant, after action brought, of an attornment by him to the landlord having taken place before the day of the demise, was held sufficient evidence of a disclaimer as against both the defendants (*c*).

(*t*) *Doe* d. *Phillips* v. *Rollings*, 4 Com. B. Rep. 188.

(*u*) *Doe* d. *Grubb* v. *Grubb*, 10 Barn. & Cres. 816; 5 Man. & Ryl. 666.

(*x*) *Doe* d. *Williams* v. *Cooper*, 1 Man. & Gran. 135; 1 Scott, N. R. 36.

(*y*) *Doe* d. *Davies* v. *Evans*, 9 Mees. & Wels. 48.

(*z*) *Doe* d. *Bennett* v. *Long*, 9 Car. & Pay. 773.

(*a*) *Doe* d. *Graves* v. *Wells*, 10 Ad. & El. 427; 2 Per. & Dav. 396; *Doe* d. *Bennett* v. *Long*, 9 Car. & Pay. 773.

(*b*) *Doe* d. *Lewis* v. *Cawdor*, 1 Cromp. M. & Ros. 398; 4 Tyr. 852.

(*c*) *Doe* d. *Mee* v. *Litherland*, 4 Ad. & El. 784; 6 Nev. & Man. 313.

Waiver.

A distress put in by the landlord for rent is a waiver of a disclaimer by the tenant (*d*).

SECT. 8.—*Death.*

In what Cases a Tenancy is determined by Death.

In some few cases also, a tenancy from year to year may be determined by the death of the parties: as where the lessor was merely a tenant for his own life, or pur autre vie; for in this case, as he could not grant any estate to continue longer than the term of the life for which he himself held the estate, a tenancy from year to year created by him must necessarily be determined by the death of the person for whose life the lessor held the property (*e*). This applies to tenancies created by the incumbents of livings, who are merely tenants for life of the glebe land; and it has accordingly been held, that a tenancy from year to year of glebe land is determined by the death of the incumbent (*f*). If one joint-tenant make a lease for years, "if he and his companion live so long," and afterwards surrender his moiety, and take back another estate; the lease determines by the death of either of them: for it has no continuance longer than the jointure continues; and that is severed by the surrender, and the new estate being taken (*g*).

Joint-tenants.

(*d*) *Doe* d. *David* v. *Williams*, 7 Car. & Pay. 322.

(*e*) *Ludford* v. *Barber*, 1 Term Rep. 86.

(*f*) *Doe* d. *Kirby* v. *Carter*, Ryan & Moo. 237.

(*g*) *Daniel* v. *Hill*, Cro. Jac. 377.

CHAPTER VIII.

RENEWAL OF LEASES.

Construction of Covenants for the Renewal of Leases.

Some nice points occur in the books concerning the construction of covenants for renewal of leases, the question in general being whether the renewed lease is to contain a similar covenant for renewal, so giving a right of renewal for ever (*a*). The leaning of the Courts, however, is against perpetual renewals (*b*); and therefore, in order to establish this construction the intention must be unequivocally expressed, and a proviso in general terms, that the lease to be granted shall contain the same covenants and agreements as the lease containing the covenant, has been repeatedly held not to extend to the covenant for renewal (*c*). A covenant to grant such further lease "as should be desired by the lessee," under the same rents and covenants; and a covenant to execute one or more leases under the same rents and covenants, "and so to continue the renewing of such lease or leases" to the lessee and his assigns, have been held sufficiently to show the intention of the parties to renew perpetually (*d*). In one case it was held that a lessor and his ancestors had, by their own acts of successive renewals, construed a covenant in a lease for lives to be for a perpetual renewal, and that he was therefore bound by it (*e*). But in a subsequent case, this method of construing the covenant by the equivocal acts of the parties was repudiated (*f*). A covenant in a lease of land for ninety-eight years, that the lessor will from time to time renew the lease, and perfect such other assurances as the lessee should reasonably require for strengthening, confirming and sure-making the demised premises, at such rents, and under such covenants and conditions, as in the lease were contained, is not a covenant for perpetual renewal (*g*). Where one, in consideration of 5*l.* 8*s.* in nature of a fine, and of a yearly rent of 6*s.* 9*d.* demised certain ground, with the buildings, &c., for twenty-one years, with a proviso for distress, if the rent were in arrear for fourteen days; and the lessor covenanted at the end of eighteen years of the term, or before, on request of the lessee, to grant a new lease of

(*a*) Covenants for perpetual renewal of leases are considered as real agreements, and go with the land, and therefore will affect even the legal interest of those who take the estate with notice of these leases and covenants; *Shelburne* (*Earl*) v. *Biddulph*, 6 Bro. P. C. 363.

(*b*) *Baynham* v. *Guy's Hospital*, 3 Ves. 298.

(*c*) 4 Jarm. Prec. 394, 3rd edit.; *Tritton* v. *Foote*, 2 Bro. Cha. Ca. 636; 2 Cox, 174.

(*d*) *Bridges* v. *Hitchcock*, 1 Bro. Par. Ca. 522; *Furnival* v. *Crewe*, 3 Atk. 83.

(*e*) *Cooke* v. *Booth*, Cowp. 819.

(*f*) In *Baynham* v. *Guy's Hospital*, 3 Ves. 298. See also *Eaton* v. *Lyon*, Ibid. 694; and *Iggulden* v. *May*, 9 Ves. 331; 7 East, 237; 3 Smith, 269; 2 New Rep. 449.

(*g*) *Browne* v. *Tighe* (in error), 2 Clark & Fin. 396.

the premises "for the like fine, for the like term of twenty-one years, at the like yearly rent, with all covenants, grants and articles, as in *that* indenture were contained;" it was held, that this covenant was satisfied by the tender of a new lease for twenty-one years, containing all the former covenants except the covenant for future renewal (*h*). An agreement in a lease for lives, that upon the renewing or inserting of any life or lives, a certain sum shall be paid by the lessee, his heirs and assigns, to the lessor, his heirs and assigns, does not amount to a covenant for perpetual renewal (*i*). Where a lessor covenanted to renew the lease at the request of the lessee within the term; and the lessee did not request, but his executors did; the Lord Chancellor (Lord Macclesfield) ordered the lessor to renew the demise of the premises for twenty-one years, that being the usual term, but said that though the new lease was to be made on the same covenants, yet that that did not take in a covenant for renewing (*k*).

What amounts to a Breach of a Covenant to renew.

If a lease for ninety-nine years, determinable on three lives, be conveyed in trust for *A.* for life, and *A.* covenant to use his utmost endeavours, as often as any of the persons on whose lives the premises are held shall die, to renew the same by purchasing of the lord of the fee a new life in the room of such as shall fail, it is no breach of the covenant, if upon one of the lives failing he procure a renewal upon his own life (*l*). A sum falling short of three years' annual value of premises, calculated on the rack rent, is not an unreasonable fine for the renewal of a lease by the Duchy of Cornwall; and therefore the lessee having covenanted in an under-lease to do his utmost endeavours to procure a renewal of the letters-patent, on either of three cestui que vies dying, commits a breach of his covenant by not paying such a fine demanded for a renewal (*m*). Where a lessor covenants that if a lessee surrender at any time during the term, he will grant him a new lease, and then levies a fine of the premises; this is a breach of the covenant, and in an action of debt on bond for the performance of covenants, the lessee need not show that he offered to surrender (*n*). A covenant in a corporation lease to renew upon the falling in "of one life for ever," cannot be extended to the case where two are suffered to fall in, although a compensation be offered (*o*).

(*h*) *Iggulden* v. *May*, 7 East, 237; 3 Smith, 269; 2 New Rep. 449; 9 Ves. 331.

(*i*) *Smyth* v. *Nangle* (in error), 7 Clark & Fin. 405; 1 West. 184.

(*k*) *Hide* v. *Skinner*, 2 P. Wms. 197. Lord Hardwicke, in a subsequent case, said this decision could not be considered as an authority upon the subject, being rather like an award and a compromise than a decree. 3 Atk. 448.

(*l*) *Scudamore* v. *Stratton*, 1 Bos. & Pul. 455.

(*m*) *Simpson* v. *Clayton*, 4 Bing. N. C. 758; 6 Scott, 469; 1 Arn. 299.

(*n*) *Buckler* v. *Harvy*, Cro. Eliz. 450; *Mayne* v. *Scott*, Cro. Eliz. 479.

(*o*) 3 Bro. Cha. Ca. 529. Incidentally to the subject with respect to the prices paid on the renewal of leases, it may be observed, that in a case where *A.*, being possessed of premises held under *B.* by lease, renewable from time to time on payment of certain fines and fees, demised them for a term to *C.*, who covenanted "that he would from time to time, and at all times during the term, pay to *A.* or *B.* such part of the fines and fees which, on every renewal by *A.* of the lease under which he held the premises

What Acts will induce a Forfeiture of the Right to Renewal.

Where it was covenanted that the lessor would renew whenever any life or lives dropped, provided that if the lessee, his executors or administrators, upon or after the death of any of the life or lives, shall refuse or neglect to renew the said lease, or make application therein, or tender such new lease, and pay or tender a certain fine, then the indenture should be void; it was held, that by such neglect the lessee forfeits his right of renewal, and might be ejected for not applying when the first life dropped (*p*). Where *A.* and *B.* covenanted in a lease for sixty-one years, that at any time within one year after the expiration of twenty years of the said term of sixty-one years, upon the request of the lessee and his paying 6*l.* to the lessors, they would execute another lease of the premises unto the lessee for and during the further term of twenty years, to commence from and after the expiration of the said term of sixty-one years, &c., and so in like manner at the end and expiration of every twenty years during the said term of sixty-one years, for the like consideration and upon the like request, would execute another lease for the further term of twenty years, &c., to commence at and from the expiration of the term then last before granted, &c.; it was held, that under this covenant, the lessee could not claim a further term at the end of the last term of twenty years in the lease, where he had omitted to claim a further term at the end of the first and second twenty years in the lease (*q*). Where there was a lease for twenty-one years at 1*l.* rent, with a covenant to the tenant to renew from twenty-one years to twenty-one years, to make up ninety-nine years; and at the expiration of the first term an arrear of rent being due, and no application being made for a renewal, the lessor brought an ejectment and obtained judgment and possession; on a bill filed in Chancery, a renewal was decreed, on payment of the rent in arrear and interest; the delay being accounted for, and there being no neglect on the part of the lessee, or prejudice to the lessor (*r*). Equity will not relieve a lessee for the consequences of his laches in not applying for a renewal within the prescribed period; and ignorance of the death of a cestui que vie is not an excuse for neglect to renew (*s*).

Renewal in the Case of Minors, &c.

By statute, in cases where guardians of minors, committees of lunatics, married women and infants are concerned, and a renewal of

demised, should be paid by him in respect of the premises demised to *C.*;" and *A.* afterwards renewed his lease under *B.* for a term of five years exceeding the term demised to *C.*; it was held, that *C.* was not liable on this covenant to pay the whole of the fines and fees incurred by *A.* on the renewal of his lease to the above extent, but only a part thereof, commensurate with the interest which *C.* had acquired in the premises; *Charlton* v. *Driver*, 2 Brod. & Bing. 345; 5 Moore, 59.

(*p*) *Baynham* v. *Guy's Hospital*, 3 Ves. jun. 295. See also *Eaton* v. *Lyon*, Ibid. 690.

(*q*) *Rubery* v. *Jervoise*, 1 Term Rep. 229.

(*r*) *Rawston* v. *Bentley*, 4 Bro. Parl. Cas. 415; and see *Statham* v. *Liverpool Docks Trustees*, 3 You. & Jerv. 565.

(*s*) 4 Jarm. Prec. 397, 398, 3rd edit. See ante, p. 4, note (*y*), as to compelling the production of a cestui que vie.

leases is required, existing leases may be surrendered and new leases granted by direction of the Courts of Equity (*t*).

Renewal where there are Under-leases.

By the statute 4 Geo. II. c. 28, s. 6, which recites, "that whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under-tenants; and whereas many of those leases cannot by law be renewed without a surrender of all the under-leases derived out of the same, so that it is in the power of any such under-tenants to prevent or delay the renewal of the principal lease by refusing to surrender their under-leases, notwithstanding they have covenanted so to do, to the great prejudice of their immediate landlords the first lessees; for preventing such inconveniences, and for making the renewal of leases more easy for the future," it is enacted, "that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her and their executors and administrators, shall be entitled to the rents, covenants and duties, and have like remedy for recovery thereof; and the under-lessees shall hold and enjoy the messuages, lands and tenements, in the respective under-leases comprised, as if the original leases, out of which the respective under-leases are derived, had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy by distress or entry in and upon the messuages, &c. for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such new principal lease." Where premises were demised and underlet, and the first tenant surrendered his lease, and took a new one with similar covenants, but the under-tenant continued in possession and never surrendered, it was doubted whether special covenants in the new lease, co-extensive with those in the old, could be enforced by the new landlord against the under-tenant as "duties reserved," by the second lease under the statute (*u*).

Tenant Right of Renewal.

It has long been an established practice to consider those who are in the possession of lands under leases for lives or years, particularly

(*t*) Stats. 11 Geo. IV. & 1 Will. IV. c. 65, ss. 12 to 20.

(*u*) *Doe* d. *Palk* v. *Marchetti*, 1 Barn. & Adol. 715. See also *Wootley* v. *Gregory*, 2 You. & Jerv. 536.

from the crown, colleges, &c., as having an interest beyond the subsisting term: and this interest is usually denominated "the tenant's right of renewal," which though not any certain or even contingent estate, there being no means of compelling a renewal, yet it is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept it in mortgages and settlements.

BOOK II.

RIGHTS AND LIABILITIES OF THE PARTIES.

CHAPTER I.

RENT.

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Sect. 1.—*Different kinds of Rent.*

General Scheme of the Chapter.

is chapter will be devoted to the purpose of explaining the nature rent. The different kinds of rent will be first considered, with the eral modes in which the reservation of it may be made—the time en it becomes due—and what amounts to a payment;—and then shall proceed to consider the doctrine of the apportionment, sus-sion and extinction of rents—and the extent of the tenant's liability.

Definition and Explanation of Rent.

The word Rent—in Latin redditus—is defined to be a certain profit ing yearly out of lands and tenements corporeal; and may be arded as of a twofold nature:—first, as something issuing out of land, as a compensation for the possession during the term; and, ondly, as an acknowledgment made by the tenant to the lord of fealty or tenure (*a*): and it will be seen presently that this distinc-n should be carefully kept in sight. Rent must always be a profit; et there is no occasion for it to be, as it usually is, a sum of money; or spurs, capons, horses, corn and other matters, may be, and occa-ionally are, rendered by way of rent: it may also consist in services nd manual operations; as to plough so many acres of ground, and e *like*; which services, in the eye of the law, are profits (*b*). This rofit must also be certain—or that which may be reduced to a cer-inty by either party: it must also issue yearly, though there is no casion for it to issue every successive year,—it may be reserved ery second, third or fourth year,—yet as it is to be produced out of

(*a*) *Bradby* on Distresses, 24; 2 Black. 41; Co. Litt. 142 a.

(*b*) *Doe* d. *Edney* v. *Benham* and *Doe* d. *Edney* v. *Billett*, 7 Queen's B. Rep. 976.

the profits of lands and tenements, as a recompense for being permitted to hold and enjoy them, it ought to be reserved yearly, because those profits annually arise and are annually renewed: it must issue out of the thing granted, and not be part of the land or thing itself, wherein it differs from an exception in the grant, which is always of part of the thing granted: it must necessarily issue out of lands and tenements corporeal merely; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain: though the lessee of tithes, advowsons or any incorporeal hereditaments, is liable to an action for the sum agreed upon in respect of his contract, but not in respect of it as rent eo nomine (*c*).

Description of Rent-service.

There are at common law three sorts of rents:—rent-service, rent-charge and rent-seck. Rent-service is so called because it has some corporeal service incident to it, as at the least fealty. The copyhold rents paid by the tenants of a manor to the lord, for their tenements holden by copy of the court-roll, having fealty incident to them, are in their very nature rent-service (*d*).

Description of Rent-charges.

A rent-charge is where the owner of the rent has no future interest or reversion in the land; as where a man by deed makes over to others his whole estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind, it shall be lawful to distrain for the same: in this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-charge, because in this manner the land is charged with a distress for the payment of it (*e*): a fee-farm rent is a rent-charge or rent-service, which is reserved on a grant in fee; the name is founded on the perpetuity of the rent or service, and not on the amount.

Rent-seck, Quit-rent, and Rack-Rent.

Rent-seck, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress; and differs from a rent-charge only in being reserved *without* a clause of distress. Rents of assize are the certain established rent of the freeholders and ancient copyholders of a manor, and which cannot be departed from: those of the freeholders are frequently called chief-rents, and both sorts are indifferently denominated quit-rents, because thereby the tenant goes quit and free of all other services (*f*). Payment of an unvaried

(*c*) Co. Litt. 47.

(*d*) *Laugher* v. *Humphrey*, Cro. Eliz. 524.

(*e*) *Bradbury* v. *Wright*, 2 Dougl. 628. This species of rent is extremely common in the town of Manchester; indeed it might almost be said that nearly the whole of the land in that town is held subject to the payment of one or more such charges, which are there called *chief-rents*. As they were originally introduced there—somewhat less than a century ago, at the time the town first began to make those rapid advances towards riches which it has subsequently attained—for the purpose of enabling persons to build who did not possess any capital for that purpose; and as land became more valuable, the same system was pursued, it follows that there are in many instances now three or four chief-rents charged upon the same land, and sometimes even more. It is difficult to conceive the confusion which has thus been introduced into the titles to property.

(*f*) 2 Black. Com. 41; Gilb. on Rents, 38; Co. Litt. 144, Harg. n. 5.

rent for a long series of years to the lord of a manor, is evidence only of a title to the rent, but not to the land in respect of which the rent is paid (*g*). Rack-rent is a rent of the full value of the tenement, or near it.

Fore-hand Rents or Fines.

Another species of rent occurs, the payment of which is generally stipulated for by a covenant in the lease; and this is sometimes called a fore-hand rent, and sometimes a fore-gift or income, but more commonly a fine: it is a premium given by the lessee at the time of taking his lease, and has been considered as an improved rent. In the case of renewal of a lease by an ecclesiastical corporation, if an accident, which has not happened from their fault or that of the tenant, delay the lease, yet if it be not completed till a new member comes in, he shall have his proportion of the fine (*h*).

Effect of the Statute as to kinds of Rent.

These are the general divisions of rent; and the difference between them (in respect of the remedy for recovering them) is now totally abolished by statute 4 Geo. II. c. 28, s. 5; as all persons may have the like remedy by distress for rents-seck, rents of assize, and chief-rents, that is, for such as had been paid for three years, within twenty years before the passing that act, or for such as have been since created, as in case of rents reserved upon lease (*i*). The statute for abolishing military tenures, 12 Car. II. c. 24, s. 5, provides that nothing therein contained shall be construed to take away any rents certain, or other service incident or belonging to tenure in common socage, or the fealty and distress incident thereunto; and that such relief shall be paid in respect of such rents as is paid in case of a death of a tenant in common socage.

SECT. 2.—*Reservation of Rent.*

(a) *How.*

Necessity of formal Terms of Reservation.

The formal terms usually employed in framing the reddendum in a lease are not essentially necessary; for any expressions declaratory of the intention of the parties that a rent shall be payable will be a sufficient reservation: but still the reservation of rent ought to be certain; for where a man demised, rendering rent "after the rate of" 18*l.* per annum, the reservation was held to be void, as it did not appear what rent he should pay in certain, or at what time (*k*): though it has been laid down, that if there be any thing in the reservation by which the amount of the rent may be ascertained, this will be as good as if the sum itself were clearly specified, upon the maxim that id certum est quod certum reddi potest (*l*). Besides the reservation of

(*g*) *Doe* d. *Whittick* v. *Johnson*, Gow, 173. The presumption is, that such rent is a quit-rent.

(*h*) *Irish Society* v. *Needham*, 1 Term Rep. 486; *Southall* v. *Leadbetter*, 3 Term Rep. 461; *Wynne* v. *Bampton*, 3 Atk. 473.

(*i*) 3 Black. Com. 43.

(*k*) *Parker* v. *Harris*, 1 Salk. 262; 4 Mod. 79.

(*l*) *Orby* v. *Mohun*, 2 Vern. 531, 542; 2 Freem. 291; 3 Bro. Parl. Cas. 248; Gilb. Eq. Rep. 45.

the rent, a special covenant for the payment of it is almost invariably inserted in the lease.

Rent may commence before Enjoyment.

Rent may be reserved to commence before the lessee is to enter upon the enjoyment of the land: thus where a man made a lease of Blackacre to commence in futuro, and of Whiteacre to begin in præsenti, rendering rent payable at Michaelmas before the commencement of the term in Blackacre; it was held to be a reservation immediately; for it was but one entire rent, and as such was payable according to the reservation (*m*). A subsequent agreement may by relation operate to make a reservation of rent from the beginning (*n*).

From what Rent must issue.

Properly speaking, a rent can be reserved out of no inheritance, but such as is manurable, as it is called, or upon which the lessor may enter to distrain, as upon lands and tenements, reversions and remainders: therefore a lease of the vesture or herbage of the land, reserving rent, is good, because the lessor may come upon the land to distrain the lessee's beasts feeding thereon; but a reservation of grass, herbage or other vesture of the land, would be bad, because they are part of the thing demised (*o*). There is this difference between a reservation, which is always of a thing not in being, but newly created or reserved out of the land or tenement demised; and an exception, which is ever a part of the thing granted, and of a thing in being (*p*).

Where Reservations are entire or several.

There is a difference between a rent reserved entire, upon a demise of several things in the same lease, and where the rent is not at first reserved entire, but upon the reservation is several, and apportioned to the several things demised: for instance, if a lease be made of several houses, rendering the annual rent of 5*l.* at the two usual feasts —viz. for one house 3*l.*, for another 10*s.*, and for the rest of the houses the residue of the said rent of 5*l.*—with a clause of re-entry into all the houses for non-payment of any parcel of the rent; this is but one reservation of one entire rent; because all the houses were leased, and the 5*l.* was reserved as one entire rent for them all, and the "viz." afterwards does not alter the nature of the reservation, but only declares the value of each house (*q*): but if the lease had been of three houses, rendering for one house 3*l.*, for another 20*s.*, and for the third 20*s.*, with a condition to re-enter into all for the non-payment of any parcel; these are three several reservations, and in the nature of three distinct demises; and each house in this case is only chargeable with its own rent; the entire sum being not at first reserved out of all the houses demised, and afterwards apportioned to the several houses according to their respective value, as in the former case; but the particular sums were at first reserved out of the several houses, and

(*m*) Gilb. on Rents, 25.
(*n*) *M'Leish* v. *Tate*, Cowp. 781.
(*o*) Co. Litt. 47, 142 a; Gilb. on Rents, 26.
(*p*) Ante, Chap. IV. Sect. 7, p. 100.
(*q*) Gilb. on Rents, 34.

therefore the non-payment of the rent of one house could be no cause of entry into another (*r*).

Reservation of Corn-rent.

A restriction occurs with regard to college leases, created by statute 18 Eliz. c. 6 (*s*), by which it is directed that one-third of the old rent then paid should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6*s*. 8*d*., or a quarter of malt for every 5*s*., or that the lessees should pay the same according to the price that wheat and malt should be sold for in the market next adjoining to the respective colleges, on the market-day before the rent becomes due (*t*). If the reservation be of corn—as in the case of an hospital renewed lease, where the reddendum was "so many quarters of corn"—it will be understood to mean legal quarters, reckoning the bushel at eight gallons; although the old leases before the statute 22 & 23 Car. II. c. 12, contained the same reddendum, and although till lately the lessees paid by composition, reckoning the bushel at nine gallons (*u*). In a lease of land for twenty-one years from the 25th of March, 1848, it was covenanted that the lessee should pay a stipulated sum for the first year, with a proviso that the rent for each subsequent year of the term should be reduced or increased according to "the average price of wheat in any one year of the said term," such average "to be taken and ascertained from the then current year's averages, which were taken in the month of January in every year under and by virtue of the Tithe Commutation Act, 6 & 7 Will. IV. s. 56," which is the result of the sales "during seven years ending on the Thursday next before Christmas-day then next preceding;" it was held, that the rent might be computed according to such septennial average so published in each year (*v*).

Reservation on alternate Days.

Formerly it was much the practice to reserve the rent payable on two alternate days, as on the usual feasts or days of payment, or within a certain number of days afterwards; this was held to give the lessee an option to pay it on either of the days: thus where rent was reserved at the feast of John the Baptist and at Christmas, or fourteen days after, the first payment to be made at Christmas next after the date; the lessee was held to be entitled to fourteen days after the first

(*r*) Where there is a demise of premises, and an entire rent reserved, if any part of the premises could not be legally demised, the whole demise is void; *Doe* d. *Griffith* v. *Lloyd*, 3 Esp. 78.

(*s*) This statute is specially exempted from the operation of the 39 & 40 Geo. III. c. 41, by s. 7 of that act. See ante, 15.

(*t*) This sagacious plan is said to have been the invention of Lord Treasurer Burleigh and Sir Thomas Smith, then principal Secretary of State; who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the newly-found America, devised this method for upholding the revenues of colleges. Their foresight and penetration have in this respect been very apparent. The corn-rent has made the old rent approach in some degree nearer to its present value; otherwise it would seem that the principal advantage of a corn-rent is to secure the lessor from the effect of a sudden scarcity of corn; 2 Black. Com. 322. Leases by the governors of colleges in Ireland must reserve more than a moiety of the true value, at the peril of the lessee; *Clements* v. *Waller*, 4 Burr. 2154.

(*u*) *St. Cross* (*Master*) v. *Howard* (*Lord*), 6 Term R. 338.

(*v*) *Kendall* v. *Baker*, 11 Com. B. 842.

Christmas as well as the others (*x*). This mode of reservation is now completely fallen into disuse: and rent is now always reserved on a day certain, although there is generally a right of entry on non-payment within a definite period afterwards.

Reservation of Rent in Advance.

Sometimes also rent is reserved to be paid in advance; and when that is intended to be the case, it should be clearly expressed whether the payment in advance is intended to be of the current quarter for the time being during the whole term, or for the first payment only (*y*).

(b) *Construction of Reservations.*

Construction of Reservations generally.

Where there are special days of payment mentioned in the reddendum, the rent ought to be computed according to the reddendum, and not according to the habendum; but where the reservation is general, as half-yearly or quarterly, and no special days are mentioned, there the half-year or quarter must be computed according to the habendum (*z*). A *net* rent is a sum to be paid to the landlord clear of all deductions (*a*). Where a lessee of a colliery covenanted to pay as rent "one-third part of the money that should arise, be made, received, or produced from the sale of the coals;" and he also covenanted to keep "true accounts of all coal daily raised, and to make and deliver true copies thereof;" it was held, that the rent was to be calculated on the amount of coals sold, not on the amount of money actually received for them (*b*). In a demise of all right and interest in coals and other minerals in a certain estate, yielding and paying yearly for every ton of coal that shall be worked, not exceeding 13,000 tons in any year, the sum of 8*d.* per ton, or yielding that amount of money, viz. 433*l.* 6*s.* 8*d.*, as fixed rent, whether the coals shall be worked or not; and for every ton above 13,000 tons 9*d.* per ton; the lessee covenanted to raise 13,000 tons of coal in each year, and to pay in the same terms as the reddendum: this was held to be an absolute covenant to pay that fixed rent although the mine became exhausted (*c*). A demise of a mine contained a covenant that the lessee would deliver quarterly to the lessor a certain proportion of all coal raised, or pay him quarterly the value in money; provided that in case at the end of the first quarter of any year the quarterly delivery or payment should not be equal to 37*l.* 10*s.*, then the lessee should pay such additional sum as would make up 37*l.* 10*s.*; and in case at the end of the second quarter such deliveries or payments for that and the preceding quarter should

(*x*) *Anon.*, 2 Show. 77.

(*y*) *Holland* v. *Palser*, 2 Stark. 161. See post, Book II., Chap. I., Sect. 4.

(*z*) Where rent was to be payable by a parol demise from the Lady-day following, evidence of the custom of the country was admitted to show that by "Lady-day," "Old Lady-day" was intended; *Doe* d. *Hall* v. *Benson*, 4 Barn. & Ald. 588.

(*a*) *Bennett* v. *Womack*, 7 Barn. & Cres. 627; 1 Man. & Ryl. 644; 3 Car. & Pay. 96.

(*b*) *Edwards* v. *Rees*, 7 Car. & Pay. 340.

(*c*) *Bute* (*Marquis*) v. *Thompson*, 13 Mees. & Wels. 487.

not be equal to 75*l.*, then the lessee should pay such additional sum as would make up 75*l.*, with a similar provision for the third and fourth quarters, it being the intent and meaning of the parties that the royalties thereby named should always amount to the sum of 150*l.* per annum at the least: held, that this was a *quarterly* minimum rent, and that an excess of this royalty in one quarter could not be set off against a deficiency in a previous quarter (*d*). A lease by deed executed some time after it bore date, demising property from a still earlier period, the first payment of rent to be made on a day after the execution, does not operate as a release of rent prior to the time of execution, if due under a contract antecedent to the deed (*e*).

Supply of Words in the Construction.

If rent be made payable yearly without saying "during the said term," yet the payment must be made every year during the continuance of the lease (*f*): if therefore a lease be made for years, provided that the lessee shall pay at Michaelmas and Lady-day 10*l.* by equal portions "during the term," though this rent is not made payable *yearly*, yet the law construes it to be so, because it is payable at the two feasts during the term, and then consequently it must be paid yearly; for if there be any omission of the payments in any one year during the lease, it is not paid at the two feasts during the term: so, if a man demise for five years, rendering 100*l.* to be paid by equal portions during the term, it shall be paid *yearly*, though that word was omitted (*g*). If a lease be made rendering rent at the two usual feasts of the year, without specifying what feasts, the law construes such payments to be made at Michaelmas and Lady-day, because those are the usual days appointed in contracts of this nature for payments: so, if a man grant a rent payable at the two usual feasts of the year, it shall be intended by equal portions, though not so mentioned in the deed; because where there are two several days appointed for payment, it is the most reasonable construction that a moiety of the rent shall be paid at each day (*h*). If a man make a lease to another on the 6th day of August, rendering yearly rent at two terms of the year, viz. at Lady-day and Michaelmas, by equal portions; though in this case, by the appointment of the parties, Lady-day be the first term mentioned, yet the first payment shall be made at Michaelmas ensuing the date of the lease, for without such transposition of the words of the deed, the intention of the parties could never be fulfilled, because the rent is reserved annually, and the lessor would lose the profits of one half-year if the first rent was not payable at Michaelmas; and the lessee would enjoy the land from the date of the lease to the first Michaelmas, and likewise from the last Lady-day of the

(*d*) *Bishop* v. *Goodwin*, 14 Mees. & Wels. 260.

(*e*) *Cooper* v. *Robinson*, 10 Mees. & Wels. 694.

(*f*) Gilb. on Rents, 51; *Harrington* v. *Wise*, Cro. Eliz. 486; Moore, 459; Noy, 57.

(*g*) Com. Dig. tit. *Rent*, (B 8).

(*h*) See also post, Book II., Chap. I., Sect. 4.

term to the expiration of it, without paying any thing; because, though the rent ended in August, yet the payment was not to be made till the Michaelmas following, before which time the lease would have expired (*i*). By an indenture dated on the 21st of March, a messuage was demised to be held from the 25th of March then instant, for the term of seven years wanting seven days, paying therefore yearly and every year during the term the yearly rent of 285*l.*, by four equal quarterly payments on the 25th March, 24th June, 29th September, and 25th December in every year, commencing from the said 25th March then instant; it was held, that this was either a covenant to pay a before-hand rent, whereby all the payment would become due within the term, or else that, by virtue of the words yearly and every year, the lessee would be liable for the last quarter's rent on a day after the expiration of the term (*k*). Where by agreement, dated the 8th September, a house was let for seven years at an annual rent payable quarterly, the first payment to be made on the 25th March following, it was held that a quarter's rent only became due on the 25th March (*l*). If rent be reserved quarterly or half-yearly, each gale (*m*) is a distinct debt (*n*).

(c) *To whom.*

To whom the Reservation must be made generally.

Rent must be reserved to the lessor himself, and not to a stranger, for it ought to be made to him from whom the land passes: no one but the king can make a reservation of rent to a stranger. If *A.*, and *B.* his son, by lease reciting that *B.* is the heir-apparent of *A.*, let for years to commence after the death of *A.*, rendering rent to *B.*, it will be void; for a reservation to him by his proper name, and not to him as heir, is the same as if it were to a stranger (*o*): so, if a lease for years be made, rendering rent to the heirs of the lessor, the reservation is said to be bad because not to the lessor first (*p*): and where by a lease rent was reserved to a person not a party to the lease, and the lessees covenanted with him and the lessors to pay rent, &c., it was held, that he could not join with the lessors in an action of covenant for non-payment of the rent (*q*). Where there is any doubt as to the person to whom the reservation should be made, the clearest and safest way is to reserve the rent generally during the term, without saying to whom, and leave it to be distributed by the law in the mode pointed out in *Whitlock's case* (*r*): for if the reservation of rent be general, the law directs it to be paid according to the intent and

(*i*) Gilb. on Rents, 49, 51; *Hill* v. *Grange*, Plow. 171.

(*k*) *Hopkins* v. *Helmore*, 8 Ad. & El. 463; 3 Nev. & Per. 453; 1 Will. Wol. & Hod. 386.

(*l*) *Hutchins* v. *Scott*, 2 Mees. & Wels. 809; Mur. & Hurl. 194.

(*m*) The periodical payments of rent are called "Gale," from *gavel*, a rent or duty; Spelman's Glossary, voce *Gabellum*.

(*n*) *Welby* v. *Phillips*, 2 Vern. 129.

(*o*) Com. Dig. tit. *Rent*, (B 5); *Oates* v. *Frith*, Hob. 130; Co. Litt. 47, 143 b; *Sacheverell* v. *Froggat*, 2 Saund. 370.

(*p*) *Whitlock's case*, 8 Co. Rep. 70, 141.

(*q*) *Southampton* (*Lord*) v. *Brown*, 6 Barn. & Cres. 718.

(*r*) 8 Co. Rep. 70, 141.

the nature of the thing demised. The reservation has always been construed most for the advantage of the lessee, and against the lessor, so that the rent be paid during the time; though if no person be mentioned, the reservation is extended by implication of law to the lessor and his heirs (*s*).

Effect of Inaccuracies of Expressions as to Parties in the Reservation.

As the annual sum reserved in the nature of rent is intended by courts of law to follow the reversion, inaccuracies of expression, by which the reservation is made to other persons than the reversioner, have not the effect of severing it from the reversion: thus, if the reservation be made to the owner in fee, his heirs, executors, or assigns, the word "executors" will be rejected, and the rent will go with the reversion and belong to the heirs: and if a tenant in tail demise for years, rendering rent to himself and his heirs, this goes to the heir in tail (*t*), and not to the general heir: or if a tenant for life, having a power, demise, rendering rent to himself, his heirs and assigns, it shall be adjudged to him in remainder. If the reservation be only to the lessor, and the deed do not say also "to his heirs, executors," &c., this reservation shall continue only for the lifetime of the lessor, and determine with his death, for expressum facit cessare tacitum (*u*): so, if a man reserve rent to him *or* his heir, it will be good to him for his life, and void to the heir (*x*): so also if the lessor be seised in fee, and make a lease for life or years, rendering rent to the lessor, *or* his executors or assigns; in this case, the rent shall continue only for the life of the lessor (*y*); but if the reservation be to the lessor, his heirs *and* assigns, in the copulative, or in the disjunctive to him *or* his heirs (or to him *or* his successors, if it be the lease of a corporation), *during the term*, then the heir or the assignee of the reversion shall enjoy it (*z*); for the words "during the term" evidently declare the intention of the lessor to be, that the payment of the rent should be of equal duration with the lease; consequently the rent must be carried over to the heir, who comes into the inheritance after the death of the lessor, and would have succeeded to the possession of the estate if no lease had been made; and if the lessor assign over his reversion the assignee shall have the rent as incident to it.

(d) *Rent Contracts.*

Where a Sum reserved may enure by way of Contract, though not as Rent.

A reservation of an annual sum of money to a third person in consideration of a demise, may be good by way of contract, though it is not a sufficient reservation of rent, but the grantee cannot distrain for it, because he has not the reversion (*a*). If a lessee simply covenant to pay such a sum yearly, without mentioning it as a consideration

(*s*) Shep. Touch. 114.
(*t*) Com. Dig. tit. *Rent*, (B 5).
(*u*) Shep. Touch. 114; 2 Wms. Saund. 368, n. (2).
(*x*) This seems now questionable, as the word "or" may be construed as the word "and," where the intention requires it; Shep. Touch. 114, Preston's ed.
(*y*) Co. Litt. 214 a.
(*z*) Com. Dig. tit. *Rent*, (B 5).
(*a*) *Oates* v. *Frith*, Hob. 130.

of the demise of the premises, it has been held to be, not a rent, but a sum in gross (*b*). A lease recited that the lessors were owners subject to a mortgage, the interest on which was payable at a certain place; it then demised the land for a term, the lessee yielding and paying a certain sum at that place in part of the interest on the mortgage, and the lessee covenanted with the lessors to pay that sum at the place and in the manner mentioned; it was held, that this was a covenant in gross, and that it was doubtful whether it was any reservation (*c*). Where in an action of debt on an agreement for non-payment of rent, it appeared that the plaintiff covenanted by the agreement to grant leases of certain premises upon certain conditions therein specified, and at a certain rent, and the defendant covenanted to pay such rent, and perform certain conditions on which the lease was to be granted; that a former lease to one Edmunds had subsisted, at the expiration of which the lease mentioned in the agreement as to be granted to the defendant was to commence; and the declaration averred that Edmunds' lease had expired, and that the defendant had entered, but not that any lease had been made; and there was also a count for use and occupation: upon demurrer to the special counts (*d*), Lord Kenyon, C. J., said, "I have always admired an expression of Lord Hardwicke, 'that there is no magic in words;' it appears that a rent was to become due on a certain day mentioned; perhaps this money to be paid is not strictly to be called *rent*, the relation of landlord and tenant not having commenced; but still the parties intended that this money should be paid, according to the best construction I can give of the agreement; collecting therefore the meaning of the parties, without incumbering myself with the technical meaning of the word '*rent*,' I think the case is with the plaintiff:" the other judges agreed in opinion with Lord Kenyon:—they observed, that the conditions mentioned in the lease were the conditions of sale at the auction at which it was bargained for: and that the intent seemed to be, that the defendant should, after the determination of Edmunds' lease, take possession, and proceed to cover in the house, and that on the house being covered in, the plaintiffs were to grant a lease; but in order to instigate the defendant to do this, he was to pay annually a certain sum before the granting of the lease, equal to what he was to pay afterwards, the whole being denominated "*rent*:" if that were not meant, the covenant to pay rent was useless, for the lease, when made, would certainly contain such a covenant (*e*). Where a landlord, who had demised premises for a term of years at a certain rent, afterwards agreed to enlarge the buildings, the lessees agreeing to pay 10 per cent. additional on the outlay; it

(*b*) *Smith* v. *Mapleback*, 1 Term Rep. 441.

(*c*) *Pargeter* v. *Harris*, 7 Queen's B. Rep. 708.

(*d*) *City of London* v. *Dias*, T. T. 41 Geo. III MS.

(*e*) The deed and conditions of sale were very obscurely worded, though it appeared that the city of London had used that form for upwards of a century.

was held, that this was a collateral agreement and not a contract running with the land (*f*). Where a lease reserved a rent of 40*l.* per annum, and at the end of it, the words "the allowance of the road to the Six Bells' Yard to be made as usual" were added, and it appeared that it had been usual for the landlord to allow a payment of 5*l.* annually, which the lessee paid to a third person for the use of a road, it was held that was a mere covenant, and not an alteration of the rent, so as to support a plea of non tenuit in replevin (*g*).

(e) *In Leases granted under Powers.*

General Restrictions in Powers as to Rent.

It has been previously observed (*h*), that powers must be construed strictly, and if all the circumstances required in them be not observed, leases granted under their authority will be void. The usual restrictions in a power, which are applicable to the subject of rent, are, that the "ancient and accustomed," or the "best and most approved rent" must be reserved. There are two methods of leasing,—at the best rent,—and upon fines, which, as the lives or leases drop, are considered among the annual profits. Although powers are sometimes adapted to both methods, yet generally they are confined to the former, and contain an express prohibition against taking money by way of fine, in lieu of the whole or a portion of the rent.

What a sufficient Execution of a Power generally.

Where a lease is made under a leasing power, it must clearly appear by the instrument that the proper rent has been reserved (*i*); and although generally the lease must specify the rent reserved, yet in some cases the reservation may be made in the terms of the power generally (*k*). If a lease be of lands subjected to a power, together with other lands not so subjected, and there be equivocal words, which render it doubtful to which the reservation of the rent may be referred, namely, whether to the premises on which the power attaches or otherwise; and the lease cannot take effect unless the rent be to issue out of those premises; then the better opinion seems to be, that the reservation shall be taken as referable only to the premises subjected to the power, and that by such means the lease may be made good.

To whom the Reservation may be made.

Although at common law rent can be reserved only to the lessor and his heirs who are privies in blood, and not to any who is privy in estate—as to him in reversion, remainder, &c.—yet in the case of powers the reservation to a tenant for life and his heirs is good, and shall enure as rent to the remainderman, and he may distrain for it: thus, where a question was raised whether the words of the reservation did not make that which was called a rent to be only a sum in gross,

(*f*) *Lambert* v. *Norris*, 2 Mees. & Wels. 333; Mur. & Hurl. 29; see also *Hoby* v. *Roebuck*, 7 Taunt. 157; 2 Marsh. 433; and *Donellan* v. *Read*, 3 Barn. & Adol. 899.

(*g*) *Davies* v. *Stacey*, 12 Ad. & El. 506; 4 Per. & Dav. 157.

(*h*) See ante, Book I., Chap. I., Sect. 23, p. 38; and Chap. IV., Sect. 17, p. 146.

(*i*) *Ker* v. *Roxburgh* (*Duke*), 2 Dow, 149.

(*k*) Powell on Powers, 555; *Orby* v. *Mohun*, 3 Bro. Parl. Cas. 248; *S. C.* Gilb. Eq. Rep. 45; 2 Vern. 531, 542; 2 Freeman, 291.

and not rent, and so turned the reservation of rent into a condition; the court held, that the land was distrainable for it as rent, and that it was not a payment upon condition; one reason for which was, that it was not the *intent* of those who were parties to the indenture to make it a condition, but rather to make a limitation of the rent for the uses mentioned; and that it could not be considered a condition, for it could not be taken as a condition at common law, because those in the remainder were mere strangers to the condition; and a condition united to the use of the term it could not be, for if it were so, he in remainder being a stranger could not in law take advantage of it; but if it were rent, the party immediately in remainder might distrain for the rent when it accrued due by reason of the Statute of Uses (*l*), by which it was enacted, "that the intent of the parties should be observed;" therefore, if the use were so limited that a stranger should have the rent, &c., he should have it and might distrain for it (*m*).

Construction of the Expression "accustomed rent" as to amount.

The terms "ancient and accustomed rent" in a power to lease are to be understood as applicable to rent which was reserved at the creation of the power, if a lease were *then* in being, or that which was last *before* reserved, if no lease were then in being; for he who created such a power intended no more than that the lessor and lessee should not be able to put the estate in a worse condition than it was when the power was created, but should keep it in the same plight and condition as it was when so settled (*n*). This rule, however, is subject to exceptions, as will be seen in the following case:—By will of 1761 power was given to tenants for life to lease for lives, so that there were reserved in every such lease the ancient and accustomed rents and heriots for the premises, or more. In 1763 a codicil was added, whereby the will was also ratified. In a lease of 1724 the rent was 1*l.*, and a heriot, or 3*l.* in lieu of it, was reserved, and the lease was granted on payment of a fine. By another lease, granted in 1762, between the times of making the will and the codicil, the rent was 15*l.*, and there was no heriot or fine. A tenant for life, in execution of the leasing power, granted a lease according to the lease of 1724: it was held that, although the latest lease preceding the creation of the power was entitled to greater weight than any single earlier lease, and ought to govern the decision where there was a balance of evidence, yet, when the ancient custom appeared to have been uniform, and a single lease varying therefrom was granted just before the creation of the power, the exceptional lease ought not then to govern merely because it was the latest; that whether the lease of 1724 or that of 1762 contained the ancient and accustomed rent and heriot was a question for

(*l*) 27 Hen. VIII. c. 10.

(*m*) Powell on Powers, 572—574; *Anon.*, Ander. 278.

(*n*) Bac. Abr. tit. *Leases*. In a very recent case this doctrine seems to have been recognized; *Doe* d. *Douglas* v. *Lock*, 2 Ad. & El. 705; 4 Nev. & Man. 807.

the jury (*o*). A lease at a single rent of premises under a power, together with other premises to which the power did not extend, was held bad; but the joining of different lands in one lease which were all under the power, though never before let by a single demise, the rent reserved being in proportion to the rents formerly reserved, was held not objectionable (*p*). It has been held that part of premises formerly demised jointly with others at one entire rent, might be let under the terms of such a power, at a rent bearing the same proportion to the old rent, that the premises demised by the lease bore to the whole premises formerly demised (*q*). Where there is a power to lease, reserving the ancient and accustomed heriots or more, and a lease is made varying from the ancient leases as to the reservation, the onus is on the lessee to show that the new reservation is as beneficial as the ancient one (*r*).

As to the Manner of the Reservation.

If a lease be made under a power requiring a reservation of the true and ancient rent, and the rent reserved be not conformable to that both in quantity and quality, and manner of reservation also, the lease, it is said, will be void (*s*). Heriots and the like need not be reserved in a lease made under a power restrained to the rendering the true and ancient rent, for they are casual and accidental services; and therefore fall not within the meaning of such restriction (*t*); but the omission to reserve a heriot, when a heriot has been accustomably reserved, will vitiate the lease (*u*).

As to the Time of Payment in the Reservation.

If there be a difference as to the time of the payment of the rent, so that it be not payable at the same periods as anciently, that will vitiate a lease under a power restricted to be made rendering the true and ancient rent: thus a reservation of the rent at two days, where the rent was formerly reserved and payable at four days, was held in *Mountjoy's case* (*v*) to make the lease void, because it was to the injury of the heirs in tail, for it was more beneficial to them to have it paid at four feasts than two, and all beneficial qualities of the rent ought to be reserved and observed (*x*). It has been held not to be a valid objection to a lease, that the rent was thereby made payable on the 25th March and 29th September, (although the term commenced on the 6th January, and that, therefore, there was a forehand rent which might prejudice the remainderman,) inasmuch as the rent was made

(*o*) *Doe* d. *Biddulph* v. *Hole*, 15 Queen's B. Rep. 848.

(*p*) *Doe* d. *Lord Egremont* v. *Stephens*, 6 Queen's B. Rep. 208; but see Powell on Powers, 554; *Doe* d. *Williams* v. *Matthews*, 5 Barn. & Adol. 298; 2 Nev. & Man. 264.

(*q*) *Doe* d. *Shrewsbury* (*Earl*) v. *Wilson*, 5 Barn. & Ald. 363.

(*r*) *Doe* d. *Egremont* (*Earl*) v. *Grazebrooke*, 4 Queen's B. Rep. 406; 3 Gale & Dav. 334.

(*s*) Powell on Powers, 552.

(*t*) *Baugh* v. *Haines*, Cro. Jac. 76.

(*u*) *Doe* d. *Douglas* v. *Lock*, 2 Ad. & El. 705; 4 Nev. & Man. 807.

(*v*) 5 Co. Rep. 3.

(*x*) Powell on Powers, 571. In this respect leases under powers in settlements differ from ecclesiastical leases under stat. 13 Eliz.; for in them a reservation at two days, when the rent was payable formerly at four days, does not vitiate the lease, because the statute does not avoid such lease if the accustomed yearly rent or more be reserved; *Baugh* v. *Haines*, Cro. Jac. 76.

payable on the same days by a former lease, and therefore that this was the usual and accustomed rent; and also for the same reason, that it was no objection to the lease that the rent was made payable by half-yearly payments, although the power required it to be payable yearly; the word *yearly* meaning the payment of rent in the year (*y*). It has, however, been doubted whether a quarterly reservation of rent, which had been previously reserved half-yearly, will vitiate the lease (*z*). The whole rent must be payable annually during the whole term, for the design of the donor is not answered unless a continual revenue be yearly payable by compulsion of law, and not in expectancy or in futuro (*a*); but under a power to make leases reserving the ancient yearly rent annually, if it were reserved upon a day before the year was up—as if the year ended at Christmas, and it was reserved at Michaelmas—it would be sufficiently in pursuance of the power (*b*). Where there was a power to lease, so that there were reserved and made payable during the continuance of the lease the best yearly rent; a lease from the 11th of October, making the rent payable by half-yearly payments on the 6th of April and the 11th of October, except the last half-year's rent, which was made payable on the 1st of August, before the end of the term, is a good execution of the power (*c*).

Construction of the Expression "best Rent."

In a lease for which the lessor is bound to reserve the *best rent* which can be got, he must reserve the best rent which can be got at the time the lease is made, without any regard to a former lease in which a less rent might have been fairly reserved on account of money to be expended in improvements (*d*). The sufficiency of the rent must be governed by the consideration on whom the onus of repair is thrown; therefore under a power to lease for twenty-one years, reserving the best rent, so as the lease shall not contain any clause whereby authority should be given to the lessee to commit waste, or whereby he should be exempted from punishment for committing waste; and so as such lease should contain such other conditions, covenants and restrictions as were generally inserted according to the usage of the counties where the premises were; it was held, that a lease was good, though the lessor thereby took the repairs of the mansion-house (except the glass windows) on himself, and covenanted, that if he did not repair it within three months after notice the tenant

(*y*) *Doe* d. *Shrewsbury* (*Earl*) v. *Wilson*, 5 Barn. & Ald. 363; *Fryer* v. *Coombs*, 11 Ad. & El. 403; and see *Doe* d. *Wilmot* v. *Giffard*, 5 Barn. & Ald. 371; *Doe* d. *Harries* v. *Morse*, 2 Cromp. & Mees. 247; 4 Tyr. 185; and *Doe* d. *Douglas* v. *Lock*, 2 Ad. & El. 705; 4 Nev. & Man. 807.

(*z*) *Doe* d. *Douglas* v. *Lock*, 2 Ad. & El. 705; 4 Nev. & Man. 807.

(*a*) *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 121.

(*b*) *Rex* v. *Weston*, 2 Lord Raym. 1198.

(*c*) *Rutland* v. *Doe* d. *Wythe* (*in error* in Dom. Proc.) 10 Cl. & Fin. 419; 12 Mees. & Wels. 355, reversing *S. C.* (*in error*), 5 Mees. & Wels. 688, and affirming *S. C.* 2 Mees. & Wels. 661; Mur. & Hurl. 245.

(*d*) *Doe* d. *Griffith* v. *Lloyd*, 3 Esp. 78. It would seem that the best rent means the best rack-rent that can reasonably be required by the landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account.

might, and deduct the charges out of the rent reserved to the lessor; and though the lessor covenanted, in consideration of a large sum to be laid out by the lessee in repair of the premises in the first instance, to renew during his (the lessor's) life, at the request of the lessee, his executors, &c., on the same terms; because the covenant only bound the lessor himself, and if the best rent were not reserved upon such renewal, the lease would be void against the remainderman (*e*). A lease at 43*l.* a year, granted under a power directing the best rent to be reserved, cannot be impeached merely by showing that the lessor rejected at the time two specific offers, one at 50*l.* and another of from 50*l.* to 60*l.* from other tenants, though the responsibility of such other tenants could not be disproved; for in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded as well as the mere amount of the rent offered, unless something extravagantly wrong in the bargain for rent be shown (*f*). Under a power to grant leases for twenty-one years, "so as upon every such lease there shall be reserved the best improved rent that can reasonably be had for the same," a lease by a tenant for life, reserving a larger rent than had been paid to the devisor, but not the best rent which could have been fairly obtained, though there was no fraud or collusion, was determined to be void (*g*). A power was reserved to grant leases for a term not exceeding seven years, so as there was reserved in such leases the best rent that could be gotten for the same, without taking any premium for the making thereof: the donee of the power granted a lease for seven years at a specified rent, which lease contained a covenant by the lessee to find board, lodging and wearing apparel, during the term, for three children of the donee (if they wished it), at 7*l.* a year each, and for the donee's son gratis; it was held by Parke and Patteson, Js. (Taunton, J., dissentiente), that assuming the power to require two conditions, first, that the rent reserved should be the best rent; and secondly, that there should be no fine or premium; that it did not clearly appear on the face of the lease that either of those conditions had been broken, because the covenant to maintain the children was not necessarily beneficial to the lessor, and, therefore, parol evidence was admissible to show that the rent reserved was the best that could be obtained (*h*). A tenant for life having a power to make leases for ninety-nine years, reserving the best and most beneficial yearly rent or rents, to be incident to the immediate reversion of the premises, that can be reasonably had at the time of making such lease, without

(*e*) *Doe* d. *Bromley* (*Bart.*) v. *Bettison*, 12 East, 305.

(*f*) *Doe* d. *Lawton* v. *Radcliffe*, 10 East, 278.

(*g*) *Wright* v. *Smith*, 5 Esp. 203.

(*h*) *Doe* d. *Rogers* v. *Rogers*, 5 Barn. & Ad. 755; 2 Nev. & Man. 550.

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taking any fine, length, &c. in pursuance of one entire bargain, granted at one and the same time, two leases of the premises, one dated in May, [illegible], for thirty years, to commence on the [illegible]th October, [illegible], on the expiration of an existing lease; and the other dated in June, [illegible], for sixty-three years, to commence on the [illegible]th October, [illegible]: in the first of these two leases a yearly rent of £[illegible] was reserved, and in the second, a rent of £[illegible] only, those amounts being estimated in reference to a covenant that the tenant should rebuild the premises at the expiration of the thirty years' term, but that if one term of sixty-three years had been granted, £[illegible] would have been too much rent for the first thirty years, and £[illegible] too little for the remainder of the term: it was held, that as between the tenant for life and the reversioner these rents were not the most beneficial which could be obtained, and consequently, that the second lease was clearly void (i).

When Leases may be granted in consideration of Fines.

As the method of granting leases in consideration of fines, or partly of fines and partly of rent, is not unusual or uncommon;—a tenant for life under a power in a settlement to lease at the "usual rent," may devise upon reserving the usual fines and rent, where the usual profit had previously been made by fines; for if the trustees under the settlement were obliged to let the lands at a rack-rent, it might be quite inconsistent with the nature of the estates (k). Where there was a devise of a testator's reversion to *J. N.* for life, with power to jointure and raise portions for younger children, remainder to his first and other sons, &c., with power to *J. N.* and those in remainder, during their respective possessions, to make leases of the lands in Sussex and Huntingdonshire for not exceeding twenty-one years, at the most rent; and of the lands in Middlesex and London for not exceeding sixty-one years, at the usual or other the most rent; it was held, that *J. N.* might lease the lands in Middlesex upon a fine, and at a reserved rent, which rent exceeded the rent reserved upon a former lease in being at the date of the will and at the testator's death, and upon which lease the then lessor had also taken a fine (l). Where there was a devise to the use of *H. I.* for life without impeachment of waste, &c., remainder to the use of plaintiff for life, with power to make leases for two or three lives, &c., or for the term of twenty-one years, so as there be reserved the best rent, without taking any sum or sums of money or other thing, for or in lieu of a fine; and *H. I.*, by indenture of 15th October, leased for fourteen years, to be computed as to the meadow land from 13th February, the pasture from 25th March, and the messuage from 12th May previously, under a yearly rent, payable to the lessor and such other person as should be entitled to the free-

(i) *Doe* d. *Sutton* (*Bart.*) v. *Harvey*, 1 Barn. & Cres. 426; 2 Dowl. & Ryl. 589.

(k) *Right* d. *Bassett* v. *Thomas*, 3 Burr. 1446.

(l) *Doe* d. *Newnham* v. *Creed*, 4 Maule & Selw. 371.

hold and inheritance, half-yearly, on the 11th November and 25th March, the first payment to be made on 11th November next ensuing; and the lessee covenanted with the lessor, his heirs and assigns, for payment to the lessor and such other person, &c., of the rent at the days and times, &c.; it was held, that the reservation of the first half-year's rent, payable at the end of twenty-seven days, was not taking a sum of money for a fine, being in consideration of a preceding occupation (*m*). Where a power was given to a tenant for life to make leases, with or without a fine, at such rent as he thought proper; it was held that a lease, without any reservation of rent whatever, was good (*n*).

Effect of Improvement of the Estate.

Improving the estate will not be considered such an alteration as varies the rent, by making it to issue out of other hereditaments than those contained in the power: thus where the tenant entered and built a new house upon the land, and then made a lease for twenty-one years, reserving only the ancient rent, &c., the Court would not suffer an objection to it to be argued (*o*).

(f) *Mode of Fixing the Amount of Rent.*

Mode of fixing the Rent of Houses and Buildings.

To be able to ascertain the proper rent which premises—whether houses and buildings or farms—will bear in different situations, so as not to deprive the landlord of a just remuneration on the one hand, nor oppress the tenant with too much rent on the other, is unquestionably a most desirable object, and in some instances a source of considerable difficulty. No rule can be laid down with any degree of accuracy, with respect to the adjustment of the rent of houses and buildings, whether situated in town or country; so many considerations of situation or local convenience, as respectability of neighbourhood, contiguity to pleasant towns, good society and the like, enter into the contemplation of the parties, when engaging houses for the purpose of habitation. A comparison with adjoining premises, or the common rate of rents in the neighbourhood, affords the only guide by which a judgment may be formed. With respect to the rent of farm-houses and buildings indeed it is different: the amount of such rent is usually ascertained by making an estimate of what they would cost when first erected, and reckoning a per-centage upon the money expended; if built within twenty years, five, and sometimes even seven and a half per cent. is charged upon the amount; and after the building has stood twenty years, two and a half per cent. is generally deducted.

One mode of ascertaining the rent which farming land will bear, is to calculate the gross value of the produce, and divide it into three

(*m*) *Isherwood* v. *Oldknow*, 3 Maule & Selw. 382.

(*n*) *Talbot* v. *Tipper*, Skin. 427; see also the case of *Clarke* v. *Smith*, 9 Cl. & Fin. 126; ante, p. 148.

(*o*) *Reed* v. *Nash*, 1 Leon. 147.

Mode of fixing the Rent of Farming Lands.

equal parts: to set aside one part for the expenses of tillage, workmen's bills, wages and other incidental expenses; another for the maintenance of the tenant and his family; and to consider the third, after deducting taxes, tithes (*p*) and assessments, as the proper rent to be paid. This is a ready mode of fixing the amount of rent; and is considered in most instances, where the quantity of arable land exceeds the meadow, to be a tolerable approach to the truth; but to allow one-third of the gross produce for the expenses of management in grazing farms, where so little labour is necessary, would not leave any thing like a proper amount of rent for the landlord. Another mode is to deduct all the expenses and outgoings, together with the maintenance of the farmer and his family, from the gross produce; to allow ten per cent. upon the capital employed; and to consider the remainder as the fair rent. There is still another mode, recommended by the author of a work upon the subject (*q*), which he considers much preferable to either of the two above mentioned; it is this—to select one acre of the best arable land in the farm; to value the gross produce, as well as the labour and expense attendant upon it, through the whole of a four years' course of husbandry—consisting of turnips, barley, clover and wheat, on fine rich lands—and fallow, wheat, clover or beans, and wheat or oats, for strong clayey soils, and after taking an average of the profit, to deduct therefrom ten per cent. for the farmer's stock and capital, the remainder being the rent; to adopt the same plan with regard to an acre of the worst land; and when the value is thus found of the best and worst land on the farm, the rent of the intermediate qualities of soil will be readily ascertained; the whole being then added together, an average taken on the whole farm will give the rent per acre. It is scarcely necessary to observe, that in order to fix the proper rent, it is essential to inquire into local circumstances; such as the quality of the land—whether light or strong, and its soundness—whether upon a clayey or gravelly substratum: whether it is well watered, without being over retentive and flooded; its tendency to seed well and carry a proportionate quantity of stock; its contiguity to markets and manure, and the value of produce in the neighbouring markets; the poor-rates, taxes and tithes; the expenses of labour in the neighbourhood; whether the farm buildings are arranged in a convenient and suitable manner, are proportionable to the size of the farm, and are in good repair; and lastly, although often overlooked, whether the land lies compactly and near to the homestead and be approached by good roads.

(*p*) If there has been a commutation of tithes, under the stat. 6 & 7 Will. IV. c. 71, it will not be necessary to deduct the tithes, unless there is a special agreement that the tenant shall pay the commutation rent-charge.

(*q*) Bayldon on the Art of Valuing Rents, &c., 4th ed. 1832.

SECT. 3.—*Nomine pœnæ.*

Forfeiture nomine pœnæ for non-payment of Rent.

A further security for the payment of rent is sometimes agreed upon by the insertion of a covenant, by the terms of which the lessee forfeits a certain sum upon non-payment of such rent. This nomine pœnæ, as it is called, is incident to the rent, and will descend to the heir: if an annual rent, therefore, be devised, the nomine pœnæ passes as incident thereto, and the grantee may have an action of debt for the arrears (*r*); by accepting the rent, however, the party, it should seem, waives the penalty (*s*). If there be a nomine pœnæ given to the lessor for non-payment of rent, the lessor must demand the rent before he can be entitled to the penalty: and in this case there must be an *actual* demand made; because the presumption is that the lessee is in attendance on the land to save his penalty and preserve his estate, and therefore shall not be punished without a wilful default; and that cannot be made to appear without a demand to be proved, and that it was not answered. Such demand must be made at the day prefixed for the payment (*t*).

Forfeiture nomine pœnæ for other things.

Strictly speaking, no forfeiture can be called nomine pœnæ unless it be for the non-payment of rent; but it is not unusual to mention stipulated penalties for other things—as for the non-payment of a collateral sum—for ploughing up ancient meadow, or above a certain number of acres in one year—for changing the character of particular premises, or the like—by the general name of nomine pœnæ (*u*). Nothing can be more obvious than that a person may set an extraordinary value upon a particular piece of land or wood, on account of the amusement which it may afford him; in this country, therefore, a man has a right to secure to himself a property in his amusements; and if he chose to stipulate for 5*l.* or 50*l.* additional rent upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, there seems nothing irrational in such a contract. The further sum per acre secured by the covenant is not considered in the light of a penalty, but as liquidated damages fixed and agreed upon between the parties; therefore where a lessee

(*r*) Co. Litt. 61 b; *Thinn* v. *Cholmeley*, Cro. Eliz. 383; *Egerton* v. *Skeif*, Lutw. 1156.

(*s*) *Doe* d. *Cheney* v. *Batten*, Cowp. 247.

(*t*) Bac. Abr. tit. *Condition*, (O 2).

(*u*) It may be a question how far it is expedient to insert a covenant of this nature (unless the penalty be sufficiently great), rather than rely on the implied covenant not to commit waste, or an express one to use the land in a husbandlike manner, or not to dig, &c.; for such a nomine pœnæ in leases is the stated damages, and damages cannot be recovered beyond the amount of the penalty; whereas in the other cases the landlord would have a prospect of being recompensed to the extent of the injury done; *White* v. *Sealey*, 1 Doug. 49. In leases containing a covenant against ploughing up meadow, if the covenant be "not to plough," and there be a penalty, a court of equity will relieve against the penalty, and will even go further than that to preserve the substance of the agreement; but if it be worded "to pay 5*l.* an acre for every acre ploughed up," there is no alternative, no room for any relief against it, no compensation; it is the substance of the agreement; it is the particular liquidated sum fixed and agreed upon between the parties, and is therefore the proper amount of the damages; *Benson* v. *Gibson*, 3 Atk. 396.

covenants that in case any part or parcel of the ancient meadow or pasture ground, or any other part of the premises which have not been in tillage for twenty years, should, during the continuance of the term, be broke up, dug up, &c., he should pay a further yearly rent of 5*l.* for every acre, &c., so broke up, &c., the increased rent is not to be considered as a penalty, but as a liquidated satisfaction fixed and agreed upon between the parties (*x*). Where a farm was demised at a yearly rent, and also subject to certain yearly payments in case the tenant should not crop, manure and manage the farm in manner therein specified, and also in case the tenant in the last three years of the term should sow more than 70 acres of clover in one year, the additional rent of 10*l.* for every acre above 70 for the residue of the term; it was held, that the additional rents were in the nature of liquidated damages and not of penalties (*y*). Where land was demised with a clause that the lessee should not sell off hay under a "penalty" of 2*s.* 6*d.* per yard of the hay sold, to be recovered by distress as for rent in arrear; it was held that this was a penalty recoverable by distress as for rent, but was not a rent (*z*). A lease contained a stipulation that for every acre, and so in proportion for a less quantity, which the lessee should suffer to be occupied by any other person without the consent of the landlord, an additional rent should be paid; and the tenant undertook to use, occupy, dress and manure the land according to the custom of the country: the tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potato crop, and it was proved to be the custom of the country for farmers to pursue that course; yet it was held that the landlord was entitled to the additional rent, this being an occupation of the land by other persons (*a*). A Court of Equity will not grant an injunction against the tenant's ploughing, where the parties themselves have fixed the price to be paid as a penalty for such ploughing (*b*). Where there is a reservation of 5*l.* per acre during the last twenty years of a term, for every acre of meadow thereby demised, which the tenant shall plough, dig, ear, break up, or convert into tillage during the said last twenty years of the term, and so after that rate for any greater or less quantity than an acre or less time than a year, it is considered that the rent is due in the last twenty years, if the land is then ploughed, whether it was first ploughed within the last twenty years, or before; and that the rent continues payable during the twenty years, though the land be again laid down to permanent grass (*c*). The right to additional rent for over tillage is not

(*x*) *Rolfe* v. *Peterson*, 2 Bro. Parl. Cas. 436; and see *Bowers* v. *Nixon*, 12 Queen's B. Rep. 558, n.

(*y*) *Jones* v. *Green*, 3 You. & Jerv. 298.

(*z*) *Pollitt* v. *Forrest*, 11 Queen's B. Rep. 949; 1 Car. & Kir. 560.

(*a*) *Greenslade* v. *Tapscott*, 1 Cromp. M. & Ros. 55; 4 Tyr. 566.

(*b*) *Woodward* v. *Giles*, 2 Vern. 119.

(*c*) *Birch* v. *Stephenson*, 3 Taunt. 469; and see *Howell* v. *Richards*, 11 East, 633.

waived by the acceptance of the reserved rent with a knowledge of the breach (*d*). A provision in a publican's lease, that the lessee shall take all his beer from the lessor, or in case he did not do so, that an advanced rent should be paid, has been much censured by the courts; and, at all events, such a covenant cannot be enforced unless the lessee be supplied with good beer (*e*).

SECT. 4.—*When Rent is due.*

At what Time of the Day Rent is due.

Rent is not due till midnight of the day upon which it is reserved (*f*), although sunset is the time appointed by law to make a proper demand of it, to take advantage of a condition of re-entry, or to tender in order to save a forfeiture (*g*); but more properly speaking the demand should be made such time before sunset as to allow sufficient light to count the money (*h*); and the person making the demand or tender must remain on the land till the sun has set. Where therefore a lessor, tenant in fee, died after sunset and before midnight, it was held that the heir, and not the executor, was entitled to the rent (*i*); but payment on the morning of the rent-day, the lessor dying before noon, is valid as against the heir, though not against the king. Where the rent was reserved payable on Michaelmas-day, and the lessor died on that day between three and four o'clock in the afternoon before sunset, and a question was raised whether the executor or the heir, or, which is the same, the jointress of the lessor, should have the rent; it was held that the rent should go to the heir or jointress, because at the time of the death of the lessor there was no remedy nor means to compel the payment thereof. Payment before the day is not a satisfaction at law (*k*), though it seems otherwise in equity; for payment of rent to the tenant in tail or for life, *on* or even *before* the day, where the tenant in tail lived to the rent-day (*l*), will discharge the lessee, though if the tenant in tail die on the same day, the remainderman is entitled to recover the rent so paid from his representatives (*m*).

At what Days in the Year Rent is due.

Where rent is reserved generally, and no mention is made as is usual of half-yearly or quarterly payments, nothing is due until the end of the year (*n*): and where, after signing a written agreement, which made no mention of the time when the rent was to be paid, the

(*d*) *Denton* v. *Richmond*, 1 Cromp. & Mees. 734; 3 Tyr. 630.

(*e*) *Cooper* v. *Twibill*, 3 Camp. 286; *Holcombe* v. *Hewson*, 2 Camp. 391.

(*f*) *Catting* v. *Derby*, 2 W. Black. 1077; *Lefiley* v. *Mills*, 4 Term Rep. 173.

(*g*) Per Hale, C. B., *Duppa* v. *Mayo*, 1 Saund. 287; 2 Salk. 578.

(*h*) *Fabyan* v. *Remston*, Aleyn, 252; *Tinckler* v. *Prentice*, 4 Taunt. 549.

(*i*) *Duppa* v. *Mayo*, 2 Salk. 578; 1 Saund. 287; and see n. 17, *Clun's case*, 10 Co. Rep. 127.

(*k*) *Clun's case*, 10 Co. Rep. 127; *Cromwell* (*Lord*) v. *Andrews*, Gro. Eliz. 150.

(*l*) *Rockingham* (*Lord*) v. *Ozenden*, cited from Reg. Lib. in note to *Ex parte Smyth*, 1 Swanst. 346.

(*m*) As to apportionment of rent, see post, Sect. 6, p. 337.

(*n*) Latch. 264.

landlord asked the tenant how he would like to pay the rent, and the tenant replied quarterly, and the rent was accordingly paid quarterly, it was held that the rent was still due annually, and not quarterly (*o*). Where there is a general reservation of a yearly rent, a clause to put an end to the term, by notice expiring on any quarter day, will not make the rent payable quarterly (*p*). By a memorandum, *A.* agreed to let to *B.* a house at a *yearly* rental of 50*l.*, and in consideration of the *yearly* rent aforesaid being duly paid, agreed to give quiet possession of the house; *B.* agreed to pay the aforesaid rent of 50*l.* and to pay taxes, and the memorandum concluded, "Likewise the stable and loft over at a further rental of 25*l.* per annum,—to be paid on the usual quarter days;" held, that the 50*l.* was not payable quarterly, but annually only (*q*). An agreement was dated the 31st of January, and a person thereby agreed to become tenant, "at the customary time of entry," at a certain rent to be "paid at the usual time," "as agreed upon;" he entered at Lady-day, the usual time of entry being the 12th of May, and the usual time of rent becoming payable, being once a year, at Michaelmas, but the rent-day, when it was paid, being the 8th January; it was held, that there was evidence that the rent was payable at Michaelmas, and that it was not necessarily payable at the end of the year, from the time of entry (*r*). When the rent is made payable on certain days in the year, the rent is due on the first of the days occurring in point of time, without regard to the local order of the words (*s*): and if rent is intended to be made payable in advance, such intention should be clearly specified; for, in a recent case, where a house was let for twelve months at the yearly rent of 80*l.*, the rent to commence at Michaelmas, and to be paid three months in advance, such advance of 20*l.* to be paid on taking possession; Lord Ellenborough thought that the agreement for the advance was confined to the first quarter only, and said, that otherwise it would have been easy to have said "*always* paid in advance (*t*)." A covenant that half a year's rent shall remain in the hands of the tenant till the last year, means the "current half-year (*u*)." Where rent was reserved quarterly, or half-quarterly if required, and the landlord received the rent quarterly for the first twelve months, it was held, that he could not, without notice, distrain for a half-quarter's rent (*x*). Premises were let, "the yearly rent to be 110*l.*, and to be payable in advance, if the landlord required the same," nothing being said as to the days of payment; after a quarter had expired the landlord de-

(*o*) *Turner* v. *Allday*, Tyr. & Gr. 819.

(*p*) *Collett* v. *Curling*, 10 Queen's B. Rep. 785.

(*q*) *Coomber* v. *Howard*, 1 Com. B. Rep. 440.

(*r*) *Gore* v. *Lloyd*, 12 Mees. & Wels. 463.

(*s*) *Hill* v. *Grange*, Plowd. 171; see also *ante*, Sect. 2, (b), p. 315.

(*t*) *Holland* v. *Palser*, 2 Stark. 161; see also *Hopkins* v. *Helmore*, 8 Ad. & El. 463; 3 Nev. & Per. 453; 1 Will. Wol. & Hol. 386.

(*u*) —— v. *Nicholls*, Loft, 393.

(*x*) *Mallam* v. *Arden*, 10 Bing. 299; 3 Moore & Scott, 763.

manded a quarter's rent only; held that he was not entitled to distrain for the whole 110*l.* (*y*).

SECT. 5.—*Payment of Rent.*

Payment of Rent generally.

Rent is considered as of a higher nature than even a debt due on an instrument under seal, as between the parties themselves; but in the case of the death of the tenant, rent in arrear, whether it be by deed or parol, is held to be of equal degree with specialty debts; and therefore in the distribution of the deceased's estate it is to be paid with debts of that degree (*z*). Rent in arrear is no part of the reversion; and therefore when rent becomes due after delivery to the sheriff of a writ of elegit against the lessor, but before inquisition taken thereon, it is not payable to the execution creditor (*a*). A payment of rent by mistake or misrepresentation to a person not entitled to demand it, does not preclude the tenant from showing that the person to whom it was paid was not entitled to it (*b*). So if *A.*, who is a tenant for life subject to forfeiture, with remainder over to *B.*, lease to *C.* for a term, and afterwards apprehending that he has forfeited, acquiesce in *B.*'s claiming and receiving the rent from *C.*; his executor may, on showing that he acquiesced under a false apprehension, recover from *C.* the amount of the rent erroneously paid to *B.* (*c*). An old corporation, before the Municipal Reform Act, were trustees of a charity, and a tenant of the charity paid rent after the new corporation came into office to the secretary of the corporation, who still continued as charity trustees; held, that this was a good payment as against the new corporation (*d*). Where a tenant paid rent regularly to the landlord's agent, deducting a sewer's rate, which it was afterwards discovered that by the terms of the agreement under which the tenant held he ought himself to have paid, it was held, that, in an action to recover the sums so deducted as arrears of rent, a plea of payment was supported by the facts (*e*).

Where Rent is payable.

Rent reserved, payable yearly, is to be paid on the land, because the land is the debtor, and that is the place of demand appointed by law: so if a man lease, rendering rent, and the lessee binds himself in a sum to perform the covenants, this does not alter the place of payment of the rent, for it may be tendered on the land without seeking the obligee, except where the condition is for the performance of homage or other corporeal service to the person of the lord (*f*). This,

(*y*) *Clarke* v. *Holford*, 2 Car. & Kir. 540.
(*z*) *Thompson* v. *Thompson*, 9 Price, 471.
(*a*) *Sharp* v. *Key*, 8 Mees. & Wels. 379.
(*b*) *Rogers* v. *Pitcher*, 6 Taunt. 202; 1 Marsh. 541.
(*c*) *Williams* v. *Bartholomew*, 1 Bos. & Pul. 326; *Gregory* v. *Doidge*, 3 Bing. 474; 11 Moore, 394; *Claridge* v. *Mackenzie*, 4 Man. & Gran. 143; 4 Scott, N. R. 796.
(*d*) *Ludlow* (*Mayor, &c.*) v. *Charlton*, 9 Car. & Pay. 242.
(*e*) *Waller* v. *Andrews*, 3 Mees. & Wels. 312; 1 Horn. & Hurl. 87.
(*f*) Co. Litt. 201 b; *Rowe* v. *Young*, 2 Brod. & Bing. 234; Shep. Touch. 378; *Crouch* v. *Fastolfe*, Sir T. Raym. 418; Com. Dig. *Pleader*; 2 W. 49.

however, which is a rule of the common law, applies principally to forfeitures and conditions; for a *covenant* for the payment of rent, no particular place of payment being mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money, for the simple reason that he has contracted so to do (*g*). The lessee of the king must pay his rent, without demand, at the Exchequer, wherever it may be; but if the king grant the land in reversion, the rent must be demanded on the land before the patentee can enter, as for a forfeiture on non-payment (*h*).

How Rent may be paid.

Like any other species of debt rent may be paid by a remittance by the post. If a tenant be directed by his landlord to remit money by the post, and it be lost, the latter must bear the loss (*i*): but it was held, that a person so remitting money ought to deliver the letter at the General Post, or a receiving-house appointed by that office, and not to a bellman in the street (*k*). Where a creditor in the country directed his debtor to pay money into a London banking-house for his account, but had no account with the house but through a country banker; it was held, that a payment to the credit of his account with the country banker was a discharge to the debtor (*l*). Generally, a creditor may insist upon payment being made either to himself or his agent; but having once authorized payment to his agent, he cannot revoke that authority, if the debtor have given such a pledge to pay pursuant to the authority as would bind him in a court of law (*m*).

Effect of Bills of Exchange or Promissory Notes in Payment of Rent.

If the landlord take a security for the payment of rent in arrear—as if he take a bond, bill of exchange, or promissory note—his so doing will not amount to a payment of the rent, nor bar him of his remedies peculiar to the recovery of rent; but a judgment obtained on a bond would be an extinguishment of the debt for rent. In one case, where the plaintiff, the tenant, gave a note of hand for rent in arrear, and took a receipt for it when paid, and the defendant having afterwards distrained for the rent, the plaintiff brought trespass, it was held, that notwithstanding the note the defendant might distrain, for that it was no alteration of the debt till payment (*n*). A tenant being indebted for rent, his landlord's agent received from the tenant a bill of exchange for the amount, which he indorsed over, and paid the rent to the landlord, crediting it in his accounts as if the tenant had paid the money; the landlord having distrained for rent: it was held to be a question for the jury whether the transaction amounted to a discount of the bill by the agent for the tenant, or a mere advance of rent by the agent to the landlord, in which latter case he was entitled to

(*g*) *Haldane* v. *Johnson*, 8 Exch. Rep. 689.
(*h*) *Borough* v. *Taylor*, Cro. Eliz. 462.
(*i*) *Warwicke* v. *Noakes*, Peake, 67.
(*k*) *Hawkins* v. *Rutt*, Peake, 186.
(*l*) *Breed* v. *Green*, Holt, 204.
(*m*) *Hodgson* v. *Anderson*, 3 Barn. & Cres. 842; 5 Dowl. & Ryl. 735.
(*n*) *Harris* v. *Shipway*, and *Ewer* v. *Clifton* (*Lady*), Bull. N. P. 182; and see *Seven* v. *Mihil*, 1 Lord Ken. 370; *Davis* v. *Gyde*, 2 Ad. & El. 623; 4 Nev. & Man. 462; 1 Har. & Wol. 50.

distrain (*o*). Where to covenant for rent against three defendants, it was pleaded that 41*l.* of the rent was paid; that of the residue two of the defendants had paid their shares, and that the other had given the plaintiff a promissory note for his share payable at a banker's; that such note was dishonoured, whereupon the plaintiff sued him and had judgment by default on the note, which judgment was still unsatisfied (*p*): Lord Kenyon said, "the judgment is a merger of the original cause of action where it is obtained immediately on the original cause itself; but it is no merger where it is on a collateral point, unless the fruits of it be obtained." Where a tenant, on whom his landlord had distrained for rent, gave a promissory note for the amount, jointly with another person, to release his goods; and a subsequent distress was made on him for arrears of rent accruing due after the period to which the note referred; it was held, that the produce of the sale of such latter distress must be applied in discharge of the note, and that the landlord could not apply it in discharge of the subsequent rent, and then sue the person who joined in giving the note for the former rent (*q*). In ordinary cases where a party has taken bills in payment of a debt, it will be presumed that the money was received, unless the contrary be shown (*r*).

Stamp Duty on Receipts for Rent.

Receipts or discharges given for the payment of rent, require to be stamped if the sum received amounts to 2*l.* or upwards (*s*). A receipt stamp is necessary where a paper contains acknowledgments at successive times of the payment of money (*t*); and it was ruled that a receipt for 52*l.* 10*s.* required only a stamp for that amount, though it mentioned 100*l.* paid before (*u*); and a written acknowledgment at the foot of an account, stating that such account is correct, may be given in evidence without a receipt stamp (*x*). If a tradesman write "settled" under his bills, and puts his initials, he incurs the penalty for giving a receipt without a stamp (*y*): and a bill of parcels to which there was subscribed the following words, "settled by two bills, one at nine and the other at twelve months," has been held to require a receipt stamp (*z*);

(*o*) *Parrott* v. *Anderson*, 7 Exch. Rep. 93; and see *Griffiths* v. *Chichester*, ibid. 95.

(*p*) *Drake* v. *Mitchell*, MS., Mich. Term, 42 Geo. III.; *S. C.* 3 East, 251.

(*q*) *Palfrey* v. *Baker*, 3 Price, 572.

(*r*) *Hebden* v. *Hartsink*, 4 Esp. 46.

(*s*) By the 16 & 17 Vict. c. 59, s. 1, certain stamp duties payable on instruments mentioned in the schedule are repealed and others granted in lieu thereof. The schedule is as follows:—

"Receipt or discharge given for or upon the payment of money amounting to 2*l.* or upwards, 1*d.*

"*Exemption.*

"Receipts given for any money deposited in any bank, or in the hands of any banker, to be accounted for, whether with interest or not; provided the same be not expressed to be received of or by the hands of any other than the person to whom the same is to be accounted for: provided always, that this exemption shall not extend to receipts or acknowledgments for sums paid or deposited for or upon letters of allotment of shares of or in any joint-stock or other company, or proposed or intended company, which said last-mentioned receipts or acknowledgments, by whomsoever given, shall be liable to the duty by this act charged on receipts."

(*t*) *Wright* v. *Shawcross*, 2 Barn. & Ald. 501, n.

(*u*) *Dibden* v. *Morris*, 2 Car. & Pay. 44.

(*x*) *Wellard* v. *Moss*, 7 Moore, 503; 1 Bing. 134.

(*y*) *Spawforth q. t.* v. *Alexander*, Peake, 25, n.; 2 Esp. 621.

(*z*) *Smith* v. *Kelly*, Peake, 25, n.; 4 Esp. 249.

and where a landlord fraudulently and improperly received various sums of money from several of his tenants, and the evidence of payments by them consisted of memoranda of accounts delivered to the tenants in which the items in question were set down, and to each of which the landlord wrote the word "paid;" it was held, that such memoranda were admissible in evidence without a stamp, when coupled with entries in the steward's books to the same effect (*a*). A paper signed by the lessor in this form—"Mr. *J.* (the lessee) having written off the sum of 72*l.* from his mortgage debt, being five quarters' rent of his house, I hereby discharge the same rent to the 24th day of July last"—requires a receipt stamp (*b*). A paper in form of a receipt, if it is not given in evidence *as* a receipt, does not require a stamp (*c*); and an unstamped receipt may be used by a witness who can prove the fact independently, to refresh his memory (*d*).

When Payment of Ground-rent may be set off against Rent.

Although it may be generally laid down that no payments or damages, made or sustained by the tenant can be set off against a claim for rent due to the landlord; yet a payment of ground-rent by the tenant, in default of payment by his mesne landlord, may always be set off against the amount of rent claimed from him (*e*); and growing rent may be discharged by such payments as well as rent actually due: such payments are not the less compulsory because the ground landlord, on demanding the ground-rent, allows the occupier time to pay. Where a tenant shortly after he had paid half a year's rent to his landlord, due at Lady-day preceding, was called upon by the agent of the ground landlord for ground-rent due previously to Lady-day, and which the landlord had refused to pay; it was held, that the payment of such ground-rent by the tenant was not a voluntary payment, although the agent of the ground landlord gave him time for that purpose; and that the tenant was entitled to deduct such payment from the next rent accruing due to his landlord, although it was not actually due at the time the ground-rent was paid: and the tenant having tendered the balance due after deducting such payment, together with another sum paid for land-tax previously due, which the landlord refused to accept, but distrained for the whole rent then in arrear; it was held, that the tenant was entitled to recover, in an action on the case, for a wrongful distress, and that a count, stating that the landlord had distrained for the whole rent when only the sum tendered was due, was sufficient (*f*). Where a stranger received rent due to the testator in his lifetime, and, afterwards, by desire of the tenant in possession, paid the demand of ground-rent due at the same time, for the same premises; it was held, that he might deduct such

(*a*) *Clarke* v. *Hougham*, 3 Dowl. & Ryl. 325.
(*b*) *Lucas* v. *Jones*, 5 Queen's B. Rep. 949; 1 Dav. & Mer. 774.
(*c*) *Brookes* v. *Davies*, 2 Car. & Pay. 186.
(*d*) *Rambert* v. *Cohen*, 4 Esp. 213.
(*e*) *Doe* v. *Hare*, 2 Cromp. & Mees. 145; 4 Tyr. 29.
(*f*) *Carter* v. *Carter*, 5 Bing. 406; 2 Moore & Pay. 732; *Sapsford* v. *Fletcher*, 4 Term Rep. 511.

payment in an action by the executor for the rent, but not a payment of ground-rent, arising after the death of the testator (*g*).

When Payment of Land-Tax is a Payment of Rent.

By the general Land Tax Act, 38 Geo. III. c. 5, s. 17, "the tenants of all houses, lands, tenements and hereditaments, which shall be rated by virtue thereof, are required and authorized to pay such sum or sums of money as shall be rated upon such premises, and to deduct out of the rent so much of the said rate as in respect of the said rents the landlord ought to bear;" and the landlords, both mediate and immediate, are required to allow such deductions and payments upon the receipt of the residue of the rents (*h*): a broker distraining for rent, deducting the land-tax, cannot be considered as *allowing* it (*i*). Where growing rent has been reduced by payments of land-tax, &c., if the landlord distrain for the whole sum reserved, the tenant may properly sue for it (*k*). If a landlord direct a tenant, who is overseer of the poor, to pay on the landlord's account rates regularly assessed on him, and promises that the levies shall eat out the rents, the tenant may set them off, or prove them as payment, in an action for use and occupation (*l*).

When Payment of Property Tax is a Payment.

By the Property Tax Act, 5 & 6 Vict. c. 35 (*m*), s. 60, Rule IV. 9, occupiers of lands, &c., paying the duty of seven pence in the pound, increased to one shilling and two pence in the pound by the 17 Vict. c. 24, s. 1, on the annual value of lands, &c., in respect of the property thereof, may deduct so much thereof, as a rate of seven pence in the pound on their rent amounts to, out of the first payment afterwards made on account of rent. Under a former Property Tax Act, it was held that where a tenant assigned his interest at Michaelmas, and afterwards paid three quarters of a year landlord's property tax due at Michaelmas, and handed over the receipt to his assignee, the latter, on paying half a year's rent at Christmas, might tender the receipt for property tax in part of his rent (*n*). A similar provision is contained in the Property Tax Act, 16 & 17 Vict. c. 34, s. 40; by that Act, s. 35, tenants of lands, &c., who have been compelled to pay property tax due from former tenants, are authorized to deduct the amount from subsequent rent. By sect. 36, the landlords of houses let in different apartments or tenements are to be charged with the property tax in respect thereof (*o*). By the 14 Vict. c. 12, s. 3, where the profits of tenant farmers fall short of the assessments, a proportionate abatement from the duties is to be made.

(*g*) *Wilkinson* v. *Cawood*, 3 Anst. 905.

(*h*) *Saunderson* v. *Hanson*, 3 Car. & Pay. 314.

(*i*) As to the extent to which the tenant may make such deductions, and the effect of the covenant to pay taxes, see post, Chap. III., Sects. 1, 2.

(*k*) *Carter* v. *Carter*, 5 Bing. 406; 2 Moore & Pay. 732.

(*l*) *Roper* v. *Bumford*, 3 Taunt. 76.

(*m*) Continued by 8 & 9 Vict. c. 4, and 11 & 12 Vict. c. 8; see also 16 & 17 Vict. c. 34, and 17 & 18 Vict. c. 24.

(*n*) *Clennell* v. *Read*, 7 Taunt. 50; 2 Marsh. 371; and see *Tinkler* v. *Prentice*, 4 Taunt. 549; and *Franklin* v. *Carter*, 1 Com. B. Rep. 750; 3 Dow. & Low. 213.

(*o*) And see sect. 42 as to deductions on payments of rent-charges under the Drainage Advances Acts, and sections 44 and 46.

Payments under other Acts of Parliament.

By the Tithe Commutation Act, 6 & 7 Will. IV. c. 71, s. 80 (*p*), and the Manorial Rights Commutation Act, 4 & 5 Vict. c. 35, s. 45, tenants may deduct from their rent payments made by them for rent-charges under those acts.

When other things may be set off against rent.

Wherever a tenant may be ousted from his occupation on default made of a payment by his landlord, he may pay in his discharge and for the redemption of the premises, and set off such payment against rent due from him to his landlord (*q*): but where a tenant paid as rent a sum to prevent a person ejecting him from a portion of the land to which he claimed title from the lessor prior to the lease, it was held not a payment which could be set up against so much of the rent (*r*). Where a landlord is bound to repair, and the tenant is obliged by sudden accident to make repairs, in order to prevent further mischief, it seems that the tenant may set off the money laid out in such repairs against an action brought against him by the landlord for rent (*s*): in a case where a tenant was ejected and possession given whilst there were crops lying upon the ground, the Court of Common Pleas refused to refer it to the officer of the court to ascertain the value of the crops, and deduct that sum from the rent due (*t*). It would appear that by special agreement money due to a party from his landlord may be set off (*u*).

When Payment of Rent is protected in Bankruptcy.

Money paid to a landlord by a bankrupt tenant to avoid a threatened distress, was, even previously to the statute 2 & 3 Vict. c. 29 (*x*), a protected payment (*y*): thus where a bankrupt proposed, after an act of bankruptcy, to dispose of his lease, which was a beneficial one, but the purchaser refused to take the lease unless five quarters' rent, which were in arrear, were first paid; after a negociation between the bankrupt and the landlord, who knew the bankrupt's situation, the rent was paid out of the money which the purchaser had agreed to give for the lease, there being at the time of the transaction no distress on the premises, but the landlord having a right of re-entry; it was held, that the bankrupt's assignee could not recover from the landlord the rent so paid to him in an action for money had and received (*z*). *A.* being a bankrupt, continued in possession of his estate, and granted an annuity out of certain premises to *B.*, and the tenant in possession paid the rent to *B.* in order to prevent a distress; it was held, that

(*p*) See post, Chap. VII., Sect. 5, (a).

(*q*) *Smith* v. *Pearce*, MS., sittings at Guildhall, after M. T. 43 Geo. III., Lord Ellenborough, C. J.

(*r*) *Boodle* v. *Cambell*, 7 Man. & Gran. 386; 2 Dow. & Low. 66; 8 Scott, N. R. 104.

(*s*) *Waters* v. *Weigall*, 2 Anst. 575. A tenant in an action against him for rent may avail himself of part payment of money obtained under a distress or of a judgment against him in the county court for the same rent; *Harmer* v. *Bean*, 3 Car. & Kir. 307.

(*t*) *Doe* d. *Upton* v. *Witherwick*, 3 Bing. 11; 10 Moore, 267.

(*u*) *Wilson* v. *Davenport*, 5 Car. & Pay. 531.

(*x*) Ante, 225. This statute is repealed, but is substantially re-enacted, with additions, in 12 & 13 Vict. c. 106, s. 133.

(*y*) *Stevenson* v. *Wood*, 5 Esp. 200. See also post, Chap. II., Sect. 2, (i).

(*z*) *Mavor* v. *Croome*, 1 Bing. 261; 8 Moore, 171.

the assignees of *A.* could not maintain an action for money had and received against *B.* (*a*). A mortgagee having given notice to the tenants holding the mortgaged premises under leases granted by the mortgagor after the mortgage, is entitled to receive from those tenants the rents actually due at the time of the notice, as well as those which accrued due afterwards; and where such rents had been received by the agent of the mortgagor after bankruptcy, and were not actually paid over, it was held, that the agent might retain such rents in order to pay the interest accruing due on the mortgage to the mortgagee, who had required him to do so, and that the assignees could not recover them (*b*).

Sect. 6.—*Apportionment of Rent.*

When Apportionment by Act of Law takes place.

As we have seen by the definition, the reservation of rent was considered as an entire contract, and therefore by the strict rule of law the rent could not be apportioned; yet in this respect, as well as in one or two other cases (*c*), the strictness of this rule has been much relaxed; and it has been long held, that as a reversion is in itself separable, so the rent incident to it may be severed likewise (*d*). Apportionment at common law takes place by act of law or by act of the parties; or upon the alteration of the lessee's interest in the thing demised. By act of law, where lands demised at an entire rent become divided among different persons; thus if freehold and leasehold premises are let together at one rent, an apportionment takes place at the death of the lessor among the real and personal representatives (*e*).

Alienation of the Lessor.

Apportionment at common law may also be by act of the parties: thus if the lessor dispose of part of the lands in reversion, either by will or deed, and the lessee attorn to such grantee, the rent is apportionable (*f*); but the lessee's concurrence to the apportionment is necessary: and in a late case the apportionment made between the claimants was held to be not binding upon the tenant, though it would have been otherwise if settled by a jury (*g*): in that case a lease was made to *A.* of two houses adjoining each other, at one entire rent of 65*l.* 10*s.*, and the lessor conveyed one of the houses by deed (to which the lessee was no party) to *B.* in fee, at an apportioned rent of 40*l.*;

(*a*) *Darnton* v. *Pigman*, Peake, Ad. Ca. 111.

(*b*) *Pope* v. *Biggs*, 9 Barn. & Cres. 245; 4 Man. & Ryl. 193.

(*c*) See Abbott's Shipping.

(*d*) *West* v. *Lascelles*, Cro. Eliz. 771. See post, Book III., Chap. VI., Sect. 5, (e), ad finem.

(*e*) *Huntley* v. *Roper*, 1 And. 21. "Apportionment," in the words of Sir E. Coke, "signifieth a division or partition of a rent, common, &c., or a making of it into parts;" but it has been better defined as "frequently not denoting division but distribution; and in its ordinary technical sense, the distribution of one subject in proportion to another previously distributed;" *Ex parte Smyth*, 1 Swanst. Rep. 338, n.

(*f*) *West* v. *Lascelles*, Cro. Eliz. 851; *Collins* and *Harding's case*, 13 Co. Rep. 57 a; Cro. Eliz. 606, 622; Moor. 544.

(*g*) *Bliss* v. *Collins*, 5 Barn. & Ald. 876; 1 Dowl. & Ryl. 291; and see *Roberts* v. *Snell*, 1 Man. & Gran. 577.

it was held, that such apportionment should have been made by a jury to give it validity, inasmuch as the grantee had not acquired the same rights and remedies against *A.* the lessee as he would have acquired under the legal apportionment by a jury; the lessee not being bound by the apportionment in the conveyance to which he was no party, and the propriety of which he might dispute.

By Alienation of the Lessee.

As we have seen that the payment of rent by the lessee is considered in the eye of the law as an acknowledgment of tenure, no act upon his part can rid him of the liability to his landlord: and though this position has been disputed (*h*), it is submitted to be strictly correct; for though when the lessee aliens part of the land, the alienee is liable for a proportional part of the rent if the landlord choose to proceed against him (*i*); and though if the landlord has received rent from the assignee, he has so far waived his privity of contract with the lessee that he cannot maintain an action of debt for the rent against him (*k*), yet the personal contract of the lessee still subsists, and renders him liable for the whole arrears of rent in an action of covenant (*l*).

Alteration of Lessee's Interest by a Surrender.

The alteration of the lessee's interest in the thing demised also gives rise to apportionment: thus, where the lessee surrenders part of the estate to the lessor himself, the rent for the remainder is apportioned (*m*): so were a lessee for years of land, rendering rent, accepts a new lease from the lessor of part of the land, it is a surrender of this part, and the rent shall be apportioned (*n*).

By an Eviction of the Lessee.

Where the lessee is evicted from part of the lands by title paramount, he will have to pay a rateable proportion for the remainder (*o*); but if he be evicted from part of the lands by his landlord, no apportionment, but a suspension of the whole rent takes place, except in the case of the king: yet there is no suspension if the eviction has followed upon the lessee's own wrongful act, as a forfeiture or recovery of part of the lands in an action of waste (*p*). A distinction in the apportionment of rents, between the grant of a rent and the reservation of a rent, laid down by Sir Edward Coke, should be noticed, as it was lost sight of in a case (*q*), which has been since overruled. The distinction is this:—if a man *grant* a rent-charge out of more lands than he is entitled to by his estate, his heir, who represents him, shall not take advantage of the wrong to set aside his ancestor's grant, whereas if he *reserve* the rent—as it is reserved out of the whole land, and it is

(*h*) 4 Jarm. Prec. 335, 3rd ed.

(*i*) *Stevenson* v. *Lambard*, 2 East, 575.

(*k*) *Walker's case*, 3 Co. Rep. 22; *Marsh* v. *Bruce*, Cro. Jac. 334.

(*l*) *Bachelour* and *Gage's case*, Cro. Car. 188; *Ipswich* (*Bailiff*) v. *Martin*, 1 Roll. Abr. 235, pl. 17; *Orgill* v. *Kemshead*, 4 Taunt. 642.

(*m*) *Smith* v. *Malings*, Cro. Jac. 160; *Anon.*, Moor, 114.

(*n*) Vin. Abr. tit. *Apportionment*, (B 5, 12).

(*o*) *Smith* v. *Malings*, Cro. Jac. 160; 1 Roll. Abr. 235; *Stevenson* v. *Lambard*, 2 East, 575; *Boodle* v. *Cambell*, 7 Man. & Gr. 386; 2 Dow. & Low. 66; 8 Scott, N. R. 104. See also post, Sect. 7, p. 346; and Book III., Chap. IV., Sect. 1, (b).

(*p*) *Walker's case*, 3 Co. Rep. 22; 1 Roll. Rep. 331; Moor, 203.

(*q*) *Rees* d. *Parkins* v. *Phillips*, Wightw. 69.

reasonable that where there is an eviction as to part of the land by title paramount, the lessee should not be charged with the whole rent—it shall all be apportioned rateably according to the value of the land (*r*): thus if a man be seised of two acres of land, of one in fee simple, and of the other in tail, and by deed *grant* a rent out of both in fee, in tail, or for life; the land intailed is discharged, and the land in fee simple remains charged with the whole rent; which is taking it most strongly against the grantor; but if he had *reserved* a rent upon the same, or a lease for life or years, and had died, and the heir in tail had avoided the lease, the rent would be apportioned. And in a recent case, where a person demised at one entire rent lands of which he was seised in fee, and lands of which he was tenant for life with power of leasing; and the lease being void as to the latter lands for want of conformity to the power; the Court held, that though the lease as to the lands comprised in the power was void, the rent might be apportioned for the remainder (*s*). Where a lessor professes to grant more than he is entitled to, as an exclusive right of sporting, and it turns out that he has no such privilege, an apportionment of rent will be made on that account (*t*). A lessee of 100 acres of land accepted the lease and entered upon the land; upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until half a year's rent became due, the lessee continuing in possession of the remainder; the prior lease was for a term extending beyond the duration of the latter lease; it was held, that the latter demise was wholly void as to the eight acres, and that the rent was not apportionable, the impediment to the lessee taking possession not being analogous to an eviction by title paramount (*u*). So where the tenant cannot obtain possession of all the premises demised, an action of covenant by lessor against the lessee for the rent cannot be maintained, as in such an action the rent cannot be apportioned (*x*).

Where Realty and Personalty are let together.

Where lands and goods are let at an entire rent, and the tenant is evicted from the lands, no apportionment can be made for the goods, as the rent is held to issue from the land alone (*y*). A contrary opinion seems to have prevailed in *Richard le Taverner's case* (*z*), though the Court came to no decision: and in two later cases, the principle first mentioned has been completely recognized; for it was held, that a judgment creditor was not entitled to any part of the rent in respect of goods demised with lands at an entire rent, though if they had been

(*r*) Co. Litt. 148 b.

(*s*) *Doe* d. *Vaughan* v. *Meyler*, 2 Maule & Selw. 276.

(*t*) *Tomlinson* v. *Day*, 2 Brod. & Bing. 680; 5 Moore, 558.

(*u*) *Neale* v. *Mackenzie*, 1 Mees. & Wels. 747; 2 Gale, 174, in error, reversing *S. C.* 2 Cromp. M. & R. 84; 1 Gale, 119; 5 Tyr. 1106.

(*x*) *Holgate* v. *Kay*, 1 Car. & Kir. 341.

(*y*) *Ernot* v. *Cole*, Dyer, 212 b, in marg.; *S. P. Collins* v. *Harding*, Cro. Eliz. 606; 13 Co. Rep. 57; Moor, 544.

(*z*) Dyer, 56 a.

let at a specific rent he might have taken the rent of the goods (*a*). So the rent for furniture in furnished lodgings has been considered as issuing out of the realty only (*b*). But where the mortgagor of a house let it furnished, and the tenant, after notice, paid the whole rent to the mortgagee; it was held, that the mortgagor might still recover for the use of the furniture (*c*).

Where Lessee is evicted in the Middle of a Quarter.

Where a lessee is evicted by title paramount in the middle of a quarter, it has been doubted whether the rent for that quarter is apportionable; though it is strange that such a question should have arisen, as it is expressly laid down in several cases (*d*) that there can be no apportionment of rent in respect of time. The confusion seems to have taken place from a proportion of the rent having been allowed when the lessee was evicted from *part* of the lands; but Sir Edward Coke distinguishes this as being made not in respect of the *time*, but of the *land* from which the lessee was evicted (*e*). No apportionment of rent therefore took place at common law in respect of time; if therefore the lease determined before the legal time of payment, no rent was paid.

Where Land is lost by any Casualty.

The loss of the land to the lessee by any casualty (*f*)—as the overflowing of the sea—appears to be another case of eviction, in which the tenant may claim apportionment: but the loss must be total, for if there be merely a partial irruption of water, the exclusive right of fishing, which the lessee would thereupon have, would be such a perception of the profits of the land as to annul his claim (*g*).

Where Land is taken for Public Undertakings under Statute 8 & 9 Vict. c. 18.

Where part of land on lease is taken for the purpose of undertakings of a public nature, the general act authorizing the taking of lands for such purposes, 8 & 9 Vict. c. 18, s. 119, gives a power to two justices to settle the apportionment of the rent if the parties cannot agree; and where part only of leasehold premises subject to an entire single rent is taken, the arbitrator appointed under that act has no power to apportion the rent (*h*). Where part only of lands comprised in a lease for an unexpired term shall be conveyed or agreed to be conveyed for sites for schools for the education of the poor, under the 4 & 5 Vict. c. 38, the rent and the fine upon renewal may, by 12 & 13 Vict. c. 49, s. 1, be apportioned between the parties interested.

Under 12 & 13 Vict. c. 49.

Under 17 & 18 Vict. c. 32.

By the 17 & 18 Vict. c. 32, where parts of lands in lease are taken for the purposes of the Church Building Acts, rents and fines on leases and renewals may be apportioned.

Under 17 & 18 Vict. c. 97.

Under the 17 & 18 Vict. c. 97, for amending and extending the acts

(*a*) *Cadogan* v. *Kennet*, Cowp. 432.
(*b*) *Newman* v. *Anderton*, 2 New Rep. 224; *Spencer's case*, 5 Co. Rep. 16.
(*c*) *Salmon* v. *Matthews*, 8 Mees. & Wels. 827.
(*d*) *Clun's case*, 10 Co. Rep. 128 a; *Barwick* v. *Foster*, Cro. Jac. 227; Yelv. 867; *Price* v. *Williams*, Cro. Eliz. 360; *Slack* v. *Sharp*, 8 Ad. & El. 366; 3 Nev. & Per. 390; 1 Will. Wol. & Hod. 496. See also post, Book III., Chap. IV., Sect. 1, (b).
(*e*) *Clun's case*, 10 Rep. 128 a.
(*f*) As to casualties by fire, see post, Sect. 7, pp. 344, 345.
(*g*) 1 Roll. Abr. 236, l. 40.
(*h*) *In re Ware*, 9 Exch. Rep. 395.

for the inclosure, exchange and improvement of land, rents and other certain payments may be apportioned by sect. 10.

Apportionment by Statute 11 Geo. II. c. 19.

The under-tenant very frequently, at common law, escaped without paying any rent at all (*i*), which being considered a hardship to the representatives of the landlord, was endeavoured to be remedied by the statute 11 Geo. II. c. 19, s. 15. That statute, after reciting "that where any lessor or landlord, having only an estate for life in the lands, tenements or hereditaments demised, happens to die before or on the day on which any rent is reserved or made payable, such rent, or any part thereof, is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, tenements or hereditaments, from the death of the tenant for life, of which advantage hath been often taken by the under-tenants, who thereby avoid paying anything for the same;" enacts, "that where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable, upon any demise or lease of any lands, tenements or hereditaments which determined on the death of such tenant for life, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, &c., if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances or a proportionable part thereof respectively." A distinction has been taken by the courts in the construction of this statute between cases—in which (before the statute) the rent would have been lost unless paid to the personal representative of the tenant for life, and those—in which, being at all events payable by the lessee, the question arose whether it should be paid to the heir or remainderman on the one hand, or to the personal representatives of the tenant for life on the other: thus the grantee of a rent-charge for life payable at Michaelmas and Lady-day, having died on Michaelmas-day, between sun-set and midnight, her administrator was declared entitled to the rent, on the ground that she had survived the time, namely, sun-set, when it was demandable and to be paid by the lessee on pain of forfeiting his lease (*k*). The courts, however, have considered it as a beneficial statute, and have put a liberal construction upon it; thus the representatives of a tenant in tail, who had demised the entailed estate by a lease which was void against the remainderman, were held to be entitled to an apportionment of the rent, even when the entire amount had been previously paid to the remainder-

(*i*) See 4 Jarm. Prec. 339, 3rd edit., and ante, 329, 330.

(*k*) *Southern* v. *Ballasis*, 1 P. Will. 179, n.; but see *Norris* v. *Harrison*, 2 Mad. 268.

man (*l*). Wherever a lease made by tenant for life or in tail does not terminate with his death—as if made in pursuance of a power or conformably to the statute—the rent is not apportioned; but if it terminate on that event, an apportionment takes place (*m*); thus if tenant for life, with a leasing power, demise, though not conformably to such power, and die before the rent become due, the interest of the lessee is determined with the life of the lessor, and the rent shall be apportioned under the statute. Where the lessee of a tenant in tail, whose estate determined in the middle of a half-year, paid the entire rent to the remainderman, Lord Hardwicke decided, that the executors of the tenant in tail were entitled to apportionment; grounding his opinion upon the fact of the tenant having paid the rent, and that therefore the person receiving it should be accountable to those entitled to it in equity (*n*); and on a demise from year to year by the guardians of an infant tenant in tail, the tenant having paid the rent to the receiver, Lord Thurlow also held, that there should be an apportionment (*o*). Two cases on the subject of tithes have also been decided in equity: in one, the executors of a deceased rector were held to be entitled to an apportionment of rent on a lease of the glebe, parsonage-house, tithes, &c. of a rectory, which the tenant had paid to the successor (*p*); and in the other, where the successor of a rectory had received the whole year's composition for a tithe which his predecessor had made, an apportionment was decreed, with reference to the respective periods of enjoyment (*q*).

Statute 4 & 5 Will. IV. c. 22.

By statute 4 & 5 Will. IV. c. 22, s. 1 (*r*), the provisions of the statute 11 Geo. II. c. 19, are expressly extended to rents reserved on leases determinable on the death of the person making them, though not strictly tenant for life, or on the death of tenants pur autre vie (*s*). The doctrine of apportionment is also extended by sect. 2 to all rents, annuities and other payments of every description coming due at fixed periods (*t*). It has been decided that this statute does not apply to cases where the party entitled to the rent himself puts an end to the term (*u*), nor as between the personal representatives and the heir of a tenant in fee (*x*).

Mortgage Interest.

Interest due on a mortgage is apportionable; for in fact such interest accrues every day for forbearance of the principal, notwithstanding it is usual in mortgages to make it payable half-yearly; and in one case

(*l*) *Whitfield* v. *Pindar*, C. B. 1781, cited 8 Ves. jun. 311.

(*m*) *Symons* v. *Symons*, Madd. & Geld. 207; *Clarkson* v. *Scarborough* (*Earl*), 1 Swanst. 354, n.; *Strafford* v. *Wentworth*, Prec. Chan. 555; *Ex parte Smyth*, 1 Swanst. 337.

(*n*) *Paget* v. *Gee*, Burn's Just. tit. *Distress*; *S. C.* Amb. 198; 9 Mod. 482.

(*o*) *Vernon* v. *Vernon*, 2 Bro. Ch. Ca. 659.

(*p*) *Hawkins* v. *Kelly*, 8 Ves. jun. 308.

(*q*) *Ansley* v. *Wadsworth*, 2 Ves. & Bea. 331.

(*r*) This statute extends to Scotland; *Fordyce* v. *Brydges*, 1 Ho. Lords' Rep. 1.

(*s*) See *Wykham* v. *Wykham*, 3 Taunt. 316.

(*t*) See *Sutton* v. *Chaplin*, 10 Ves. jun. 67.

(*u*) *Oldershaw* v. *Holt*, 4 Per. & Dav. 367; Arn. & Hod. 1; 12 Ad. & El. 590.

(*x*) *Beer* v. *Beer*, 12 C. B. 60.

an apportionment was decreed, although the money which had been originally secured by mortgage had been, by order of the court, transferred to government securities (y).

Yearly Tenancies.

As regards tenancies from year to year, the suggestion of a learned writer (z) is very worthy of notice, viz., that if a tenant for life, in a case where the land has been let from year to year by the owner of the fee, prior to the estate for life being created, wishes to entitle his representatives to the rent for the fractional period (if any) of the current quarter or half-year preceding his decease, he should terminate the original holding by notice, and then re-let the premises to the same or any other tenant; though the interest of the remainderman would probably be better consulted by his agreeing that an apportionment should be made under the existing tenancy, than that the land should be re-let, subject to the disadvantage arising from the tenant's interest being liable to be suddenly determined by the lessor's death. It has been recently held, where a tenant in fee demised lands from year to year and died, having devised them for life, and the devisee received rent, but did not live long enough to have a right to determine the yearly tenancy, that his administrator was not entitled to an apportionment under the statute 11 Geo. II. c. 19 (a).

How Apportionment is made.

The proper action in which to apportion rent between a lessor and lessee is an action of debt (b), and it cannot be apportioned in an action of covenant by lessor against the lessee, the action being personal; but in covenant against an assignee, whose obligation arises from privity of estate, and not of contract, the case is different; against him, therefore, the rent may be apportioned in an action of covenant (c).

Sect. 7.—*Extent of Tenant's Liability.*

In case of the Tenant assigning the Premises.

The lessee, being a party to the original contract, continues always liable for rent, notwithstanding any assignment; for it is extremely clear, that a person who enters into an express covenant in a lease continues liable on his covenant, notwithstanding the lease be assigned over (d). As the lessee has from his covenant both a privity of contract and of estate, though he assign, and thereby destroy the privity of estate, yet the privity of contract continues, and he is liable, in an action of covenant, for the rent, notwithstanding the assignment. The assignee, on the other hand, comes in only in privity of estate, and is therefore liable only whilst in possession, that is, whilst he has the legal estate (e). Where, however, he assigns over, he is liable as to

(y) 3 Atk. 260, 502; 2 P. Wms. 176, 503, n. 1.

(z) 4 Jarm. Prec. 341, 3rd ed.

(a) *Botheroyd* v. *Woolley*, 1 Gale, 66; 5 Tyr. 522.

(b) See Brownl. & Goulds. 33.

(c) *Stevenson* v. *Lambard*, 2 East, 575; *Holgate* v. *Kay*, 1 Car. & Kir. 341.

(d) *Eaton* v. *Jacques*, 2 Dougl. 455; *Auriol* v. *Mills*, 4 Term Rep. 94.

(e) See ante, 87, 214, &c., and post, Book III., Chap. II., Sect. 3, (c).

the arrears of rent incurred before (it is said) as well as during his enjoyment: but the assignee of a lessee has been held not liable for rent accruing after an assignment over, although the assignment be wrongful (*f*). An assignee has been made liable in equity, though the privity of estate was destroyed at common law (*g*).

In case of the Tenant quitting.

A tenant remains liable for rent, unless he deliver up complete possession of the premises, or the landlord accept of another in his room (*h*); but where a lessee quitted, in the middle of his term, apartments which he had taken for a year, and the lessor let them to another tenant, it was held, that she should not recover in an action for use and occupation against the lessee for a subsequent portion of the year, during which the apartments had been unoccupied (*i*); though if a tenant abandon premises without notice, the landlord may recover subsequent rent, notwithstanding he has put up a bill at the window and otherwise endeavoured to obtain another tenant (*k*). Where a tenant from year to year, at a rent payable half-yearly, without giving any notice to the landlord, quitted the premises at the expiration of the current year; and before the next half-year expired the landlord let the premises to another tenant, who occupied the same; it was held, that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year, when he quitted the premises, to the time when the landlord re-let the same to the second tenant (*l*). If the landlord of lodgings enter into and use the apartments whilst the tenant is in possession, he is deprived of his right to rent; but if the tenant have abandoned the possession during his tenancy, the landlord's lighting fires in the rooms, or even using the rooms, will not deprive him of his right to rent (*m*). Where during a current quarter some dispute arose between the lessor and lessee of a first and second floor of a house demised for a year, at a rent payable quarterly; and the lessee having told the lessor that she would quit immediately, the latter answered that she might go when she pleased; upon which the lessee did quit, and the lessor accepted possession of the apartments; it was held, that he could neither recover the rent, which by virtue of the original contract would have become due at the expiration of the current quarter, nor rent pro ratâ for the actual occupation of the premises for any period short of the quarter (*n*).

Where the Premises are destroyed by Fire.

Where the lessee covenants generally to pay rent, he is bound to pay it though the house be burnt down. And a lessee who covenants

(*f*) *Paul* v. *Nurse*, 2 Man. & Ryl. 525.
(*g*) Bac. Abr. tit. *Covenant*, (E 4).
(*h*) *Harding* v. *Crethorn*, 1 Esp. 57; *Ibbs* v. *Richardson*, 9 Ad. & Ell. 849; 1 Per. & Dav. 618; see ante, 256, 257, 258.
(*i*) *Walls* v. *Atcheson*, 11 Moore, 379; 3 Bing. 462; 2 Car. & Pay. 268.
(*k*) *Redpath* v. *Roberts*, 3 Esp. 225.
(*l*) *Hall* v. *Burgess*, 5 Barn. & Cres. 332.
(*m*) *Griffith* v. *Hodges*, 1 Car. & Pay. 419.
(*n*) *Grimman* v. *Legge*, 8 Barn. & Cres. 324; 2 Man. & Ryl. 438. See also post, Book III., Chap. IV., Sect. 1, (b). The extent of the liability of a lessee who has become bankrupt, and whose interest has been assigned by the commissioners, has been already stated, ante, Book I., Chap. VI., Sect. 7, pp. 225, 226.

to pay rent and to repair, with an express exception of casualties by fire or tempest, is liable upon the covenant for rent, though the premises are burnt down, and not rebuilt by the lessor after notice; for although it was the default of the lessor in not repairing, and though it is a hard case, yet the lessee must at all events perform his covenant, by which he is expressly bound to pay rent during the term (*o*). Where premises were destroyed by fire during a tenancy under a written agreement, and rendered no longer habitable, the landlord was held to be still entitled to recover rent, accruing due after the fire, in an action for use and occupation (*p*). So also a tenant from year to year of a second floor, under a parol agreement, has been held liable in the same form of action (*q*): and where the rent for similar lodgings was payable quarterly, he was held liable for rent up to the time of the fire at least (*r*). The tenant in such cases, to get rid of his liability, should give a regular notice to quit. The rule is, that when the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make good his contract, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. Formerly the Court of Chancery would have relieved the lessee, and would have granted an injunction to restrain the landlord from bringing an action on the covenant for rent (*s*); but the doctrine at present entertained by the Court of Chancery is, that the tenant, under such circumstances, has no equity, and cannot restrain the landlord from bringing an action at law upon the covenant (*t*): thus it has been held, that the tenant, with a covenant by him to rebuild, has no equity to compel his landlord to expend money received from an insurance office, on the demised premises being burnt down; nor to restrain the landlord from suing for the rent until the premises should be rebuilt (*u*).

Where there is no beneficial Enjoyment.

A tenant for a fixed time will, in general, still continue liable to pay rent, though he gives up the premises on account of deriving no beneficial advantage from them, unless indeed where there is a default or fraud on the part of the landlord (*x*). Where *A.* agreed to purchase *B.*'s equitable interest in land for a term of years, at a specified rent;

(*o*) *Monk* v. *Cooper*, 2 Stra. 763; 1 Lord Raym. 1477; *Belfour* v. *Weston*, 1 Term Rep. 310; *S. P. Weigall* v. *Waters*, 6 Term Rep. 488; *Hare* v. *Groves*, 3 Anst. 687.

(*p*) *Baker* v. *Holtzappfel*, 4 Taunt. 45; see also *Hart* v. *Windsor*, 12 Mees. & Wels. 68.

(*q*) *Izon* v. *Garton*, 7 Scott, 537; 5 Bing. N. C. 501; 2 Arn. 39.

(*r*) *Packer* v. *Gibbins*, 1 Queen's B. Rep. 421; 1 Gale & Dav. 10. See also post, Book III., Chap. IV., Sect. 1, (b).

(*s*) *Brown* v. *Quilter*, Amb. 619; 2 Eden, 210; *Camden* v. *Morton*, 2 Eden, 219, cited 18 Ves. jun. 118; Selw. N. P. 464; *Steel* v. *Wright*, cited 1 Term Rep. 708.

(*t*) *Holtzappfel* v. *Baker*, 18 Ves. jun. 115.

(*u*) *Leeds* v. *Cheetham*, 1 Sim. Rep. 146; and see *Paris* v. *Gilham*, Coop. 56. As to the progress of the law relating to accidental burning of houses by fire, see Co. Litt. 57, n. 1; and 4 Jarm. Prec. 407, &c. 3rd ed. See also post, Chap IV., Sect. 2, and Chap. V., Sect. 1.

(*x*) See ante, 98, 282, and post, Chap. IV., Sect. 2, (a); and Book III., Chap. IV., Sect. 1, (b).

it was held, that after paying the rent several years, and acknowledging that a further sum was due, he could not resist *B.*'s claim for such further rent in an action on the agreement, by showing that he had not been able to use the lands; but that *B.* might recover in an action for use and occupation (*y*). Where the plaintiff was lessee of a colliery, at the rate of so much per wey, and the colliery became not worth working, upon the plaintiff offering to pay for all the coal that could be got, he was relieved by the Court of Chancery against the future rent and the covenant in the lease to work the colliery (*z*).

Where the Lessee is evicted.

By an entry of the lessor, or any one claiming through him, into any part of the premises demised, the rent is suspended (*a*): and therefore, as to subsequently (*b*) accruing rent the eviction will be a bar; but if the lessor enter by virtue of a power reserved, or even as a mere trespasser, if the lessee be not evicted, it will be no suspension of the rent (*c*). If a lessor serve a writ in ejectment under a clause, that for any breach of covenant the lease shall determine and be utterly void, he cannot maintain an action for subsequent accruing rent or breaches of covenant (*d*). If a party, having a paramount right to evict a tenant, goes to him and claims his right, on which the tenant attorns to him, it seems to be equivalent to an expulsion (*e*). Where lands were demised, and the lessee only entered on and had possession of part, in consequence of the lessor having previously demised the residue to a third party; it was held, that the want of possession was equivalent to an eviction by the tortious act of the lessor, and was not quasi an eviction by an elder title, and that therefore the rent was not apportionable and could not be distrained for (*f*). It is essentially necessary that such eviction be not the effect of a mere trespass, for in such case the lessee is not excused from the payment of his rent: thus where in an action of debt for rent, the lessee pleaded, that Prince Rupert, an alien born, with an hostile army, had entered upon the lessee, and expelled him out of possession, the Court of King's Bench held, that he was still bound to pay his rent (*g*). So a lessee of tithes is liable on his covenant to pay rent, notwithstanding the tithes have been commuted for a rent-charge, his remedy being by surrender of his lease under the 88th section of the Tithe Commutation Act, 6 & 7 Will. IV. c. 71 (*h*).

(*y*) *Connolly* v. *Baxter*, 2 Stark. 525.

(*z*) *Brown* v. *Morris*, 2 Bro. Ch. Ca. 311; but see *Bute* (*Marquis*) v. *Thompson*, 13 Mees. & Wels. 487; ante, Book II., Chap. I., Sect. 2 (b); see also *Jones* v. *Shears*, 7 Car. & Pay. 346.

(*a*) *Morrison* v. *Chadwick*, 7 C. B. Rep. 266; 6 D. & L. 567.

(*b*) See *Beodle* v. *Campbell*, 7 Man. & Gran. 386; 8 Scott, N. R. 104.

(*c*) Bull. N. P. 165, 177; *S. P. Hunt* v. *Cope*, Cowp. 243; see also *Newton* v. *Allin*, 1 Queen's B. Rep. 518; 1 Gale & Dav. 44; ante, 338; and post, Book III., Chap. IV., Sect. 1, (b).

(*d*) *Jones* v. *Carter*, 15 Mees. & Wels. 718.

(*e*) *Poole* (*Mayor, &c.*) v. *Whitt*, 15 Mees. & Wels. 571.

(*f*) *Neale* v. *Mackenzie*, 1 Mees. & Wels. 747; 2 Gale, 174, in error, reversing *S. C.* 2 C. M. & R. 84; 1 Gale, 119; 5 Tyr. 1106; and see *Watson* v. *Wand*, 8 Exch. Rep. 335.

(*g*) *Paradine* v. *Jane*, Aleyn, 26; Style, 47.

(*h*) *Tasker* v. *Bullman*, 8 Exch. Rep. 351.

CHAPTER II.

DISTRESS, AND OTHER MEANS OF RECOVERING RENT.

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SECT. 1.—*Distress, generally.*

Definition of Distress.

OF the various remedies which the law affords to the landlord for the recovery of rent from his tenant, that by distress being the most ancient, and also the most effectual in its nature, first claims our consideration. A distress is taking, without legal process, a personal chattel from the possession of a wrong-doer into the hands of the party grieved, as a pledge for the redressing an injury, the performance of a duty, or the satisfaction of a demand. The act of taking, the thing taken, and the remedy generally, have been called a distress (*a*), an inaccuracy which the older text writers generally avoided. We shall consider, 1st, what a distress is—2d, who may distrain—3d, what may be distrained—4th, the mode of proceeding in making the distress—5th, the way in which the distress is to be used—6th, the remedies for an unfounded, irregular, or excessive distress.

(*a*) The definition of Rastall is very neat and comprehensive:—"Distresse est la chose que est prise et distrainé sur ascun terre pur rent arriere, ou pur autre dutie, coment que le propertie del chose soit perpignant al estrange;" Abr. tit. *Distresse.*

Origin and History of Distress.

When and whence the power of distress was introduced, and whether it be, as Lord Chief Baron Gilbert thinks, a modification of the pignorary method of the civil law (*b*); or, as Sir Henry Spelman supposes, introduced by the Saxons, are matters, although curious, of too speculative a nature to be discussed in these pages (*c*). That such a question should be raised, however, proves the very early period at which the remedy was embodied in our common law. It should be remarked, that originally the power of distress was not so much a remedy, as the means of obtaining a remedy; for when made, the chattels distrained remained only as a pledge in the hands of the distrainer, but could not be sold; and as Blackstone observes (*d*), "Although such a distress put the owner to inconvenience, and was therefore a punishment to him, yet if he continued obstinate, and would make no satisfaction, it was no remedy at all to the distrainer." This power, however, limited as it was, became the means of great oppression in the hands of the powerful barons (*e*); and continual enactments of the legislature up to 1 & 2 Philip & Mary, c. 12, were passed for the purpose of protecting tenants (*f*); but as the independence and power of tenants in opposition to their landlords increased in this country, the current of legislative enactment took a turn, and since that period the provisions of acts of parliament have been generally for the protection of the landlord, and have at length, at the present day, rendered the remedy by distress what a learned writer on this subject (*g*) terms "one of the most equitable and efficient remedies known to the English law."

Whence the Power of Distress is derived.

The power of distraining is distinguished as being held either of common right, or by special powers. I. By common right—as where a person seised in fee grants out a lesser estate with the reversion to himself, and a reservation of rent or other services, the law gives him this remedy for such rent or services without any express provision (*h*). II. By special powers—as where one, not being the reversioner, and consequently not able to distrain of common right, may, on granting a lease, by an express stipulation reserve to himself the power of distraining (*i*). By whichever of these modes the power of distress is obtained, the nature of it is the same, viz. to render all the chattels found upon the premises—with certain exceptions hereafter mentioned—liable to be taken into the hands of the party grieved without legal process, to remain in his hands as pledges (*k*), to compel the

(*b*) Gilb. on Distress, 2.

(*c*) Distress, as a means of compelling attendance in the lord's courts, being so particularly mentioned in the most ancient compilations of feudal law, see Assizes de Jerusalem, c. 3, 8, 20; Reg. Maj. l. 3, 16, s. 38, and Dufresne's Gloss. voce *Distringere*, tends very much to confirm the derivation assigned by Spelman.

(*d*) 3 Black. Com. 14.

(*e*) Barrington on Ancient Statutes, 14.

(*f*) Dufresne's Gloss. voce *Parcus*.

(*g*) Bradby on Distress, 3.

(*h*) Litt. s. 214; Bac. Abr. 196.

(*i*) Bac. Abr. 196; Lit. s. 214, 312, n. (*i*). It has been held that penalties may be distrained for, though the lease giving power to do so is not under seal; *Pollitt* v. *Forrest*, 11 Queen's B. Rep. 949; 1 Car. & Kir. 560.

(*k*) Hence the distrainer cannot maintain trover; *Moneux* v. *Goreham*, 2 Selw. N. P. 1384; *Rex* v. *Cotton*, Parker, 121; *Turner* v. *Ford*, 15 Mees. & Wels. 212.

performance (*l*). The enactments of the legislature, by which, in case of distress for rent, these pledges were rendered liable to be sold, will be subsequently noticed.

For what Rents Distress may be made.

A distress may be made of common right for all services, for distresses were incident by the common law to every rent-service, and by particular reservation to rent-charges also, but not to rent-seck till the statute 4 Geo. II. c. 28, s. 5 (*m*), extended the same remedy to rents-seck, rents of assize and chief rents, and thereby in effect abolished all material distinction between them (*n*). Although it may now be stated generally that a distress may be taken for any kind of rent in arrear, including that due from tenants at will (*o*); with respect to fee-farm rents it has been held, that a distress is not incident to them, except the case be brought within the statute 4 Geo. II. c. 28, s. 5 (*p*). A distress may be made where a tenant holds by the service of cleaning the parish church or of ringing the church-bell at stated times (*q*). A landlord has no right to distrain for double rent upon a weekly tenant who holds over after a notice to quit (*r*); nor to distrain for overpayments made on account of land-tax: thus where a landlord's receiver allowed the tenant to make a deduction in respect of payments for land-tax every year for seventeen years greater than the landlord was liable to pay, the landlord knowing or having the means of knowing all the facts; it was held, that he could not distrain for the amount erroneously allowed, though the receipt given every year showed the amount paid and the amount deducted (*s*). A distress may be made for the whole rent reserved on furnished apartments, because in contemplation of law the rent issues out of that part of the demised premises which belongs to the realty (*t*); although generally a distress cannot be made for a rent reserved on a letting of incorporeal hereditaments, as tithes, commons or tolls (*u*). Penalties for breaking up pasture land or for carrying hay, straw, &c., off the premises, "to be recovered by distress as for rent in arrear," may be distrained for, though the lease is not under seal (*x*).

When taking Security prevents a Distress.

Taking a security for the rent, as a bond, bill of exchange or promissory note, will not take away the right to distrain; thus where rent is in arrear, and the landlord accepts a bond as a security for it, he may still distrain; for the rent is of a higher nature, and the accept-

(*l*) Bract. l. iii. p. 130; Glan. l. vii. c. 17; Co. Lit. l. 1, c. 1.

(*m*) See *Johnson* v. *Faulkner*, 2 Gale & Dav. 184; 2 Queen's B. Rep. 925; post, Chap. II., Sect. 4.

(*n*) Com. Dig. tit. *Distress* (A 1); 2 Black. Com. 6.

(*o*) *Doe* d. *Benson* v. *Frost*, 17 Law T. 145.

(*p*) *Bradbury* v. *Wright*, 2 Dougl. 624; the three years during which they must by this statute have been paid, need not be consecutive; *Musgrave* v. *Emmerson*, 10 Q. B. 326.

(*q*) *Doe* d. *Edney* v. *Benham* and *Doe* d. *Edney* v. *Billet*, 7 Queen's B. Rep. 976.

(*r*) *Sullivan* v. *Bishop*, 2 Car. & Pay. 359.

(*s*) *Bramston* v. *Robins*, 4 Bing. 11; 12 Moore, 68; see also *Waller* v. *Andrews*, 3 Mees. & Wels. 312; 1 Horn. & Hurl. 87.

(*t*) *Newman* v. *Anderton*, 2 New Rep. 224.

(*u*) Co. Lit. 47 a.

(*x*) *Pollitt* v. *Forrest*, 1 Car. & Kir. 560; 11 Queen's B. Rep. 949; see ante, 327, and 328.

ance of a security of an unequal degree is no extinguishment of the claim (*y*); but payment of the bond, bill or note (*z*), or even a judgment obtained upon a bond, would be an extinguishment of it (*a*), although the landlord's right to distrain revives upon an execution being waived (*b*). Where a landlord's agent takes from the tenant a bill of exchange for rent due, indorses it over, and pays the rent to the landlord as a mere advance of the rent to him, the landlord is entitled to distrain (*c*). An agreement to take interest on rent in arrear does not take away the landlord's right to distrain (*d*). A promissory note given by a tenant to his landlord on account of rent, without there being any distinct agreement between the parties that it should operate as a suspension of the right to distrain, has been held not to have that effect. If a note given with such an agreement would have the effect of suspending the right to distrain, the agreement must be specially pleaded in bar to an avowry, as well as the fact that the note was given on account of the rent (*e*).

What other Acts prevent a Distress.

It may be generally stated that so long as the rent is in arrear the landlord has the power of distraining for it; and nothing but a payment of it, or tender of the arrears, which may be made on a Sunday, will take away such power: even attending on the land to pay the rent will not destroy the right to distrain, unless a tender of payment be actually made (*f*). A distress cannot be made after a tender of payment; for if the landlord come to distrain the goods of his tenant for rent, the tenant may, before the distress, tender the arrears, and, if the distress be afterwards taken, it is illegal: so if, the landlord having distrained, the tenant make a tender of the arrears and costs *before* the impounding of the distress, the landlord ought to deliver up the distress; and if he does not, the detainer is unlawful, though the taking was not; and the tenant may maintain trespass for a subsequent removal (*g*). A tender of rent, however, *after* the distress is impounded, is insufficient, for then it is in the custody of the law (*h*): but the landlord may be liable in trover for a subsequent detention (*i*). But where cattle distrained damage feasant were in a private pound, and the distrainer admitted they were about to be forwarded to a public pound; it was held, that tender of amends made while they were in

Tender.

When.

(*y*) Roll. Abr. tit. *Extinguishment*.

(*z*) *Davis* v. *Gyde*, 2 Ad. & El. 623; 4 Nev. & Man. 462; 1 Har. & Wol. 50; *Harris* v. *Shipway*, and *Ewer* v. *Clifton* (*Lady*), Bull. N. P. 182; and see *Drake* v. *Mitchell*, 3 East, 251; *S. C.* MS. M. Term, 42 Geo. III.; *Parrott* v. *Anderson*, 7 Exch. Rep. 93.

(*a*) *Harris* v. *Shipway*, and *Ewer* v. *Clifton* (*Lady*), Bull. N. P. 182.

(*b*) *Seven* v. *Mihill*, 1 Lord Ken. 370.

(*c*) *Parrott* v. *Anderson*, 7 Exch. Rep. 93; and see *Griffiths* v. *Chichester*, 7 Exch. Rep. 95, n.

(*d*) *Skerry* v. *Preston*, 2 Chit. 245.

(*e*) *Davis* v. *Gyde*, 2 Ad. & El 623; 4 Nev. & Man. 462; 1 Har. & Wol. 50.

(*f*) 1 Lord Raym. 609. A tender of the rent "under protest" is good; *Manning* v. *Lunn*, 2 Car. & Kir. 13.

(*g*) *Vertue* v. *Beasley*, 1 Mood. & Rob. 21.

(*h*) *Ladd* v. *Thomas*, 12 Ad. & El. 117; 4 Per. & Dav. 9; *Ellis* v. *Taylor*, 8 Mees. & Wels. 415; *Firth* v. *Purvis*, 5 Term Rep. 432; see also *Six Carpenters' case*, 8 Co. Rep. 146; *Thomas* v. *Harries*, 1 Man. & Gr. 695; 1 Scott, N. R. 524; and post, Sect. 4, (f).

(*i*) *West* v. *Nibbs*, 4 Com. B. Rep. 172.

the private pound was not too late (*k*). Thus it appears that a tender of rent at the proper time and place will save a distress, though the landlord refuse to take it, the tenant having done all that he is bound to do; the landlord may, however, maintain an action of debt or covenant for his rent, but shall not recover damages or costs for the non-payment (*l*). A tender should be made without a condition being imposed on the person who receives it; but sending a certain sum "to settle one year's rent," does not impose a condition (*m*). But a tender of a quarter's rent, coupled with a demand of a receipt up to a particular day, the contest being whether one or two quarters' rent is due, is not a valid tender (*n*). A tender "under protest" is good (*o*). The tender of rent, or of amends for damage feasant, should be made to the lessor or owner himself. In the former case it has been held, that it need not be made to the broker who distrains; and if made to the landlord, a subsequent detainer is wrongful (*p*). It has even been held, that where a tender was made to the bailiff of the lessor, it was *not* good (*q*); that, however, was the case of a distress damage feasant (*r*): although in a case, where it appeared that the distrainer's wife had been in the usual habit of acting as his agent in such matters, and had made a distress damage feasant in his absence, it was held that a tender of amends to her was sufficient (*s*). The question is now, however, set at rest by a case which decides that where a landlord gives a warrant to distrain for rent, he thereby authorizes the bailiff to receive the rent if tendered; and Lord Campbell, C. J., appeared to be of opinion that the landlord could not prohibit the bailiff from accepting such tender: at all events, where a warrant is delivered to the bailiff directing him to distrain and proceed for the recovery of the rent as the law directs, the bailiff cannot refuse a tender on the ground that he was afterwards forbidden by the landlord's attorney to receive it; and if on that ground, though truly alleged, he proceeds to sell, he and the landlord are liable in trover (*t*). The fact of the tenant having a cross debt due to him by his landlord will not prevent the latter from distraining (*u*); but if after rent becomes due there is an express agreement that the two should be set-off against each other, then it seems there cannot be a distress (*v*). Where a person being about to take an apartment of a tenant, was promised by the landlord that his property should not be taken so long as he paid the rent to the tenant, it was held, that the landlord's right to distrain was not barred, unless

How.

To whom.

Cross Demands.

Special Agreements with Under-Tenants.

(*k*) *Brown* v. *Powell*, 4 Bing. 230; 12 Moore, 454; see post, Chap. VII., Sect. 4.

(*l*) *Anon.*, 1 Ventr. 21.

(*m*) *Bowen* v. *Owen*, 11 Queen's B. Rep. 130.

(*n*) *Finch* v. *Miller*, 5 C. B. Rep. 428.

(*o*) *Manning* v. *Lunn*, 2 Car. & Kir. 13.

(*p*) *Smith* v. *Goodwin*, 4 Barn. & Adol. 413; 1 Nev. & Man. 371.

(*q*) *Pilkington's case*, 5 Co. Rep. 76; *S. C.* nom. *Pilkington* v. *Hastings*, Cro. Eliz. 813.

(*r*) *Hatch* v. *Hale*, 15 Queen's B. Rep. 10; infra.

(*s*) *Browne* v. *Powell*, 4 Bing. 230; 12 Moore, 454; see post, Chap. VII., Sect. 4.

(*t*) *Hatch* v. *Hale*, 15 Queen's B. Rep. 10.

(*u*) But see post, Book III., Chap. VI., Sect. 5, (f).

(*v*) Per Patteson, J., in *Wilson* v. *Sewell*, post, Book III., Chap. VIII., Sect. 1.

the rent were actually paid, and that a tender, of which the landlord had no notice, was not sufficient (*v*). From an agreement, to which a landlord of a farm is privy, for a sale by the tenant of some eatage of pasture to a third person, the amount produced by the sale to be paid to the landlord, a contract by him may be inferred not to distrain cattle put on the demised land to consume the eatage (*x*).

Sect. 2.—*Who may distrain.*

(a) *There must be an actual existing Demise at a fixed Rent.*

Necessity of an actual existing Demise at a fixed Rent.

A landlord has no right to distrain unless there be an *actual* demise to the tenant at a *fixed* rent; therefore where a lease of tithes and land was granted at an entire rent, and it was void as to the tithes because it was not under seal, it was held, that a distress for an arrear of rent was altogether unlawful, because there was no distinct rent due for the land (*y*). The owner of land, and also of tithe commuted under the 6 & 7 Will. IV. c. 71, agreed by parol to demise to the plaintiff the land "tithe free," at a yearly rent of 400*l.*; it was held, that, although before the commutation such an agreement might have operated as an agreement to demise both tithe and land at that joint rent, yet the agreement being after the commutation, the words "tithe free" were surplusage, since, by the 80th section of that act, if the owner distrained for the rent-charge, the plaintiff would be entitled to deduct the amount from his rent, and consequently there was a holding at a certain rent of 400*l.*, for which the owner might distrain (*z*). When a lease was made by parol of 100 acres of land at a certain rent, and the lessee accepted the lease and entered upon the land, but afterwards found that eight acres had been previously demised by his lessor to another person who was in possession, it was held, that the demise was altogether void as to the eight acres, and that the rent could not be apportioned, and therefore could not be distrained for (*a*). The defendant, by agreement, demised to the plaintiff certain premises from the 15th of May, 1851, at the yearly rent of 145*l.*, payable on November 14th and May 14th. These premises had been let to W whose tenancy expired on the 15th of May, 1851, and who had omitted to give a notice to quit to one of his under-tenants, who occupied a cottage at a yearly rent of 5*l.*; and, in consequence, the plaintiff could not obtain possession of that part of the premises. It was then agreed that the defendant should receive from the under-tenant rent for the

(*v*) *Welsh* v. *Rose*, 6 Bing. 638; 4 Moore & Pay. 484.

(*x*) *Horsford* v. *Webster*, 1 C. M. & Ros. 696; 1 Gale, 1; 5 Tyr. 409.

(*y*) *Gardiner* v. *Williamson*, 2 Barn. & Adol. 337.

(*z*) *Meggison* v. *Lady Glamis*, and *Sells* v. *Same*, 7 Exch. Rep. 685.

(*a*) *Neale* v. *Mackenzie*, 1 Mees. & Wels. 747; 2 Gale, 174, in error, reversing S. C. 1 Gale, 119; 2 C. M. & Ros. 84; 5 Tyr. 1106; see also *Holgate* v. *Kay*, 1 Car. & Kir. 341; and ante, p. 337, &c.

half years, and deduct that 5*l.* from the rent to be paid for the whole by the plaintiff, and that the plaintiff should pay 70*l.* to the defendant on the 14th of November, 1851, and 14th of May, 1852: it was held, that such an agreement operated as a new demise, and that the defendant was entitled to distrain for 70*l.*, which became due on the 14th of November (*b*). A rent of a certain sum per cube yard of marl dug, and a certain sum per thousand of bricks made from clay dug from land, is a rent which may be ascertained with certainty, and which therefore may be distrained for (*c*). Where the demise was subject to certain rents, provisions, conditions and stipulations, and amongst others that the lessee should not sell hay off the premises, under the penalty of 2*s.* 6*d.* per yard of the hay sold, to be recovered by distress as for rent in arrear, it was held that this was a penalty recoverable by distress as for rent, but was not a rent (*d*).

Agreement for Lease.

As there must be an actual demise, if a party is in possession under an agreement for a lease merely (*e*), and no other circumstances exist whence an implied tenancy can be raised and the amount of rent fixed, since no rent is due for the occupation, but only a compensation in the nature of rent, the owner cannot distrain for non-payment (*f*). Very slight circumstances, however, will have the effect of constituting the necessary actual tenancy (*g*); thus where a tenant, who had entered on premises under an agreement for a lease, admitted a charge of half a year's rent in an account between him and his landlord; it was held, that this constituted him a tenant from year to year, and made him liable to distress (*h*); and where the plaintiff took possession of premises under an agreement for a lease to be granted to him for seven years, at a yearly rent payable half-yearly, but no lease was executed, nor was the quantum of rent to be paid ascertained, though the plaintiff occupied under the agreement for three years, and paid rent for two; it was held, that this created a tenancy from year to year, and entitled the landlord to distrain for the arrears due at the rate previously paid (*i*). In the same case, where it appeared that by the custom of the country the tenant was to have the use of the barns, gate-houses, &c. of the farm for a certain period after the end of the term, for the purpose of thrashing out corn and foddering cattle; and the tenancy was determined at Michaelmas, and the landlord in January following distrained corn-rick for rent due at Michaelmas, he having in the meantime obtained an injunction to restrain the tenant from carrying off the premises corn in the straw; it was held, that the holding by the tenant

(*a*) *Watson* v. *Waud*, 8 Exch. Rep. 335.
(*b*) *Daniel* v. *Gracie*, 6 Queen's B. Rep.
(*c*) *Pollitt* v. *Forrest*, 11 Queen's B. Rep. 1 Car. & Kir. 560; see ante, 328.
(*d*) See ante, Book I., Chap. IV., Sect. 130, as to what are actual demises what agreements only.
(*f*) *Dunk* v. *Hunter*, 5 Barn. & Ald. 322; *Hegan* v. *Johnson*, 2 Taunt. 148.
(*g*) See ante, 177.
(*h*) *Cox* v. *Bent*, 5 Bing. 185; 2 Moore & Pay. 281.
(*i*) *Knight* v. *Bennett*, 3 Bing. 361; 11 Moore, 222.

under the custom, though involuntary, was a prolongation of the original term, and that the landlord was entitled to distrain. Where a tenant entered under an agreement containing stipulations for a lease at 25*l.* per year, and an engagement by the landlord to complete certain erections, which were never completed nor any rent paid, but the tenant on being called on after some years' occupation, said he was ready to pay upon the erections being completed and an allowance made to him for some repairs; it was held, that a demise at a certain rent could not be implied so as to entitle the landlord to distrain (*k*). So where a person let a furnished house at a certain rent from a future day, and agreed that it should be furnished suitably for a school; the suitable furnishing is a condition precedent to the right to demand the rent, and therefore the lessor, not having furnished it, could not distrain (*l*). Where a person entered upon premises subject to the approbation of the landlord, who afterwards did not approve, but upon an agreement to pay an advanced rent, as well for the time he had been in possession as for the future, was willing to let him continue in possession; it was held, that the landlord might distrain for the advanced rent accrued before the agreement as well as for what accrued afterwards—such agreement giving him the same power by relation to his tenant's first entry into possession, as it did to recover his rent in future (*m*). An acknowledgment of an antecedent tenancy, with an agreement to go on on certain terms, is sufficient to authorize a distress (*n*). If a tenancy has existed, a surrender of the term must be complete, or the right of a landlord to distrain will continue (*o*). If a tenant is evicted by title paramount, but remains in possession under a new agreement with the person who had evicted him, his original landlord cannot distrain on him for rent (*p*). If a lessor exercises his option that a lease shall be void for breach of covenant, it would seem he canuot distrain for subsequent accruing rent (*q*). Where the landlord has given a notice to quit and the tenant holds over, but nothing is done to show that a new tenancy is created, the landlord cannot distrain for rent accruing due after the time when the notice expired (*r*). In a former decision, however, a distress for rent accruing after the expiration of a notice to quit was considered to operate merely as a waiver of the notice (*s*).

Acknowledgment.

Surrender.

Eviction.

Notice to quit.

(*k*) *Regnart* v. *Porter*, 7 Bing. 451; 5 Moore & Pay. 370.

(*l*) *Mechelen* v. *Wallace*, 6 Nev. & Man. 316.

(*m*) *M'Leish* v. *Tate*, Cowp. 781.

(*n*) *Eagleton* v. *Gutteridge*, 11 Mees. & Wels. 465; 2 Dowl. N. S. 1053; see also *Gladman* v. *Plumer*, 15 Law J., N. S., Q. B., 79; 10 Jur. 109.

(*o*) *Coupland* v. *Maynard*, 12 East, 134. See as to surrenders, ante, 249, &c.

(*p*) *Hopcraft* v. *Keys*, 9 Bing. 613; 2 Moore & Scott, 760. See as to evictions, ante, 338, 346, and post, Book III., Chap. IV., Sect. 1, (b); and as to the right of a tenant to show that his landlord's title has expired, ante, 168.

(*q*) *Jones* v. *Carter*, 15 Mees. & Wels. 718.

(*r*) *Alford* v. *Vickery*, 1 Car. & Mar. 280; *Jenner* v. *Clegg*, 1 Mood. & Rob. 213; *Williams* v. *Stiven*, 15 Law J., N. S., Q. B., 321; 10 Jur. 804.

(*s*) *Zouch* d. *Ward* v. *Willingale*, 1 H. Black. 311; see ante, 299.

Where the Landlord has treated the Tenant as a Trespasser.

If the landlord have in any way acted so as to rebut the presumption of an existing tenancy—as if he has treated the occupier of his premises as a trespasser, by ejecting him—he cannot afterwards distrain on him for rent; although the ejectment is directed against the claim of a third person who comes in and defends in lieu of the occupier, and the occupier is aware of that circumstance, and has never been turned out of possession: thus where *J. S.* demised freehold and copyhold premises to the plaintiff for a term of years, and died before the expiration of the term, when they descended to his heir, who devised them to the defendant for life; and the latter refused to take as devisee, claiming title as heir at law of the lessor, but neglected to be admitted on the death of the devisor, whereupon the lord of the manor seized the copyholds and received the rent; and the heir at law of the lessor having afterwards brought an ejectment against the tenant (the plaintiff), and sued out a writ of possession, the defendant, as devisee, subsequently brought an ejectment against the plaintiff with a view to defeat the claim of the heir, and succeeded upon a demise laid on the death of the devisor, which was previously to the expiration of the lease; it was held, that the defendant could not distrain upon the plaintiff for rent due before or since the determination of the lease, more than three years having elapsed from that period, and she having treated the plaintiff as a trespasser by bringing the action of ejectment, although the latter continued to occupy the premises from the time of the original letting to the day of the distress (*t*).

(b) *Persons having the Reversion.*

Where Persons having the Reversion may distrain.

All persons who have the reversion after the termination of an estate which has been granted with a reservation of rent, may, by the common law, recover this rent when in arrear by distress. But the right of distress may be lost by the severance of the reversion; as where the plaintiff was tenant to six defendants, joint tenants of the reversion, and four of them conveyed away the reversion to a third party; it was held, that the six were not entitled to distrain for the rent due to the six before the conveyance (*u*). And if a man have not the reversion, he may reserve to himself a power of distraining; and such reservation will be good to bind the lessee by way of contract, for the performance whereof the lessor may have an action. If the assignee of a term surrender to the original lessor, though he reserve a sum in gross to be paid annually, he cannot distrain for that or the original rent, but he may have an action of assumpsit for such sum in gross: or if a lessee for years assign his term rendering rent, he cannot distrain for it without a particular clause for that purpose, because he has no

(*t*) *Bridges* v. *Smyth*, 5 Bing. 410; 2 Moore & Pay. 740.

(*u*) *Stavely* v. *Allcock*, 16 Queen's B. Rep. 636.

reversionary interest, and the only remedy which he has is by an action on the contract (*x*).

Persons having terms for years.

If a lessee of a term grant out under-leases for some period, be it only a day shorter than his own interest, he has a power of distress without reservation, which even passes to his executors (*y*). But where a lessee transfers all his interest to another, although he reserve rent to himself, he cannot distrain for the rent; therefore where a lessee had a term which expired on the 11th November, and on the 11th September preceding he verbally let them until the 11th November, on payment down of an immediate rent; it was held, that such lessee could not distrain, as the whole of his interest had passed to the under-lessee (*z*): and where the lessee of two farms agreed by parol with another that he should have them during the leases, that person remaining tenant to the lessee during that period, and at the leaving of the farms to be paid for the fallows and dung; and the under-tenant took possession and paid one year's rent to the lessee who afterwards distrained for rent in arrear; it was held, that he was not entitled to do so, as the agreement operated as an absolute assignment of all his interest in the farms (*a*). A termor, after his term is expired, and a demand of possession by the lessor, cannot distrain upon his under-tenant continuing in possession (*b*). If a termor surrenders his term and has a new lease granted, his right to distrain on his under-tenants is retained by the statute 4 Geo. II. c. 28, s. 6 (*c*).

Tenants from Year to Year.

A tenant from year to year under-letting from year to year has a reversion, which enables him to distrain (*d*).

Joint-Tenants.

One joint tenant may distrain alone; but then he must avow in his own right and as bailiff to the other (*e*); and he may sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, if the others do not forbid him; and if when applied to they merely decline to act, that will not prevent him from proceeding (*f*).

Heirs in Gavelkind.

One of several coheirs in gavelkind may distrain for rent due to himself and his coheirs without express authority from them (*g*).

Coparceners.

Coparceners are considered in law but as one heir, and therefore must join in making a distress (*h*): but after partition, they may of common right make several distresses, and their grantees also have the same power (*i*). And even a rent-charge, although entire in its

(*x*) *Smith* v. *Mapleback*, 1 Term Rep. 441; —— v. *Cooper*, 2 Wils. 375; *Talentine* v. *Denton*, Cro. Jac. 111; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898; 5 Scott, 117; 3 Hodges, 188.

(*y*) *Wade* v. *Marsh*, Latch. 211.

(*z*) *Preece* v. *Corrie*, 5 Bing. 24; 2 Moore & Pay. 57; see ante, 211, 220.

(*a*) *Parmenter* v. *Webber*, 8 Taunt. 593; 2 Moore, 656; *S. P.* —— v. *Cooper*, 2 Wils. 375; and see *Rex* v. *Wilson*, 5 Man. & Ryl. 157, n.

(*b*) *Burne* v. *Richardson*, 4 Taunt. 720.

(*c*) Ante, Book I., Chap. VIII., p. 307.

(*d*) *Curtis* v. *Wheeler*, Mood. & Malk. 493; *S. C.* not *S. P.* 4 Car. & Pay. 196; see also *Oxley* v. *James*, 13 Meea. & Wels. 209.

(*e*) *Pullen* v. *Palmer*, 5 Mod. 73, 150; 3 Salk. 207.

(*f*) *Robinson* v. *Hoffman*, 4 Bing. 562; 1 Moore & Pay. 474; 3 Car. & Pay. 234.

(*g*) *Leigh* v. *Shepherd*, 2 Brod. & Bing. 465; 5 Moore, 297.

(*h*) *Stedman* v. *Page*, 1 Salk. 390; 5 Mod. 141.

(*i*) *Butler and Baker's case*, 3 Co. Rep. 22 b.

nature and against common right, may be divided between coparceners; and thus by act of law the tenant of the land may become subject to several distresses (*j*).

Tenants in Common.

As tenants in common are obliged to avow separately (*k*), it seems that they should make several distresses (*l*) thus where land was demised by four persons (whose original title did not appear) at one entire rent, to be divided and paid separately in equal portions; and one of the four distrained upon the tenant for her own share of the rent; it was held, that the distress was regular, for whatever might have been the interest of the landlords as between themselves, as between them and the terre-tenant they were tenants in common, and entitled each to a separate distress (*m*). After a devise of a reversion to two tenants in common, one of them may distrain for his share of the rent upon the lessee of the devisor, where such lessee has paid the whole rent to the other tenant in common after notice not so to pay (*n*). It has been held, that the survivor of two tenants in common may sue in covenant for the whole rent due upon a lease made by them, although the reservation was to both according to their respective interests (*o*). If a rent-charge has been divided by will, or by deed operating under the Statute of Uses, amongst several persons as tenants in common, there may be several distresses without attornment (*p*).

Tenants in Tail.

Although a tenant in tail make leases not conformable to the enabling statute 32 Hen. VIII. c. 28, such leases are good as against himself, and therefore as a reversioner he may distrain even at common law for the rent reserved thereby (*q*).

Tenants by Curtesy.

As the tenant by curtesy has an estate of freehold, he has, in contemplation of law, a reversion in all lands of the wife leased for years or life, and therefore may distrain of common right. If the wife's estate be but a rent of inheritance, the husband when tenant by curtesy may also distrain for it (*r*).

Tenants under Execution.

An entry under an execution either by elegit, statute merchant or statute staple, gives so far an estate in the rent of land as to confer the power of distress, although there is but an uncertain interest in the reversion (*s*); and a tenant by elegit may distrain without attornment (*t*).

Lords of Manors and Commoners.

A lord of a manor may of common right distrain for his copyhold rents (*u*). Where two commoners agreed, to their mutual advantage,

(*j*) Co. Litt. 164 b; see also *Rivis* v. *Watson*, 5 Mees. & Wels. 255.

(*k*) *Pullen* v. *Palmer*, 3 Salk. 207; 5 Mod. 73, 150.

(*l*) Bradby on Distresses, 41.

(*m*) *Whitley* v. *Roberts*, M'Clel. & You. 107.

(*n*) *Harrison* v. *Barnby*, 5 Term Rep. 246; and see *Powis* v. *Smith*, 5 Barn. & Ald. 850; 1 Dowl. & Ryl. 490; *Doe* d. *Pritchitt* or *Pitcher* v. *Mitchell*, 1 Brod. & Bing. 11; 3 Moore, 229.

(*o*) *Wallace* v. *M'Laren*, 1 Man. & Ryl. 516.

(*p*) *Rivis* v. *Watson*, 5 Mees. & Wels. 255.

(*q*) See the cases collected in a note on *Ex parte Smyth*, 1 Swanst. 346.

(*r*) Bradby on Distresses, 46.

(*s*) Bro. Abr. *Distresses*, pl. 72; *Cubit's case*, 4 Co. Rep. 7.

(*t*) *Lloyd* v. *Davies*, 2 Exch. Rep. 103.

(*u*) *Laugher* v. *Humphrey*, Cro. Eliz. 524.

not to exercise their respective rights for a certain term; it was held, that one might distrain the other's cattle damage feasant during that time (*v*). In case of an absolutely stinted common in point of number, one commoner may distrain the supernumerary cattle of another: but not if an admeasurement be necessary; or where the stint has relation to the quantity of common land: and a commoner cannot distrain, where the owner of cattle has any colour of right to put them on the land, as that would be taking to himself jurisdiction as to the competency of such right; but if there be no pretence or shadow of right, as in the cattle of a stranger, the commoner may always resort to distress (*x*).

Mortgagees and Mortgagors.

A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, may distrain for the rent in arrear at the time of the notice, as well as for rent which may accrue after such notice, although he was not in the actual seisin of the premises, nor in the receipt of the rents and profits at the time it became due (*y*); but he may not distrain for rent due upon a lease made after the mortgage, unless he has accepted rent from the tenant, or has given him notice to pay rent, and the tenant has acquiesced (*z*). Payment of rent by the tenant under a distress does not constitute an acquiescence by relation back to the period when notice was given (*a*). And a mortgagor may distrain under a lease by deed granted by himself after the mortgage by virtue of the estoppel (*b*): but he cannot distrain for arrears of rent due on a lease made before the mortgage; for by the act of mortgaging the privity of estate is destroyed (*c*). But if a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in the receipt of the rents incident to that reversion, he, during such permission, is presumptione juris authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name, as his bailiff (*d*).

Annuitants.

If an annuity be granted out of an estate, and the grantor, to secure the payment, vests the estate in trustees for a term, to the use of the annuitant, and subject thereto continues in possession, the annuitant may distrain for the arrears; for supposing the term to have given him the reversion, the grantor is to be considered as his under-tenant, upon whom he might as reversioner distrain at common law (*e*).

Guardians and Committees of Lunatics.

As guardians may make leases of the infant's lands in their own names, which will be good during the minority of the ward, they may,

(*v*) *Whiteman* v. *King*, 2 H. Black. 4; see also post, Sect. 7.

(*x*) *Hall* v. *Harding*, 4 Burr. 2432; 1 W. Black. 673.

(*y*) *Moss* v. *Gallimore*, 1 Dougl. 279.

(*z*) *Rogers* v. *Humphreys*, 4 Ad. & El. 299; 5 Nev. & Man. 511; 1 Har. & Wol. 625; see also *Wheeler* v. *Branscombe*, 5 Queen's B. Rep. 373; 1 Gale & Mer. 406.

(*a*) *Evans* v. *Elliott*, 9 Ad. & El. 342; 1 Per. & Dav. 256; 1 Will. Wol. & Hod. 744; see also *Brown* v. *Storey*, 1 Scott, N. R. 9; 1 Man. & Gr. 117; and ante, 195, 211.

(*b*) Bradby on Distresses, 99.

(*c*) Bullen on Distresses, 74.

(*d*) *Trent* v. *Hunt*, 9 Exch. Rep. 14.

(*e*) *Fairfax* v. *Grey*, 2 W. Black. 1326.

therefore, like other persons granting leases, distrain in their own names (*f*). By the statutes 11 Geo. IV. & 1 Will. IV. c. 65, powers are given to the guardians of infants, and to the committees of lunatics, to grant leases under the direction of the Court of Chancery, and consequently they would be entitled to distrain for rent.

(c) *Persons not having the Reversion.*

In what Cases Persons not having any Reversion may distrain.

Although generally a man who never had, or who has parted with the reversion, cannot distrain (*g*); yet, in some particular cases, the power of distress is held of common right, even without the reversion; —as for a rent granted for equality of partition by one coparcener to another, or for a rent granted in lieu of lands upon an exchange;—in these cases, the grantee may distrain without any provision of the parties, though he has no reversion; the law giving him such a power of distress, lest he should be without remedy: but if a man grant such a rent over to another, after arrears incurred, he cannot distrain for such arrears, because they are by the grant divided from the freehold of the rent. A woman endowed of a rent as well as of land,—whether it be rent-service, rent-charge or rent-seck, with or without deed (*h*), although she have not the reversion, may also distrain of common right (*i*); and this extension was made in favorem dotis (*k*). The rents also paid by copyholders, as tenants of the manor, to the lord, have always been considered as rent-service, fealty being necessarily incident to this species of tenure, and therefore are distrainable of common right (*l*).

(d) *Executors and Administrators.*

When Executors and Administrators may distrain.

By the common law, executors or administrators could not distrain for arrears incurred in the lifetime of the owner of a rent (*m*): it was therefore enacted by statute 32 Hen. VIII. c. 37, s. 1, that the executors and administrators of tenants in fee, fee-tail, or for term of life, of rent-services, rent-charges, rent-seck and fee-farm rents, may distrain upon the lands chargeable with the payment thereof, so long as such lands remain in the possession of the tenant who ought to have paid them, or of any other person claiming under him by purchase, gift or descent. This statute has been considered a remedial law, extending to all executors of tenants for life, as well those who before the statute were entitled to an action of debt, as those who had no remedy whatever (*n*). In one case the Court *seemed* to be of opinion that the statute gave *a remedy* by way of distress for rents of freehold

(*f*) *Shepland* v. *Rydler*, Cro. Jac. 55, 98; *Bredell* v. *Constable*, Vaugh. 179.

(*g*) *Parmenter* v. *Webber*, 8 Taunt. 593; 2 Moore, 656; *Smith* v. *Mapleback*, 1 Term Rep. 441; see also ante, p. 356.

(*h*) *Coll* v. *Coventry* (*Bishop*), Hob. 140, 153.

(*i*) Co. Litt. 169.

(*k*) *Anon.*, Keilw. 101.

(*l*) *Laugher* v. *Humphrey*, Cro. Eliz. 524.

(*m*) Co. Litt. 162 a.

(*n*) *Hool* v. *Bell*, 1 Lord Raym. 172; 3 Salk. 136.

only (*o*). It has been contended that the statute does not apply to rents reserved on an estate for years (*p*); and it was decided that it did not extend to the executor of a person who was seised in fee of land and demised it for years, reserving a rent; for he could not distrain for arrears of rent accrued due in the testator's lifetime (*q*). The question is now, however, set at rest by statute 3 & 4 Will. IV. c. 42, ss. 37 and 38; by which it is enacted, "that the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime;" and "that such arrears may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made." Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder, and after the expiration of it, a distress may be taken for rent during the whole term (*r*). An executor may distrain before probate, and may ratify a distress made by a bailiff in the name of the testator immediately after his death (*s*).

(e) *Husbands seised Jure Uxoris.*

When Husbands seised in Right of their Wives may distrain.

Arrears of rent, arising out of land in which the wife has only a chattel interest, whether accruing during or before the marriage, might always by the common law be distrained for by the husband; he had no such power, however, over the arrears accruing on a freehold interest in land, which, if they were due *before* the marriage, belonged not to the husband, but to the personal representatives of the wife; and even if they accrued during the marriage, and the wife survived, such arrears belonged to her, and did not go to her husband's representatives (*t*). These rights were, however, given to the husband by the statute 32 Hen. VIII. c. 37, s. 3; and the husband may now distrain for arrears accrued before or during the marriage. After the death of the wife, the husband may distrain alone for all rent due in right of the wife, even if it accrue to her in autre droit, as executrix

(*o*) *Renvin* v. *Watkin*, 1 Selw. N. P. 8th ed. 678.

(*p*) *Meriton* v. *Gilbee*, 8 Taunt. 159.

(*q*) *Prescott* v. *Boucher*, 3 Barn. & Adol. 849; *S. P. Jones* v. *Jones*, ibid. 967; *Martin* v. *Burton*, 1 Brod. & Bing. 279; 3 Moore, 608; and see *Staniford* v. *Sinclair*, 2 Bing. 193.

(*r*) *Braithwaite* v. *Cooksey*, 1 H. Black. 465.

(*s*) *Whitehead* v. *Taylor*, 10 Ad. & El. 210; 2 Per. & Dav. 367.

(*t*) *Ognel's case*, 4 Co. Rep. 51 a.

or administratrix (*u*): and, though the wife may generally join with her husband, in no case whatever can she distrain alone (*x*).

(f) *Tenants pur autre Vie.*

By 32 Hen. VIII. c. 37, s. 4 (*y*), tenants pur autre vie may distrain for arrears due during the life, and unpaid after the death of the cestui que vie, in like manner as at common law they might have done during his life.

(g) *Corporations.*

When Corporations may distrain.

There was formerly considerable doubt as to the power of corporations in making distresses, and appointing agents or bailiffs to enter into land on their behalf for a condition broken (*z*); various conditions being requisite—such as, that the demise should be by deed, though this does not seem to have been always free from doubt (*a*); but the question has been put to rest by the statute 4 Geo. II. c. 28, s. 5, which has placed bodies politic and corporate on the same footing as other persons with respect to the recovery of rents-seck, chief-rents and rents of assize. If a lease be made by the agent of a corporation not under their common seal, although it be invalid as a lease for want of due execution, yet if the tenant hold under it and pay rent to the bailiffs of the corporation, it is sufficient to constitute a tenancy at least from year to year, and to entitle the corporation to distrain for the rent (*b*). Any one churchwarden or overseer holding property under the statute 59 Geo. III. c. 12, s. 12, may distrain for rent due in respect of the property (*c*).

(h) *Persons having special Powers.*

When Persons having special Powers may distrain.

It is not unfrequently the case, that where the grantor of property parts with his reversion, but reserves a rent to himself—which would deprive him of his right to distrain—he reserves to himself in the grant a special power to distrain for the rent so reserved: under this power he may of course avail himself of the remedy by distress. A person who has possession of land, though he has not the legal estate, may by agreement grant another a power of distress (*d*). The grantee of a rent-charge may always distrain, as it is the very essence of a rent-charge, that a power of distress should be given to the grantee by the deed creating it: and an assignee of a rent-charge also may distrain for rent becoming due after the assignment (*e*): so a devisee may dis-

(*u*) *Osborne* v. *Wickenden*, 2 Saund. 195; *Ankerstein* v. *Clark*, 4 Term Rep. 617; *Parry* v. *Hindle*, 2 Taunt. 181.

(*x*) See also ante, Book I., Chap. I., Sect. 14, p. 27, and Chap. VI., Sect. 9, p. 230.

(*y*) See ante, 359, 360, as to the extent of this statute.

(*z*) 1 Kyd on Corporations, 262.

(*a*) 1 Roll. 514; Bac. Abr. tit. *Corporations*, (E 3).

(*b*) *Wood* v. *Tate*, 2 New Rep. 247; Vin. Abr. *Corporations*, (K), pl. 11, 41; and see ante, Book I., Chap. I., Sect. 8.

(*c*) *Gouldsworth* v. *Knights*, 11 Mees. & Wels. 337.

(*d*) *Chapman* v. *Beecham*, 3 Queen's B. Rep. 723; 3 Gale & Dav. 71; *Pollitt* v. *Forrest*, 11 Queen's B. Rep. 961.

(*e*) *Maund's case*, 7 Co. Rep. 28.

train for rent devised to him out of lands, if the land be charged with a distress, but not otherwise (*f*). It has, however, been more than once determined, that if a lessee for years assign his term, reserving a rent with no clause of distress, he cannot distrain for the rent, either by the common law or by the statute (*g*). It should be remarked, that the clause which reserves a power of distress cannot, for further securing the payment of rent, contain any thing but the usual provision; and a covenant that the grantor of a rent should not replevy the goods distrained until the rent be paid, is void (*h*). Where by an inclosure act a yearly *corn-rent* was substituted in lieu of tithes, and a power of distress was given for the recovery thereof; it was held, that the goods of a tenant, coming in under the owner of land which had remained for several years untenanted, and wholly unprofitable, were liable to be distrained for such corn-rent in arrear (*i*).

(i) *In Case of Bankruptcy.*

When the landlord may distrain.

The landlord may distrain before an act of bankruptcy for the whole amount of rent due by a person who afterwards becomes bankrupt. He may also distrain after the bankruptcy, where the tenant's goods remain on the premises, even although the messenger be in actual possession of the goods (*k*). Formerly there was no statute law on this point, and the landlord might distrain the goods for his entire debt, even after assignment or sale by the assignees, if the goods were not removed (*l*). But now by statute 12 & 13 Vict. c. 106, repealing 6 Geo. IV. c. 16, it is enacted, sect. 129, "that no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt, whether before or after the issuing of the fiat or the filing of the petition for the adjudication of bankruptcy, shall be available for more than one year's rent, accrued due prior to the date of the fiat or the day of the filing of such petition; but the landlord or person to whom the rent shall be due shall be allowed to come in as a creditor for the overplus of the rent due, and for which the distress shall not be available (*m*)." This enactment applies only to rent accruing due before the fiat or filing of the petition, and does not, therefore, render a distress for rent, accruing due after the fiat or filing of the petition, invalid: and where the assignees have declined a lease,

(*f*) Shep. Touch. 429; *Buttery* v. *Robinson*, 3 Bing. 392; 11 Moore, 262.

(*g*) —— v. *Cooper*, 2 Wils. 375; *Parmenter* v. *Webber*, 8 Taunt. 593; 2 Moore, 656; *Smith* v. *Mapleback*, 1 Term Rep. 441; *Preece* v. *Corrie*, 5 Bing. 24; 2 Moore & Pay. 57; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898; 5 Scott, 117; 3 Hodges, 188; ante, p. 359.

(*h*) 1 Inst. 145 b.

(*i*) *Newling* v. *Pearce*, 1 Barn. & Cres. 437; 2 Dowl. & Ryl. 607; and see *Bendyshe* v. *Pearce*, 4 Moore, 99.

(*k*) *Ex parte Plummer*, 1 Atk. 103; *Ex parte Jaques* and *Ex parte Dillon*, ibid. 104; *Buckley* v. *Taylor*, 2 Term Rep. 600; *Briggs* v. *Sowry*, 8 Mees. & Wels. 729.

(*l*) *Ex parte Plummer*, 1 Atk. 103; but see *Lee* v. *Lopes*, 15 East, 230.

(*m*) It is questionable whether a distress is a "transaction" within the statute 2 & 3 Vict. c. 29, repealed by 12 & 13 Vict. c. 106, but re-enacted with additions by sect. 133 (ante, p. 198); and therefore whether a distress, made after a secret act of bankruptcy, but before issuing a fiat, is valid for any excess beyond a year's rent; *Lachington* v. *Elliott*, 7 Man. & Gran. 538; 8 Scott, N. R. 275.

but the bankrupt has not delivered it up to the lessor, the latter has still his right of distress notwithstanding the 129th section (*n*), which it *should* seem does not affect the lessor's right of distress (*o*). The certificate of a bankrupt does not operate as a release of rent due by him, and therefore his landlord may avow for a return of goods of a third person seized as a distress made before the certificate for rent due before the bankruptcy (*p*). Before the statute 6 Geo. IV. c. 16, it was held, that where a trader, after committing an act of bankruptcy, took a shop, and agreed to pay a half-year's rent in advance, where by the custom of the country half a year's rent becomes due on the day on which the tenant entered, that the landlord, after an assignment under the commission, and before half a year expired, might distrain the goods on the premises for half a year's rent; or if he bought the tenant's goods at a sale under the commission, he might retain the amount of the half-year's rent (*q*). Where the landlord distrained for rent before the bankruptcy of his tenant, and when the goods were appraised left them on the premises for the use of the bankrupt's wife, the bankrupt *himself* being in prison, and after the bankruptcy distrained again for the same amount of rent, it was held that the second distress was void (*r*).

Effect of the Landlord's Neglect to distrain.

It is a settled principle, that a landlord has no lien in the case of bankruptcy, after the goods are removed from the premises; therefore, if he neglect to distrain, and suffer the goods to be sold by the assignees, and removed from off the premises, he can only come in on an average with the rest of the creditors (*s*); and if he prove his debt for rent under the commission, and swear that he has no security, he thereby waives, it should seem, his right to distrain. If he neglects to distrain, he will often be unable to obtain the benefit of the statute of 8 Anne, c. 14 (*t*). A landlord who petitioned to be paid the rent in arrear at the time of the commission being taken out, seven years after the effects had been sold by the assignees, was considered only as a common creditor, and compelled to come in pro ratâ, his demand being a stale one. A mortgagee who has paid the arrears of rent on a bankrupt's estate, unless he has an order of the Court of Chancery to stand in the landlord's place, shall not be preferred to the creditors under the commission (*u*).

Points incidental to the Subject.

A landlord distrained for more than two years' rent, the goods being in the hands of a trustee for the tenant's creditors; the trustee

(*n*) See ante, p. 203.

(*o*) *Briggs* v. *Sowry*, 8 Mees. & Wels. 729. This case was decided on the 74th section of the 6 Geo. IV. c. 16, which act has been repealed by the 12 & 13 Vict. c. 106; but the two sections being substantially the same, the conclusion in the text appears to be warranted.

(*p*) *Newton* v. *Scott*, 9 Mees. & Wels. 434; 10 Mees. & Wels. 471; see also *Phillips* v. *Shervill*, 6 Queen's B. Rep. 944.

(*q*) *Buckley* v. *Taylor*, 2 Term Rep. 600.

(*r*) *Ex parte Bradley*, 1 Dea. & Chit. 223.

(*s*) *Ex parte Plummer*, 1 Atk. 102; *S. P. Bradyl* v. *Ball*, 1 Bro. Ch. Cas. 427.

(*t*) See post, Sect. 9, (a).

(*u*) *Anon.*, 1 Atk. 102; *Ex parte Descharmes*, 1 Atk. 103; *Bradyl* v. *Ball*, 1 Bro. Ch. Cas. 427.

then agreed to pay the rent and expenses, the landlord giving up one quarter's rent; the goods were then appraised and condemned at the sum agreed on, and the amount was paid over to the landlord; it was held, that the excess of that amount above one year's rent was not money received to the use of the assignees of the tenant, who had committed a prior act of bankruptcy (*x*). Payment of rent, after an act of bankruptcy, to the landlord who threatens a distress, is valid, and cannot be impeached by the assignees: and where an execution levied was overreached by an act of bankruptcy, the creditor was allowed to set-off a payment he had made to the landlord under a distress for rent (*y*). An undertaking given by the solicitor of the assignees of a bankrupt tenant, will frequently make him personally liable; thus where a distress had been put in upon the lands of a bankrupt tenant by the landlord, and the solicitor to the assignees undertook to pay the landlord his rent, provided it did not exceed the value of the effects distrained, he was held liable (*z*). If a constable become a bankrupt when possessed of goods which he has levied under a distress for rent due to the landlord, it seems that the landlord has a lien upon such goods; but if they are sold and converted into money, it seems that he has no lien upon them, but must come in as a creditor pro ratâ (*a*).

(j) *In Case of Insolvency.*

Mode of Proceeding in case of Insolvency.

By statute 1 & 2 Vict. c. 110, s. 58, it is enacted, "that no distress or distresses for rent, made and levied after the arrest or other commencement of the imprisonment of any person whose estate shall, by any such order as aforesaid, have been vested in the provisional assignee, upon the goods or effects of any such person, shall be available for more than one year's rent, accrued prior to the making of such order; but that the landlord or party to whom the rent shall be due, shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available, and entitled to all the provisions made for creditors by this act." A landlord may distrain after the tenant's discharge under this act for rent due before the arrest, the amount of which was inserted in the schedule, the landlord having also opposed the discharge (*b*). If a distress is made before the tenant is arrested, but the goods are not sold until after, the landlord is not restricted to one year's rent by the Insolvent Act, 7 Geo. IV. c. 57 (*c*). By the statute 7 & 8 Vict. c. 96 (*d*), amending 5 & 6 Vict. c. 116,

(*x*) *Lackington* v. *Elliott*, 7 Man. & Gran. 538; 8 Scott, N. R. 275.

(*y*) *Ex parte Elliott*, 3 Deac. 343; 3 Mon. & Ay. 664; *Stevenson* v. *Wood*, 5 Esp. 200; and see *Mavor* v. *Croome*, 1 Bing. 261; 8 Moore, 171; and *Darnton* v. *Pigman*, Peake, Ad. Ca. 111.

(*z*) *Burrell* v. *Jones*, 3 Barn. & Ald. 47.

(*a*) *Ex parte Dobson*, 7 Vin. Abr. 74.

(*b*) *Phillips* v. *Shervill*, 6 Queen's B. Rep. 944.

(*c*) Repealed in part by 12 & 13 Vict. c. 106, but not as to this point.

(*d*) *Wray* v. *Egremont* (*Earl*), 4 Barn. & Adol. 122; 1 Nev. & Man. 188.

whereby relief is given to insolvent debtors, though not in custody, it is enacted (sect. 18), "that no distress for rent, made and levied after the filing of any petition for protection from process, upon the goods or effects of the petitioner, shall be available for more than one year's rent accrued prior to the filing of such petition, but that the landlord or party to whom the rent shall be due, shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available, and entitled to all the provisions made for creditors by the said recited act or by this act."

(k) *Receivers and Agents.*

Distresses by Agents and Receivers.

Receivers appointed by the Court of Chancery have a power, where they consider it necessary, to distrain, and need not apply first to the Court for a particular order for that purpose (*f*); because, as that Court never makes an immediate order, but appoints a future day for a tenant to pay, it might be an injury to the estate to wait till that time, as it would give the tenant an opportunity to convey his goods off the premises in the meantime. If, however, there is any doubt who has the legal right to the rent, then the receiver should make an application to that Court for an order, as he must distrain in the name of the person who has that right (*g*). An authority to tenants to pay rent to a third person, whose receipt was to be a discharge, does not entitle that person to distrain, although he receives the rents for his own benefit (*h*). If a person having authority to distrain for rent due to another, says at the time that he distrains for rent due to himself, he may nevertheless justify as bailiff of the other (*i*).

(l) *Sequestrators.*

By the 12 & 13 Vict. c. 67, a sequestrator is empowered to levy any distress in his own name for the recovery of tithes, tithe rent-charge or rent, &c., payable to the incumbent of the sequestrated benefice.

SECT. 3.—*What may be Distrained.*

(a) *General Rule.*

General Rule as to what may be distrained.

A distress being anciently considered merely as a pledge in the hands of the lord, to compel the tenant to perform the service or duty required, could not at common law be sold; but was to be restored in the same plight to the owner, when such service or duty was performed; and therefore nothing could be distrained unless it could be returned in specie and undamaged (*j*), and in the same state as when

(*f*) *Pitt* v. *Snowdon*, 3 Atk. 750; *S. P. Dancer* v. *Hastings*, 4 Bing. 2; 12 Moore, 34; *Bennett* v. *Robins*, 5 Car. & Pay. 379; *Brandon* v. *Brandon*, 5 Mad. 473.

(*g*) *Hughes* v. *Hughes*, 3 Bro. Ch. Cas. 87.

(*h*) *Ward* v. *Shew*, 9 Bing. 608; 2 Moore & Scott, 756.

(*i*) *Trent* v. *Hunt*, 9 Exch. Rep. 14.

(*j*) Gilb. Dist. 34; 3 Black. Com. 7. It will be proper to mention, that in this sec-

taken (*k*). Therefore before the statute 2 Will. & Mary, c. 5, sheaves or cocks of corn were not distrainable, because they could not be restored upon a replevin in the same condition as they were in before: so the flesh of animals lately slaughtered cannot be distrained (*l*). Bearing this in mind, it may, however, be laid down as a general rule, that all chattels and personal effects—with the exceptions hereafter mentioned—which are found upon the premises, may be distrained for rent, whether they be the effects of the tenant or of a stranger (*m*); and the reason is, that the landlord has a lien on them in respect of the place in which they are found, and not in respect of the person to whom they belong. The property must be upon the premises, except, as hereafter mentioned, in the case of a fraudulent removal (*n*). The property must not be in such a situation that the attempt to distrain it would probably lead to a breach of the peace; thus it has been held, that a horse cannot be distrained whilst a person is actually riding it (*o*): but it has been also considered at Nisi Prius, in a case which would appear to be much more likely to lead to the consequences alluded to, namely—where a man was leading the horse—that that will not prevent it from being distrained (*p*). Upon the same principle, wearing apparel, if in actual use, cannot be distrained: but if it be not in use, though taken off only for natural repose, it may be distrained (*q*). The same rule applies to whatever is in actual use in the hands of a person at the time; for as a distress is a pledge, that cannot be a pledge to one man of which another has the actual use. A landlord is primâ facie liable for the act of his bailiff in taking goods privileged from distress, though they never came to his hands; but if, when he knows the circumstances, he disclaims and repudiates the act, he is not bound by it (*r*).

(b) *Corn and Growing Crops.*

Enactments respecting Distress of Corn and Growing Crops.

As by the principles of the common law, corn and farm produce generally could not be distrained, landlords were in a great measure deprived of the means of compelling fraudulent agricultural tenants to pay their rent, although they were in possession of valuable crops: to

tion, where things are spoken of as not being distrainable, it must be understood with reference to the subject of distress, as a remedy for the recovery of rent; for all chattels whatever are distrainable damage feasant, it being but natural justice that whatever does the injury should be a pledge to make compensation for it.

(*k*) *Simpson* v. *Hartopp*, Willes, 515; and see this rule as applied to fixtures, post, p. 373.

(*l*) *Morley* v. *Pincombe*, 2 Exch. Rep. 101.

(*m*) An under-tenant of part cannot recover a contribution against the under-tenant of the other part of premises, as for money paid *to his use*, where he has been obliged to pay the original lessor, under a threat of distress, the whole rent reserved on all the premises; and it is uncertain whether he can recover at all; *Hunter* v. *Hunt*, 1 Com. B. Rep. 300.

(*n*) See post, Sect. 4, (b), (d), pp. 377, 382.

(*o*) *Storey* v. *Robinson*, 6 Term Rep. 138.

(*p*) *Wagstaff* v. *Clack*, Cambridge Sum. Ass. 1826, MS.; see also *Bunch* v. *Kennington*, 1 Queen's B. Rep. 679.

(*q*) *Bissett* v. *Caldwell*, Peake, 50; S. P. *Baynes* v. *Smith*, 1 Esp. 206.

(*r*) *Hurry* v. *Rickman*, 1 Mood. & Rob. 126.

remedy this, therefore, by statute 2 Will. & Mary, sess. 1, c. 5, s. 3, it was enacted, That it shall be lawful for any, having arrear of rent, to seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay being in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land or ground charged with such rent, and to lock up or detain the same in the place where the same shall be found, until the same shall be replevied or sold: and by statute 11 Geo. II. c. 19, ss. 8, 9, the landlord may take and seize, as a distress for arrears of rent, all sorts of corn and grass, hops, roots, fruits, pulse or other product whatsoever growing upon any part of the estate demised; and the same may cut, gather, make, cure, carry and lay up, when ripe, in the barns or other proper place on the premises; and if there should be no barn or proper place on the premises, then in any other barn or proper place which he shall procure, as near as may be to the premises; and in convenient time appraise, sell or otherwise dispose of the same, towards satisfaction of the rent, and of the charges of such distress, appraisement and sale; the appraisement thereof to be taken when cut, gathered, cured and made, and not before; provided that notice of the place where such distress shall be lodged, shall, in one week after the lodging thereof, be given to the tenant, or left at the last place of his abode; and if the tenant shall pay or tender the arrears of rent and costs of the distress before the corn, &c. be cut, the distress shall cease, and the corn, &c. be delivered up. By statute 56 Geo. III. c. 50, s. 6, landlords are not to distrain for rent "on any corn, hay, straw or other produce," which have been seized in execution and sold (according to the provisions of that act(s)), under the contract of the tenant not to take straw, &c. off the premises, and which at the time of the sale have been severed, "nor on any turnips whether drawn or growing," if sold according to the provisions of the act.

2 W. & M. sess. 1, c. 5.

11 Geo. II. c. 19.

56 Geo. III. c. 50.

Cases decided upon the Subject.

The grantee of a rent-charge, with power to distrain in the same manner as the law directs in case of rent in arrear, may, under this power, and the statutes 2 Will. & Mary, s. 1, c. 5, and 4 Geo. II. c. 28, s. 5 (t), distrain oats and hay in stacks or trusses(u). Trees, shrubs and plants growing in lands which the defendant had demised to the plaintiffs for a term, and which they had converted into nursery ground, and planted subsequently to the demise, are not distrainable by the landlord under the statute of 11 Geo. II. c. 19, as it applies only to corn and other products of the land which may become ripe, and are capable of being cut and laid up (x). Growing crops may be considered as goods and chattels under the statute 11 Geo. II.

(s) See post, Chap. IV., Sect. 4, (b).
(t) Ante, 349.
(u) *Johnson* v. *Faulkner*, 2 Queen's B. Rep. 925; 2 Gale & Dav. 184.
(x) *Clarke* v. *Gaskarth*, 8 Taunt. 431; 2 Moore, 491; recognized in *Clarke* v. *Calvert*, 3 Moore, 114.

c. 19, and may therefore be so described in pleading (*y*). Growing crops cannot be sold before they are ripe (*z*). A tenant's growing crops, taken in execution and sold, and remaining on the premises a reasonable time for the purpose of being reaped, are not distrainable by the landlord for rent become due after the taking in execution. Such crops having been so taken, sold and left on the premises, and the arrears of rent paid, pursuant to statute 8 Anne, c. 14, s. 1 (*a*), the landlord cannot distrain them for rent subsequently due, on the ground that the purchaser has not entered into the agreement with the sheriff (to use and expend the produce in a proper manner) directed by statute 56 Geo. III. c. 50, s. 3 (*b*); nor is he entitled to presume, from the absence of such agreement, that the straw of such crops was sold for the purpose of being carried off the land, contrary to s. 1 (*c*). So where growing corn sold under a fi. fa. was not removed till a long time afterwards, it was held, that as at the time of the levy and sale no rent was due to the landlord, he was not entitled to a year's rent under the 8 Anne, c. 14, s. 1. Nor is the landlord in such a case entitled to distrain, notwithstanding the dictum of Thompson, B., to the contrary, in *Gwilliam* v. *Barker* (*d*). Goods in the custody of the law not being distrainable (*e*), a distress made on growing crops of corn, which have been sold by the sheriff under a fi. fa. for a year's rent accruing due to the landlord, either prior or subsequently to the entry under the execution and sale, cannot be sustained, unless the vendee has allowed the crops to remain uncut an unreasonable time after they have become ripe (*f*); the statute 8 Anne, c. 14, s. 1, which prohibits the removal until payment of a year's arrears of rent, not having the effect of preventing such crops from being in the custody of the law, and so preserving the landlord's right of distress (*g*). A custom that a tenant may leave his away-going crop in the barns, &c. of the farm, for a certain time after the lease has expired, and he has quitted the premises, is good; and the landlord may distrain the corn so left, for rent in arrear, after six months have expired from the determination of the term (*h*). Corn sown by a tenant at will (who died before harvest), and purchased by another person, cannot be distrained by the landlord for rent due from a subsequent tenant (*i*).

(*y*) *Glover* v. *Coles*, 1 Bing. 6; 7 Moore, 231.

(*z*) *Owen* v. *Leigh*, 3 Barn. & Ald. 470; *Proudlove* v. *Twemlow*, 1 Cromp. & Mees. 326; 3 Tyr. 260.

(*a*) See post, Sect. 9, (a).

(*b*) See post, Chap. IV., Sect. 4, (b).

(*c*) *Wright* v. *Dewes*, 1 Ad. & El. 641; 3 Nev. & Man. 790; and see *Parslow* v. *Cripps*, Comyn, 204.

(*d*) 1 Price, 277; *Peacock* v. *Purvis*, 2 Brod. & Bing. 362; 5 Moore, 79; *Wright* v. *Dewes*, 1 Ad. & El. 643.

(*e*) See post, 374.

(*f*) *Peacock* v. *Purvis*, 2 Brod. & Bing. 362; 5 Moore, 79; *Wright* v. *Dewes*, 1 Ad. & El. 641; 12 Q. B. 678; *Wharton* v. *Naylor*, 6 Dow. & L. 136.

(*g*) *Wharton* v. *Naylor*, 12 Q. B. 673, overruling the dicta of Tindal, C. J., and Maule, J., in *Smallman* v. *Pollard*, 6 Man. & Gr. 1001.

(*h*) *Beavan* v. *Delahay*, 1 H. Black. 5; *S. P. Lewis* v. *Harris*, 1 H. Black. 7, n.; *Knight* v. *Bennett*, 3 Bing. 364; see also post, Sect. 4, (e), p. 385.

(*i*) *Eaton* v. *Southby*, Willes, 131.

(c) *Cattle.*

When Cattle may be distrained.

Besides the right to distrain cattle, like any other chattels, which a landlord has when they are upon the premises, by section 8 of the statute 11 Geo. II. c. 19, every landlord may take and seize, as a distress for arrears of rent, any cattle or stock of his tenant feeding or depasturing upon any common appendant or appurtenant, or any ways belonging to any part of the premises demised. It seems to be now settled that where beasts escape, and come upon land by the negligence or default of their owner, and are trespassers there, they may be distrained immediately by the landlord for rent in arrear (*l*): but where they come upon land by the insufficiency of fences, which the tenant, being a lessee, ought to repair, the lessor cannot distrain such beasts till they have been levant and couchant; that is, they must be lying down and rising up on the premises for a night and a day without pursuit made by the owner of them,—and after actual notice has been given to the owner that they are there, and he has neglected to remove them (*m*). Cattle which are upon land by way of agisting may also be distrained for rent (*n*): and where a stranger put in his beasts to graze for a night, by the consent of the lessor and license of the lessee, it was held, that the lessor might distrain them for rent due out of those lands which he consented that the beasts should graze on: because such consent was no waiver of his right to distrain, unless it had been expressly agreed to; and being but a parol agreement, it could not alter the original contract between the lessor and lessee, from which the power to distrain arises (*o*). It seems to have been held in one case, that cattle which are being driven to a market or fair, and are put into pasture on the way for one night, are privileged from distress (*p*). If the landlord come to distrain, and the tenant, seeing him, drive cattle off the land, the landlord may follow the beasts and distrain them out of the premises, if he had once a view of the cattle on his land; but if the beasts go off the land of themselves before he observe them, he cannot distrain them afterwards (*q*): though if the distrainer once enter the premises to distrain the cattle, it should seem that they cannot afterwards be driven off to prevent a distress (*r*). By sect. 6 of the statute 56 Geo. III. c. 50, cattle feeding on crops sold under the provisions of that act cannot be distrained (*s*).

(d) *Exception in favour of Trade.*

To what Cases the Exception extends generally.

The general rule of law with respect to distresses has many exceptions in favour of trade, to protect the goods of third persons which

(*l*) Gilb. Dist. 45.
(*m*) *Poole* v. *Longueville*, 2 Saund. 289.
(*n*) Roll. Abr. 669.
(*o*) *Fowkes* v. *Joyce*, 3 Lev. 260; 2 Vent. 50; 2 Wms. Saund. 290, n. 7; 2 Lutw. 1161; 2 Vern. 129.
(*p*) *Tate* v. *Gleed*, 2 Wms. Saund. 290, n. 7.
(*q*) Co. Litt. 161 a.
(*r*) *Clement* v. *Milner*, 3 Esp. 95.
(*s*) See post, Chap. IV., Sect. 4, (b).

happen to be upon the tenant's premises in the way of his trade. All goods sent to a tradesman for the purpose of being wrought upon in the way of his trade, are, during the time that they remain in his custody, protected from distress (*t*). The principle of the cases seems to be, that if articles are sent to a place to remain there, they are distrainable; but if sent for a particular object, and the remaining at the place be an incident necessary for the completion of that object, they are not (*u*). Therefore, things sent to places of trade—as cloth to a tailor's shop, yarn to a weaver's, a horse to a smith's, books to a bookseller and bookbinder (*x*), and the like—are not distrainable: so if a horse goes with yarn to a weaver, or fetches yarn from thence, and carries it to a private house to be weighed, and it is hung there till the yarn be weighed, neither the horse nor the yarn can be distrained; so a horse which brings corn to market, and is put into a private yard while the corn is selling, cannot be distrained; because the bringing of the corn there is in the way of trade, and consequently of public benefit: so goods in the possession of a common carrier are protected from distress for the benefit of trade;—as if they be delivered to him to put into a waggon in a private barn. But horses and carriages standing at livery may be distrained (*y*). A boat sent by the owner to some salt works, and left a reasonable time in a canal on the premises, for the purpose of being loaded with salt, is not privileged from distress (*z*). Brewers' casks sent to a public house with beer, and left there until the beer is consumed, are not privileged (*a*). Where a butcher had sent a beast to the shop of another butcher to be slaughtered, and after it had been slaughtered the carcass remained in the shop for some time (but how long did not appear), and the landlord distrained for rent in arrear; it was held, that the carcass was privileged from distress (*b*). Trees growing in a nurseryman's ground, who is a yearly tenant, and removable by such tenant from time to time, have been held not to be distrainable for rent (*c*).

To Cases of Goods in the Hands of a Factor or Agent.

Goods of a principal in the hands of a factor for sale are privileged from distress for rent due from such factor to his landlord; on the ground that the rule of public convenience, out of which the privilege arises, is within the exemption of a landlord's general right to distrain; and therefore that such goods are protected for the benefit of trade (*d*): so goods landed at a wharf and consigned to a broker as

(*t*) See *Gibson* v. *Ireson*, 3 Queen's B. Rep. 39; *Simpson* v. *Hartopp*, Willes, 514; 4 Term Rep. 568.

(*u*) *Parsons* v. *Gingell*, 4 Com. B. Rep. 545; and *Lewis* v. *Gingell*, 4 Com. B. Rep. 561, n.

(*x*) *Munster* v. *Johns*, 16 Law T. 245.

(*y*) *Parsons* v. *Gingell*, 4 Com. B. Rep. 545; and *Lewis* v. *Gingell*, 4 Com. B. Rep. 561, n.

(*z*) *Muspratt* v. *Gregory* (*in error*), 3 Mees. & Wels. 677; 1 Horn. & Hurl. 184; *S. C.* 2 Gale, 158; 1 Mees. & Wels. 633; Tyr. & Gr. 1086.

(*a*) *Joule* v. *Jackson*, 7 Mees. & Wels. 450.

(*b*) *Brown* v. *Shevill*, 2 Adol. & El. 138; 4 Nev. & Man. 277.

(*c*) *Clarke* v. *Calvert*, 3 Moore, 96; *S. P. Clark* v. *Gaskarth*, 8 Taunt. 431; 2 Moore, 491.

(*d*) *Gilman* v. *Elton*, 3 Brod. & Bing. 75; 6 Moore, 243.

agent of the consignor, for sale, and placed by the broker in the wharfinger's warehouse over the wharf for safe custody, until an opportunity for selling them should occur, were held not distrainable for rent due in respect of the wharf and warehouse; as they were brought to the wharf in the course of trade, and were consequently protected (*e*); so corn sent to a factor for sale, and deposited by him in the warehouse of a granary keeper, he not having any warehouse of his own, is under the same protection against a distress for rent as if it were deposited in a warehouse belonging to the factor himself (*f*): so goods sent to an auctioneer to be sold on premises occupied by him, or in an open yard belonging to premises in his occupation, are privileged (*g*): so a carriage sent to a coachmaker and commission agent for sale (*h*), although the place of sale is merely hired for the occasion, or the occupation has been acquired by the auctioneer by an act of trespass (*i*).

(e) *Tools, Utensils, Beasts of the Plough, &c.*

When Tools and Utensils of Trade, &c. may be distrained.

The tools and utensils of a man's trade are said not to be distrainable while there is any other property on the premises, or whilst they are in actual use: therefore the axe of a carpenter, the books of a scholar, and the like, are not distrainable while any other distress can be had, or while they are in actual use (*k*). Again, the sheep of the tenant and the beasts of the plough (considering them as materials of husbandry, to plough and manure the land), are also privileged by the statute de districtione scaccarii, 51 Hen. III. st. 4, which, in affirmance of the common law, enacts, that no man shall be distrained by the beasts of his plough or his sheep, either by the king or any other, while there is *another sufficient distress;* unless indeed for damage feasant, in which case, the thing that does the trespass must afford compensation. In one case of trover for a stocking-loom, which had been distrained for rent, where it appeared that an apprentice was using the loom at the time it was taken, the court held that it could not legally be taken while the apprentice was using it (*l*); but in another case of trover for three tape-looms, where it appeared that they had been distrained for rent, because there was no other sufficient distress upon the premises, the court held the distress good, as it did not appear that the looms were in actual use at the time they were taken (*m*). This exception is not much favoured at the present day, as the courts have always shown a great inclination to disallow the privilege; and indeed in one case, Lord Kenyon expressly decided

(*e*) *Thompson* v. *Mashiter*, 1 Bing. 283; 8 Moore, 254.

(*f*) *Matthias* v. *Mesnard*, 2 Car. & Pay. 353.

(*g*) *Adams* v. *Grane*, 1 Cromp. & Mees. 380; *Brown* v. *Arundell*, 10 C. B. 54; *Williams* v. *Holmes*, 8 Exch. Rep. 861.

(*h*) *Findon* v. *M'Laren*, 6 Queen's B. Rep. 891.

(*i*) *Brown* v. *Arundell*, 10 C. B. 54.

(*k*) Gilb. on Dist. 36, &c.; *Gorton* v. *Falkner*, 4 Term Rep. 565; *Rede* v. *Burley*, Cro. Eliz. 596; Noy, 68.

(*l*) *Watts* v. *Davies*, 1 Selw. N. P. 676.

(*m*) *Gorton* v. *Falkner*, 4 Term Rep. 505.

that the implements of trade were not privileged, and might be distrained for rent (*n*); but materials delivered by a manufacturer to a weaver, to be manufactured at his own house, have been lately held to be privileged from distress; though frames or other machinery delivered with the materials for the purpose of being used in the weaver's house, are not privileged, unless there be other goods upon the premises sufficient to satisfy the rent due (*o*). So a thrashing machine which is not a fixture, is liable to distress, unless in actual use at the time, or there be other sufficient distress (*p*): in that case the machine had been let to the tenant, who on Saturday afternoon ceased to work it, and being some distance from home, it was left on the tenant's premises till Monday, when the distress was made; it was held that it was not in use. It has been held, if a landlord distrain inter alia the tenant's cattle and beasts of the plough for rent in arrear, and it appear after the sale that there would have been sufficient to satisfy the arrears and expenses without taking or selling such cattle, that such distress is not thereby proved to be an illegal distress, contrary to the statute 51 Hen. III. st. 4, if there were reasonable grounds for supposing—as from the appraisement of proper and competent persons at the time of the taking—that without the taking of the beasts of the plough there would not have been a sufficient distress (*q*): and when beasts of the plough are taken in a lawful distress, the sale of them need not be postponed to that of other goods. Beasts of the plough may be distrained if the only other subject of distress is growing crops (*r*). By section 6 of the statute 56 Geo. III. c. 50, horses, waggons, &c., used for the carrying, &c., crops sold under that act cannot be distrained (*s*).

(f) *Goods at an Inn and Auctioneers' Premises.*

When and where Chattels at an Inn may be distrained.

The privilege which exempts cattle and goods from being distrained at an inn, arises from the circumstance of their being there by authority of law; for common inns are so much devoted to the public service, that their owners are obliged to receive all guests and horses that come to them for reception. The cattle or goods must be actually within the premises of the inn itself, to be exempted from distress, and not in any place to which the tenant may have removed them for his convenience: thus, where a race-horse was distrained for rent at a stable half a mile distant from the inn, the distress was determined to be a good one, and that the plaintiff had no remedy but against the innkeeper (*t*). This privilege also extends, it seems, only to temporary

(*n*) *Roberts* v. *Jackson*, Peake, Ad. Ca. 36.

(*o*) *Wood* v. *Clarke*, 1 Cromp. & Jer. 484; 1 Tyr. 314; and see *Simpson* v. *Hartopp*, Willes, 514; 4 Term Rep. 568.

(*p*) *Fenton* v. *Logan*, 9 Bing. 676; 3 Moore & Scott, 82.

(*q*) *Jenner* v. *Yolland*, 6 Price, 5; 2 Chit. 167.

(*r*) *Piggott* v. *Birtles*, 1 Mees. & Wels. 441; 2 Gale, 18; Tyr. & Gr. 729.

(*s*) See post, Chap. IV., Sect. 4, (b).

(*t*) *Crosier* v. *Tomkinson*, 2 Ld. Ken. 439

guests; for a person who hires an unfurnished room at an inn, by such hiring becomes an under-tenant, and any furniture that he may have brought into such room must be liable to the landlord's distress. It was accordingly held, in a leading case upon this subject, that a carriage standing at livery is distrainable for rent by the lessor of the premises (*u*). It was once held that the consent of the landlord to the goods being upon the premises would not avail to prevent his power of distress; but if such consent were fraudulently given for the purpose of obtaining a distress, equity would relieve upon the ground of fraud: thus, where the servants of a grazier driving a flock of sheep to London, were encouraged by an innkeeper to put the sheep into pasture grounds belonging to the inn, and the landlord, seeing the sheep, consented that they should stay there for one night, and then distrained them for rent, the grazier was relieved against the distress (*x*).

(g) *Fixtures.*

When Fixtures may be distrained.

Whatever is part of the freehold is exempted from distress; for that which is part of the freehold cannot be severed from it without detriment to the thing itself in the removal; consequently, it cannot be such a pledge as may be restored in the same condition to the owner: and again, that which is fixed to the freehold is often part of the thing demised; those things, therefore, which savour of the realty are not distrainable (*y*). This privilege extends to such things as the tenant will not be permitted on any consideration to remove with him from the premises, by reason of their being annexed to and considered as part of the freehold, and not because they are absolutely fixed to the freehold, and cannot be removed therefrom; for a mere temporary removal of them for purposes of necessity is not sufficient to destroy the privilege (*z*): thus a smith's anvil on which he works is not distrainable; for it is accounted part of the forge, though it be not actually fixed by nails to the shop (*a*): so a millstone is not distrainable, though it be removed out of its proper place in order to be picked; because such removal is of necessity, and the stone still continues to be part of the mill (*b*): nor a kiln, which is considered not to be a personal chattel, but belonging to the freehold (*c*). In like manner keys, windows and charters concerning the realty being by construction of law parcel of the freehold, are not liable to be distrained (*d*).

Barnes, 472. It has been thought by the Court of Chancery, that the grounds used with an inn ought to have the same privilege as the inn itself, and therefore that the cattle of strangers or passengers ought not to be distrained there.

(*u*) *Francis* v. *Wyatt*, 1 W. Black. 483; 3 Burr. 1498.

(*x*) *Fowkes* v. *Joyce*, 2 Vern. 129; 3 Lev. 260; 2 Wms. Saund. 290, n. 7; 2 Lutw. 1161; 2 Vent. 50.

(*y*) Co. Litt. 47 b.

(*z*) *Gorton* v. *Falkner*, 4 Term Rep. 567. As to what things are fixtures, see post, Chap. IV., Sect. 8.

(*a*) Bro. Abr. tit. *Distress*, pl. 23.

(*b*) Ibid.

(*c*) *Niblet* v. *Smith*, 4 Term Rep. 504.

(*d*) Gilbert on Distresses, 34, 48; *Hellawell* v. *Eastwood*, 6 Exch. Rep. 295.

It has also been decided that the law is still the same with regard to such fixtures as grates and a copper, though they are things that the tenant may remove, and that therefore they cannot be distrained, as it is impossible to restore them in the same plight they were in when distrained (*e*). The question whether machinery fixed by bolts to the floor of a factory can be distrained (*f*), seems to be set at rest by the case of *Hellawell* v. *Eastwood* (*g*), where it was held that manufacturing machinery, viz., mules for spinning cotton, some of which were fixed by screws to the wooden floor of a cotton mill, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead, were not parcel of the freehold, and were therefore distrainable for rent.

(h) *Goods in the Custody of the Law.*

When Goods distrained or taken in Execution may be distrained.

Goods in the custody of the law are not distrainable (*h*); for it is repugnant that it should be lawful to take goods out of the custody of the law; and that cannot be a pledge to me, which I cannot reduce into my actual possession; therefore things distrained *damage feasant* cannot be taken for rent; nor goods in a bailiff's hands under an execution (*i*); nor goods seized by process at the suit of the Queen, or taken under an attachment. Goods which have been sold under a writ of execution, but which are so circumstanced that it has not been proper to remove them from the premises, are in the custody of the law, and cannot be distrained; thus, where a tenant's corn, while growing, was seized and sold under a fi. fa., and the vendee permitted it to remain till it was ripe, and then cut it; after which, and before it was fit to be carried, the landlord distrained it for a year's rent; it was held not to be distrainable: so growing crops seized by the sheriff under a fi. fa., and not severed from the land, are in the custody of the law, although in the hands of the vendee under a bill of sale from the sheriff (*k*): but where corn was taken in execution and sold by the sheriff under the statute 2 Will. & Mary, stat. 1, c. 5, s. 3, and the vendee permitted it after severance to lie on the ground, the court held it to be distrainable for rent (*l*). If, however, a sale of goods under an execution be fraudulent—as where a fictitious bill of sale is made, and the goods remain on the premises—they may be distrained for rent (*m*): and where the execution was irregular—as where a sheriff's officer

(*e*) *Darby* v. *Harris*, 1 Queen's B. Rep. 895; 1 Gale & Dav. 234; see also *Pitt* v. *Shew*, 4 Barn. & Ald. 208. Hence the uselessness of such enactments as are in 10 Vict. c. 15, s. 14, and c. 17, s. 44.

(*f*) *Duck* v. *Braddyll*, M'Clel. 217; 13 Price, 459.

(*g*) 6 Exch. Rep. 295; see post, Chap. IV., Sect. 8, (b).

(*h*) Co. Litt. 47, n.

(*i*) As to the landlord's remedy in such cases, under the statute of 8 Anne, c. 14, see post, Sect. 9, (a), p. 401.

(*k*) *Wharton* v. *Naylor*, 12 Queen's B. Rep. 628; 6 D. & L. 136.

(*l*) *Eaton* v. *Southby*, Willes, 131; *Peacock* v. *Purvis*, 2 Brod. & Bing. 362; 5 Moore, 79; *Parslow* v. *Cripps*, Comyn, 203; *Wright* v. *Dewes*, 1 Ad. & El. 641; 3 Nev. & Man. 790; *Wharton* v. *Naylor*, 12 Queen's B. Rep. 673; 6 Dowl. & Low. 136; see also ante, 367, 368.

(*m*) *Smith* v. *Russell*, 3 Taunt. 400.

executed a writ of fieri facias by going to the house and informing the debtor he came to levy on his goods, and laying his hand on a table, said, "I take this table," and then locked up the warrant in the table-drawer, took the key and went away, without leaving any person in possession—and after the writ was returnable the landlord distrained; it was held that it was a lawful distress (*n*): so the goods may be distrained if the execution has been waived (*o*). Where a sheriff's officer, being in possession of a tenant's effects under an outlawry, made a distress on them for rent, and on the request of the landlord sold the goods distrained, and afterwards the outlawry was reversed, the officer was held liable to pay the produce of the goods to the landlord, for they were not in custodiâ legis, the judgment being mere waste paper (*p*). Goods seized by a messenger under a fiat in bankruptcy are not privileged as in the custody of the law (*q*).

In Cases of Extents.

A distinction has been taken between proceedings at the suit and for the benefit of the crown, and an outlawry in a civil suit (*r*). An immediate extent against the king's debtor tested after a distress taken for rent justly due to the landlord, with notice of the tenant being the king's debtor, and appraisement of the goods and chattels, but before sale, shall prevail against the distress (*s*); so where a man was outlawed and an extent issued thereupon, and his goods were seized, although the landlord distrained three days before the extent, it was held that he was not entitled to any part of the rent due under the statute of 8 Anne, c. 14 (*t*). In a late case, where an officer entered under an extent, and improperly continued on the premises for a longer period than he ought, the court would not permit the rent accruing subsequently to the seizure to be paid out of the proceeds; but left the landlord to his action against either the tenant for use and occupation, or the officer for wrongfully continuing on the premises (*u*). The landlord of premises on which goods have been seized under an extent in aid, is not entitled under the statute of 8 Anne, c. 14, to call on the sheriff to pay a year's rent due before the teste of the writ (*x*).

(i) *Animals Feræ Naturæ.*

When Animals Feræ Naturæ may be distrained.

As every thing which is distrained is presumed to be the property of the wrong-doer, it follows that such things wherein no man can have an absolute and valuable property, as dogs (*y*), cats, rabbits, and all

(*n*) *Blades* v. *Arundale*, 1 Maule & Selw. 711.

(*o*) *Seven* v. *Mihil*, 1 Lord Ken. 370.

(*p*) *St. John's College, Oxford* v. *Murcott*, 7 Term Rep. 259.

(*q*) *Briggs* v. *Sowry*, 8 Mees. & Wels. 729; see ante, 362.

(*r*) Imp. Sheriff, 171; see also *St. John's College, Oxford* v. *Murcott*, 7 Term Rep. 259.

(*s*) *Rex* v. *Cotton*, Parker, 112.

(*t*) *Rex* v. *Sotherby*, Bunb. 5; West on Extents, 113. As to the statute of 8 Anne, see post, Sect. 9, (a).

(*u*) *Rex* v. *Hill*, 6 Price, 19; and see *Lane* v. *Crocket*, 7 Price, 566; and *Harrison* v. *Barry*, 7 Price, 690.

(*x*) *Rex* v. *Decaux*, 2 Price, 17.

(*y*) Co. Litt. 47 a. Although all the old authorities include dogs as things in which a man can have no property, such a rule

animals feræ naturæ, cannot be distrained (z); yet if deer, which are feræ naturæ, are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandize, that they may be distrained for rent (a): and birds kept in cages—as parrots or canaries—have been held to be the subject of a right of property, and therefore they may be distrained.

Sect. 4.—*Proceedings in Distress.*

(a) *When to be made.*

On what Day and Time a Distress may be made.

A distress for rent cannot be made in the night—that is, after sunset and before sunrise—because the tenant would not have any notice to make a tender of his rent, which possibly he might do in order to prevent the distress (b). It cannot be made the same day on which the rent becomes due; for if the rent be paid at any time during that day whilst a man can see to count it, the payment is good; although strictly indeed the rent is demandable and payable before sunset the day whereon it is reserved; yet it is not due till the last minute of the natural day (c). The custom of a place or an agreement between the landlord and tenant, if there be no objection to it in point of law, may indeed empower the landlord to distrain for it earlier, for conventio vincit legem; therefore where a person took a shop, and agreed to pay a year's rent in advance, where by the custom of the country half a year's rent became due on the day on which the tenant entered; it was held that the landlord might distrain before the half year had expired (d).

Limitation of Time.

By statute 3 & 4 Will. IV. c. 27, s. 2, no person shall distrain for rent but within twenty years next after the time at which the right to distrain first accrued to the person distraining, or some person through whom he claims, and the subsequent sections point out the time when the right shall be deemed to have first accrued (e); by section 42 no arrears of rent or interest in respect of money charged on rent, or damages in respect of arrears, shall be recovered by distress, action or suit, but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent. It has been decided in a case in the Court of Exchequer, that the second section of this statute does not apply to distresses for rents reserved on ordi-

would not now be considered as good; for trover may be maintained for them; and the legislature has made it penal to steal them; and see *Binstead* v. *Buck*, 2 W. Black. 1117; *Davies* v. *Powell*, Willes, 46.

(z) Co. Litt. 47.

(a) *Davies* v. *Powell*, Willes, 46; 7 Mod. 249.

(b) Gilb. on Dist. 56, &c.; *Aldenburgh* v. *Peaple*, 6 Car. & Pay. 212.

(c) *Duppa* v. *Mayo*, 1 Saund. 287; 2 Salk. 578.

(d) *Buckley* v. *Taylor*, 2 Term Rep. 600; *Tracey* v. *Talbot*, 6 Mod. 214.

(e) See post, Book III., Chap. VII., Sect. 4, (b).

nary leases, but must be confined to rents existing as an inheritance distinct from the land, and for which the party might before that statute have had an assize (*f*). The application of the 42nd section to rents on ordinary leases was not in that case in dispute, but the court intimated an opinion, which has since been confirmed by a decision of the Court of Common Pleas (*g*), that it did apply to such rents (*h*). The result, therefore, is, that the limitation of six years will apply to distresses for rents on ordinary leases (*i*).

(b) *Where to be made.*

When Lands are held under separate Demises.

Where there are separate demises, there ought to be separate distresses on the several premises subject to the distinct rents, for no distress on one part can be good for both rents (*k*). Where lands, however, lying in different counties, are held under one demise at one entire rent, a distress may be lawfully taken in either county for the whole rent in arrear, and chasing a distress over is a continuance of the taking; but where the counties do not adjoin, a distress cannot be chased out of one county into the other (*l*).

Distress must be upon the Premises.

The distress must be made upon the land from whence the rent issues; therefore—with the statutable exceptions of distresses after a fraudulent removal, hereafter mentioned, and distresses for gale rents of quarries in the Forest of Dean under 59 Geo. III. c. 86, s. 7—no person can make a distress on the highway, it being privileged for the convenience of passengers and the encouragement of commerce (*m*); but it would seem that where a farm adjoins a highway, goods standing on the highway, within the middle of it, and on that part of it next the demised premises, may be distrained (*n*). By statute 11 Geo. II. c. 19, s. 8, cattle and stock feeding on common appendant or appurtenant, or on ways belonging to premises demised, may be distrained. In a recent case, where it appeared that by an indenture *A.* demised to *B.* a wharf next the River Thames, described by abutments, together with all ways, paths, passages, easements, profits, commodities and appurtenances whatsoever to the said wharf

(*f*) *Grant* v. *Ellis*, 9 Mees. & Wels. 113; see also *James* v. *Salter*, 3 Bing. N. C. 544; 4 Scott, 168; 3 Hodges, 70; *Ely* (*Dean and Chapter*) v. *Cash*, 15 Mees. & Wels. 617.

(*g*) *Humfrey* v. *Gery*, 7 Com. B. Rep. 567; and see *Manning* v. *Phelps*, 10 Exch. Rep. 59.

(*h*) Agreeing thereby with Bosanquet, J., who differed in this respect from the rest of the Court of Common Pleas, in *Paget* v. *Foley*, 2 Bing. N. C. 679; 2 Hodges, 32; 3 Scott, 120. In that case, as also in *Strachan* v. *Thomas*, 12 Ad. & El. 536; 4 Per. & Dav. 229, it was decided, that, as regards actions, the 42nd section was altered by 3 & 4 Will. IV. c. 42, s. 3.

(*i*) The word "legacy," in the 40th section, has been held not to be confined to legacies of *real* estate; *Sheppard* v. *Duke*, 9 Simons, 567.

(*k*) *Rogers* v. *Birkmin*, 2 Stra. 1040.

(*l*) *Walter* v. *Rumball*, 1 Lord Raym. 55; 12 Mod. 76; 1 Salk. 247.

(*m*) Statute of *Marlbridge*, 52 Hen. III. c. 15. The king indeed has a prerogative to distrain upon other land than his own, which is very ancient, 2 Inst. 132, and was specially excepted by a clause in the statute of *Marlbridge*.

(*n*) *Hodges* v. *Lawrence*, 18 Just. Pea., Exch., 347.

belonging; and that by the indenture the exclusive use of the land of the River Thames opposite to and in front of the wharf between high and low-water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but that the land itself between high and low-water mark was not demised; it was held, that the lessor could not distrain for rent in arrear, barges, the property of *B.*, lying in the space between high and low-water mark, and attached to the wharf by ropes (*o*).

(c) *How made in ordinary Cases.*

For what Amount of Rent the Distress should be made.

A distress should not be made for more than is due (*p*); and the whole of what is due should be distrained for at one time, so as not vexatiously to make several distresses for different portions of the same rent. Where a yearly tenancy was created, and the lessee occupied during ten years, and rent was in arrear for part of one of those years and part of another; it was held, that the lessor might distrain as for so much rent in arrear upon an entire lease, and was not obliged to make separate distresses as for several rents due on different demises (*q*).

When Doors may be broken open.

The outer door of the house can in no case—except under the directions of the statute 11 Geo. II. c. 19, in the case of goods fraudulently removed, of which hereafter—be broken open in order to make a distress; but if the outer door be open, the person distraining may justify breaking open an inner door or lock to find any goods which are distrainable (*r*). A landlord is not justified in breaking open the outer door of a stable, though not within the curtilage, to levy an ordinary distress for rent (*s*); nor in forcibly opening a padlock on a barn door (*t*); nor can he legally break open gates or break down inclosures for the same purpose (*u*): but in order to distrain he may open the outer door by the usual means adopted by persons having access to the building, and therefore he may open it by turning the key, by lifting the latch, or by drawing back the bolt (*x*). It may be a question whether, if the outer door is broken open, the distress is void (*y*). Where the defendant, having with him a constable, had entered the plaintiff's house to make a distress for rent; and after he had stated his business and began to take an inventory, the plaintiff's wife tore his paper, beat him and the constable out, and then blocked

(*o*) *Capel* v. *Buszards*, 6 Bing. 150; 2 Man. & Ryl. 197; 3 Moore & Pay. 480; 3 You. & Jer. 344; 8 Barn. & Cres. 141; overruling *S. C.* 4 Bing. 137; 12 Moore, 339; 2 Car. & Pay. 541.

(*p*) *Taylor* v. *Henniker*, 12 Ad. & El. 488; 4 Per. & Dav. 242.

(*q*) *Legge* v. *Strudwick*, 2 Salk. 414; cited in *Birch* v. *Wright*, 1 Term Rep. 380.

(*r*) *Brown* v. *Dann*, Bull. N. P. 81.

(*s*) *Brown* v. *Glenn*, 16 Queen's B. Rep. 254.

(*t*) 9 Vin. Abr. 128, *Distress*, (E 2), pl. 6.

(*u*) Co. Litt. 161 a.

(*x*) *Ryan* v. *Shilcock*, 7 Exch. 72.

(*y*) Ibid.

up the door; upon which, about an hour afterwards, the defendant with several others returned and demanded admittance, which being refused, he broke open the doors; it was held by Wilmot, J., that the distress having been lawfully begun and not deserted, but the defendant having been compelled to quit by violence, there was a recontinuance of the first taking, and so the second entrance was lawful, though the defendant could not, when he first came, have so broken open the door (*z*). And it has been held lately in a similar case, that such a defence could be given in evidence on the plea of not guilty in trespass (*a*). Where a landlord who occupied an apartment over a mill demised to his tenant, from which it was divided only by a boarded floor without any ceiling, took up the floor of his own apartment, and entered through the aperture to distrain for rent; it was held a lawful entry (*b*).

What constitutes a Valid Act of Distress.

The distress may be made either by the landlord himself or by an authorized agent, who is called a bailiff; in the former case if a landlord come into a house and seize upon some goods as a distress in the name of all the goods in the house, it will be good seizure of all (*c*). A very slight expression of the landlord's intention is sufficient to commence a distress: thus where a landlord, to whom rent was in arrear, hearing his tenant and a stranger dispute about the property of an article on the premises, declared "the article shall not be removed till my rent is paid;" and the stranger, nevertheless, having removed the article in the afternoon of the same day, the landlord sent his broker to distrain for rent; it was held, that the distress was commenced by the landlord's saying in the morning that he would not suffer the article to be removed until his rent was paid, and completed by the entry of the broker afterwards; and that the landlord therefore had a right to take and bring back the article which had been carried away in the meantime (*d*). Where a broker went to the tenant's house and pressed for payment of rent alleged to be due, and of a sum for the expense of the levy, but touched nothing and made no inventory, and the tenant then paid the rent and expenses under protest, on which the broker withdrew; it was held, in an action against the landlord for an excessive distress, that he could not say there had been no actual distress (*e*). Where a landlord's agent went upon the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there for an arrear of rent, and that unless the rent was paid or the goods replevied within five days, they would be appraised and sold, and then went away without leaving any person in possession; it was held, that this was a sufficient seizure to give the tenant a

(*z*) Esp. N. P. 382.
(*a*) *Eagleton* v. *Gutteridge*, 11 Mees. & Wels. 463; 2 Dowl., N. S., 1053.
(*b*) *Gould* v. *Bradstock*, 4 Taunt. 562.
(*c*) *Dodd* v. *Morgan*, 6 Mod. 215.
(*d*) *Wood* v. *Nunn*, 5 Bing. 10; 2 Moore & Pay. 27.
(*e*) *Hutchins* v. *Scott*, 2 Mees. & Wels. 809; Mur. & Hurl. 194.

right of action for an excessive distress; and that the quitting without leaving any one in possession was not an abandonment of the distress—the 11 Geo. II. c. 19, s. 10, giving the landlord power to impound or otherwise secure on the premises goods distrained for rent in arrear (*f*). There is no abandonment of a distress where the distrainor, having seized the goods of a stranger on the premises without having given him notice of the distress, permits him to take them away for a temporary purpose, the distrainor intending that they shall be returned, which is done (*g*). Where a broker's man, having taken possession of property under a distress and remained two days, left the house in a state of excitement bordering on insanity; and the landlord thinking that his leaving had been procured by the drugging of his liquor by the parties in the house, but which was not proved, six days afterwards broke into the house and took away the goods without any previous demand of admission; it was held, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them (*h*). In making a distress for rent, circumstances may occur which may require the presence of a police-officer. But to justify the landlord in calling him in, it must be shown that his presence was rendered necessary either from threats of resistance or the apprehension of violence (*i*).

Inventory and Removal.

After seizure has been made, as above pointed out, it is proper for the landlord or his bailiff, if the distress be made by an agent, to make an inventory (*k*) of as many goods as are judged sufficient to cover the rent distrained for, and also the charges of the distress. After the inventory is taken it is necessary to give a notice in writing (*l*) to the tenant of the fact of the distress having been made, and the time when the rent and charges must be paid or the goods replevied; this is usually done by writing such notice at the bottom of the inventory (*m*). A true copy of the inventory and notice must then be served personally upon the tenant or owner of the goods, or left at the house, or if there be no house on the premises, upon the most notorious situation. There should in all cases be a witness present to prove the regularity of the proceedings. When the distress has been thus made, it is always the safest way to remove the goods immediately, and in the notice to acquaint the tenant where they are removed to. In many cases, however, the tenant for his own convenience requests the landlord to permit them to remain on the premises, and consents to allow him to retain possession beyond the five days; in such cases a written consent should be procured, and some person left in possession of the

(*f*) *Swann* v. *Falmouth* (*Earl*), 8 Barn. & Cres. 456; 2 Man. & Ryl. 534.

(*g*) *Kerby* v. *Harding*, 6 Exch. Rep. 234.

(*h*) *Russell* v. *Rider*, 6 Car. & Pay. 416.

(*i*) *Skidmore* v. *Booth*, 6 Car. & Pay. 777.

(*k*) See a form, post, Book IV., Chap. VI., Sect. 1.

(*l*) *Wilson* v. *Nightingale*, 8 Queen's B. Rep. 1034.

(*m*) If this notice states that more rent is due than is actually due, it will not be remedied by a fresh notice of the correct amount given before the sale; *Taylor* v. *Henniker*, 12 Ad. & El. 488; 4 Per. & Dav. 242.

goods upon the premises (*n*). Although an inventory need not be as exact and minute as a specification, yet it ought not to be loose and general in its terms. The following inventory, "one clock and weights, &c., and any other goods and effects that may be found in and about the said premises, to pay the said rent and expenses of this distress," was considered by the court objectionable, and was held sufficient only on the ground that the distress was in fact meant to include all the goods on the premises (*o*).

Appointment and Acts of Bailiff.

Where the bailiff of the landlord distrains, he should properly have a warrant or authority in writing from his employer, which is technically called a "warrant of distress (*p*);" and in case of a joint distress by coparceners, the warrant must be signed by all the persons entitled to distrain (*q*); but in a recent case it has been held, that one of several joint-tenants may sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, if the others do not forbid him; and if when applied to they merely decline to act, that will not prevent him from proceeding (*r*). A man may distrain without any express previous authority; and if he obtain the assent of the person in whose right he did distrain, his assent will be as effectual as his command could have been; for such assent shall have relation to the time of a distress taken (*s*). It has been held, that where, in replevin against a broker, it is proved that the landlord employs the attorney to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any written warrant (*t*). Where a warrant of distress was addressed to Messrs. *T.*, or their agent, and their clerk erased the name of *T.* and substituted that of *W.*, by whom the distress was made, and the landlord's agent who had signed the warrant knew of the distress being so made, and communicated with *W.* respecting it; it was held, that the employment of *W.* was sufficiently authorized by the agent to make the latter liable on an indemnity given by him to *T.* (*u*). The Statute of Westminster 2d, (13 Edw. I. st. 1, c. 37), which enacts, that no distress shall be taken except by bailiffs

(*n*) A written licence by the tenant, that in consideration of the landlord withdrawing he might afterwards resume possession of the distress, does not require a stamp; *Hill* v. *Ramm*, 6 Scott, N. R. 571; 5 Man. & Gr. 789; *Fishwick* v. *Milnes*, 5 Exch. Rep. 825; see also *Cox* v. *Bailey*, 6 Scott, N. R. 798; 6 Man. & Gran. 193.

(*o*) *Wakeman* v. *Lindsey*, 14 Queen's B. Rep. 625.

(*p*) This does not require a stamp; *Pyle* v. *Partridge*, 15 Mees. & Wels. 20.

(*q*) *Stedman* v. *Page*, 1 Salk. 390; 5 Mod. 141; *Horne* v. *Lewis*, 1 Lord Raym. 639.

(*r*) *Robinson* v. *Hoffman*, 4 Bing. 562; 1 Moore & Pay. 474; 3 Car. & Pay. 234.

(*s*) Gilb. Dist. 32. A subsequent agreement to a distress, given by the landlord to the person making it, is as much an authority as if he had previously appointed him his bailiff to distrain; Bro. Abr. tit. *Traverse*, 3; *Lamb* v. *Mills*, 4 Mod. 378; *Trevillian* v. *Pyne*, 11 Mod. 112. Indeed it was laid down in a late case by Best, C. J., that wherever a specific appointment of an agent is necessary, a subsequent recognition of acts done by him in that capacity is better even than a previous authority; *Jones* v. *Bright*, 5 Bing. 533; 2 Moore & Pay. 120. So where a distress was made in the name of a person who was dead, a recognition of it by the executor has been held good; *Whitehead* v. *Taylor*, 10 Ad. & El. 210; 2 Per. & Dav. 367.

(*t*) *Duncan* v. *Meikleham*, 3 Car. & Pay. 172.

(*u*) *Toplis* v. *Grane*, 7 Scott, 620; 5 Bing. N. C. 636; 2 Arn. 110.

"sworn and known," does not apply to distresses taken for rent in arrear (*x*). It would seem that an infant cannot be a bailiff (*y*). The bailiff should show the cause of his making the distress, if required to do so, but if not requested, he may distrain generally (*z*). A landlord is primâ facie liable for the act of his bailiff in irregularly conducting a distress, either in distraining excessively, not selling for the best price, making extortionate charges, and not depositing the surplus with the sheriff or constable for the tenant's use (*a*); but if when he knows the circumstances he disclaims and repudiates the act, he is not bound by it (*b*).

Copy of Charges.

By statute 57 Geo. III. c. 93, s. 6, every broker or other person who levies a distress is to give a copy of his charges, and of all the costs and charges, signed by him, to the person on whose goods the distress is levied, and it has been held that this statute does not apply to the landlord, unless he interferes personally in making the distress (*c*).

(d) *In Case of Fraudulent Removal.*

Enactments respecting Distresses on Goods fraudulently removed.

To prevent the clandestine removal of goods off the premises by the tenant, the statute 8 Anne, c. 14, s. 2, authorized landlords to follow and distrain them within five days after such removal. And now by statute 11 Geo. II. c. 19, s. 1, it is enacted, "that in case any tenant or tenants, lessee or lessees for life or lives, term of years, at will, sufferance or otherwise, of any messuages, lands, tenements or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his, her or their goods or chattels, to prevent the landlord or lessor, landlords or lessors from distraining the same for arrears of rent so reserved, &c., it shall and may be lawful to or for every landlord, &c., or any person or persons by him, her or them for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away, or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels wherever the same shall be found, as a distress for the said arrears of rent; and the same to sell or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, lessors or landlords, in and upon such premises for such arrears of rent." Sect. 2 provides "that no landlord or lessor, or other person entitled to such arrears of rent, shall take or seize any such goods or chattels as a distress for the

(*x*) *Begbie* v. *Hayne*, 2 Bing. N. C. 124; 1 Hodges, 266; 2 Scott, 193; *S. P. Child* v. *Chamberlain*, 6 Car. & Pay. 213.

(*y*) *Cuckson* v. *Winter*, 2 Man. & Ryl. 313.

(*z*) *Buller's case*, 1 Leon. 50.

(*a*) *Dawe* v. *Cloud*, 14 Law Times, Q. B., 155.

(*b*) *Hurry* v. *Rickman*, 1 Mood. & Rob. 126.

(*c*) *Hart* v. *Leach*, 1 Mees. & Wels. 560; 2 Gale, 172; Tyr. & Gr. 1010; see post, 396, Sect. 5.

same, which shall be sold bonâ fide and for a valuable consideration, before such seizure made, to any person or persons not privy to such fraud as aforesaid." By sect. 7 it is further enacted, "that where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant or tenants, lessee or lessees, his, her or their servant or servants, agent or agents, or other person or persons aiding or assisting therein, shall be put, placed or kept in any house, barn, stable, out-house, yard, close or place, locked up, fastened or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent; it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her or their steward, bailiff, receiver or other person or persons empowered, to take and seize as a distress for rent such goods and chattels, first calling to his, her or their assistance the constable (*d*), headborough, borsholder or other peace-officer of the hundred, borough, parish, district or place, where the same shall be suspected to be concealed, who are hereby required to aid and assist therein; and in case of a dwelling-house (oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein) in the day-time, to break open and enter into such house, barn, stable, out-house, yard, close and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she or they might have done by virtue of this or any former act, if such goods and chattels had been put in any open field or place" (*e*).

What Cases are within the Statute.

In order to justify, under this statute, the landlord in seizing within thirty days goods removed off the premises, as a distress for rent wherever found, the removal must have taken place *after* the rent became due (*f*). This has been expressly held both on a demurrer to pleas which stated a removal a few days before the rent became due (*g*), and on a motion to enter a judgment non obstante veredicto (*h*); and the Court of Queen's Bench has held, dissentiente Crompton, J., that the landlord was justified in seizing goods fraudulently removed on the quarter-day, the rent being then due and payable, although not in arrear (*i*). Where the removal has been after the landlord has conveyed away his reversion, he cannot seize under the statute (*k*). The

(*d*) The presence of a constable is required; and must be stated in a plea of justification where doors or gates are broken open; *Rick* v. *Woolley*, 7 Bing. 751; 5 Moore & Pay. 663.

(*e*) In the Metropolitan Police District constables are empowered to detain carriages removing goods between eight in the evening and six in the morning, if there are good grounds for suspecting the removal is to evade the payment of rent.

(*f*) *Watson* v. *Main*, 3 Esp. 15; *S. P. Furneaux* v. *Fotherby*, 4 Camp. 136. In the latter case Lord Ellenborough is reported to have said, "that where goods are fraudulently removed from the premises in the night, to prevent the landlord from distraining upon them for the arrears of rent to become due next morning, the case certainly comes within the mischief intended to be remedied by the statute, and there is some ground to contend that it comes within its provisions."

(*g*) *Northfield* v. *Nightingale*, T. T. 1832. MS.

(*h*) *Rand* v. *Vaughan*, 1 Bing. N. C. 767; 1 Hodges, 173; 1 Scott, 670.

(*i*) *Dibble* v. *Bowater*, 2 Ell. & Bl. 564.

(*k*) *Ashmore* v. *Hardy*, 7 Car. & Pay. 501.

"sworn and known," does not apply to distresses [illegible] act of his arrear (*x*). It would seem that an infant cannot [illegible] due, turned bailiff should show the cause of his making th[illegible] nt; thus in a do so, but if not requested, he may distrain [illegible] day, and with is primâ facie liable for the act of his baili[illegible] leaving sufficient a distress, either in distraining excessiv[illegible] landlord followed price, making extortionate charges, [illegible] though the removal with the sheriff or constable for the [illegible] *ent* (which was a ques- knows the circumstances he disclai[illegible] under the statute (*l*). The bound by it (*b*). [illegible] as against the landlord: to

Copy of Charges.

By statute 57 Geo. III. c. [illegible] ust show that the goods were who levies a distress is to g[illegible] tress, and also that sufficient goods costs and charges, signed [illegible] (*m*). It would seem that it is a ques- distress is levied, and it [illegible] removal be fraudulent within the statute, apply to the landlord, [illegible] t the trial that the removal was to avoid a distress (*c*). [illegible] te applies to the goods of the *tenant* only, and [illegible] *nger* or lodger; therefore a plea justifying the (d[illegible] the premises, and distraining them for rent in

Enactments respecting Distresses on Goods fraudulently removed.

To prevent th[illegible] that they were the tenant's goods (*o*): but the tenant, the sta[illegible] bankrupt lessee are considered as the actual tenants (*p*). and distrain [illegible] fraudulently removed and distrained on the premises of statute 11 [illegible] are rescued by him, it may be a question whether an or tenant [illegible] le damages under the 4th section of 2 Will. & Mary, sufferar [illegible] rescuing a distress, will lie against him (*q*). The proditam [illegible] distress are precisely the same in case of a fraudulent rese[illegible] as in ordinary cases (*r*).

co[illegible]

g[illegible]

[illegible] v. *Smith*, 4 Dowl. & Ryl. [illegible] *Bach* v. *Meats*, 5 Maule & Selw. [illegible] v. *Duncan*, 7 Bing. 243; 5 [illegible] & Pay. 19; Mood. & Malk. 533. [illegible] however, *Gilham* v. *Arkwright*, 16 Law [illegible] 88, where it was ruled by Patte- [illegible] J. (*Parry* v. *Duncan* being cited), that [illegible] unnecessary for the landlord to prove [illegible] a sufficient distress was not left on the [illegible]

(n) *John* v. *Jenkins*, 1 Cromp. & Mees. [illegible]; 3 Tyr. 170.

(o) *Thornton* v. *Adams*, 5 Maule & Selw. [illegible]; *S. P. Postman* v. *Harrell*, 6 Car. & Pay. [illegible]; see also *Fletcher* v. *Marillier*, 9 Ad. & El. 457; 1 Per. & Dav. 354; 2 Will. Wol. & Hod. 14. A clandestine removal must be always pleaded specially; *Spencer* v. *Harrison*, 2 Car. & Kir. 429; *Furneaux* v. *Fotherby*, 4 Camp. 136; *Vaughan* v. *Davis*, 1 Esp. 257.

(p) *Welch* v. *Myers*, 4 Camp. 368.

(q) *Harris* v. *Thirkeld*, 20 Law Times, 98.

(r) In addition to the remedy by distress given by the first section of the statute 11 Geo. II. c. 19, in case of fraudulent removal, it is also enacted by section 3, in order "to deter tenants from fraudulently conveying away their goods and chattels, and others from wilfully aiding or assisting therein, or concealing the same, that if any tenant or lessee shall fraudulently remove and convey away his or her goods or chattels as aforesaid, or if any person or persons shall wilfully and knowingly aid or assist any such tenant or lessee in such fraudulent conveying away or carrying off of any part of his or her goods or chattels, or in concealing the same, all and every person or persons so offending shall forfeit and pay to the landlord or landlords, lessor or lessors, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her or them respectively carried off or concealed as aforesaid; to be recovered by action of debt." By sect. 4 it is provided, "that where the goods and chattels so fraudulently carried off or concealed shall not exceed the value of 50*l.*, it shall and may be lawful for the landlord or landlords, from whose estate such goods or chattels were removed, his, her or their bailiff, servant or agent, in his, her or their behalf, to exhibit a complaint in writing against such offender or offenders, before two or more justices of the peace of the same county, riding or division of such

When a Distress may be made after the expiration of the Tenancy.

After Expiration of Tenancy.

Where any innovation was made by statute, distrained for his rent after the determi-

of his debtor, may take possession of ds of the latter, and remove them premises for the purpose of satis- a bonâ fide debt, without incurring penalty inflicted by the third section of e statute, although the creditor takes possession, knowing the debtor to be in distressed circumstances, and under an apprehension that the landlord will distrain; *Bach* v. *Meats*, 5 Maule & Selw 200. In an action on that section against the tenant for fraudulently removing his goods from off the premises to avoid a distress for rent, it is not necessary to show an actual participation in the act, if the removal was with his privity; *Lister* v. *Brown*, 3 Dowl. & Ryl. 501; 1 Car. & Pay. 121; and in such a case it seems that it is immaterial whether the removal took place by night or with any particular concealment. In an action upon the statute against a defendant for aiding and assisting a tenant in removing and concealing his cattle, to hinder the landlord from distraining, the acts and orders of the tenant are admissible evidence of his own fraud, and of knowledge on the part of the defendant, if by other evidence he is proved to have contributed to the facility of it; and circumstances of suspicion may be laid before the jury to prove such a fraudulent co-operation as the legislature contemplated; and it is not necessary, to support such an action, that it should be proved that a distress was in progress, or about to be put in execution, or even contemplated; it is enough if the rent be shown to be in arrear, and that the goods have been removed afterwards; *Stanley* v. *Wharton*, 10 Price, 138; 9 Price, 301. And see *Woodgate* v. *Knatchbull*, 2 Term Rep. 154. A variance in stating the amount of rent in arrear is immaterial; *Gwinnett* v. *Phillips*, 3 Term Rep. 643.

The fourth section of the statute, which gives a summary remedy before two magistrates, provided the value of the goods shall not exceed 50*l.*, does not take away the jurisdiction of the superior courts in cases where the goods are of less than that value; *Horsfall* v. *Davy*, Holt, 147; 1 Stark. 169; and see *Basten* v. *Carew*, 3 Barn. & Cres. 649; 5 Dowl. & Ryl. 558; *S. P. Stanley* v. *Wharton*, 9 Price, 301; 10 Price, 138; *Bromley* v. *Holder*, 1 Mood. & Malk. 175. And the fact that the landlord in the first instance made his complaint before a magistrate, will not preclude him from afterwards maintaining an action; for the remedy given by that section is cumulative, and therefore the landlord may elect at his option which course may be most convenient to himself; *Stanley* v. *Wharton*, 10 Price, 138. Justices may determine whether the goods have been fraudulently removed, even

nation of his lease (*s*); but now a distress for rent may be made though the lease be determined; for by the statute 8 Anne, c. 14, ss. 6 & 7, it is enacted, that it shall be lawful to distrain after the determination of the lease, in the same manner as if it had not been determined; provided the distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and also during the possession of the tenant. This statute does not apply to cases where the tenancy has been put an end to by the tenant's own wrongful disclaimer (*t*). A landlord, who permits his tenant to retain possession of part of a farm after the tenancy has expired, may distrain on that part within six months after the expiration of the tenancy (*u*): and where a part of the tenant's corn remained in a barn on the demised premises beyond the period of six calendar months, but within the time allowed by the custom of the country for the outgoing tenant to get in and dispose of his crops; it was held, that the corn might be distrained by the landlord (*x*): and so when the tenant's remaining was by agreement (*y*). But where a tenant remained a few days after the expiration of the term, and after the entry of a new tenant, went away, leaving a cow and some pigs, and there was nothing to show for what purpose he left them, and the new tenant entered, it was held that the landlord could not afterwards distrain the animals so left under the statute (*z*). If a tenant die, and his representative enter upon the premises, and continue therein until the end of the term, and afterwards; the landlord may at any time within six months after the end of the term, under the restrictions prescribed by the act, distrain for the arrears which were due at the time

in cases where there are conflicting claims to the premises; *Coster* v. *Wilson*, 3 Mees. & Wels. 411; 1 Horn. & Hurl. 141. Justices, either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their own counties; *Rex* v. *Morgan*, Cald. 157. The goods need not be enumerated or specified in the order of the justices; it is sufficient if they find the value; *Rex* v. *Rabbits*, 6 Dowl. & Ryl. 343, and Burn's Justice, tit. *Distress*. The adjudication of the justices is an order and not a conviction, and cannot, therefore, like a conviction, be returned to the sessions in an amended form; *Rex* v. *Cheshire* (*Justices*), 5 Barn. & Adol. 439. It must show on the face of it, that the party removing the goods was tenant; and that is not sufficiently shown by stating, that on complaint duly made, the party was charged with having fraudulently removed his goods from certain premises to prevent *A. B.* from distraining them for arrears of rent due to him for the said premises, and that it appearing that he did so remove, &c., he is convicted thereof. It would seem, also, that the order should state that the complainant was the party's landlord, or the bailiff, servant or agent of such landlord; *Rex* v. *Davis*, 5 Barn. & Adol. 551; 2 Nev. & Man. 349. An order, which states that the witnesses were examined upon oath, is not bad because it omits to state they were examined on oath as to the value of the goods removed; nor is the warrant on such an order invalid for omitting to state that the witnesses were examined upon oath; *Coster* v. *Wilson*, 3 Mees. & Wels. 411; 1 Horn. & Hurl. 141. On the 7th section it has been ruled, that it is not necessary that a party seizing goods fraudulently removed should first call to his assistance an ordinary peace officer; it is sufficient if he be assisted by a person appointed a special constable for the occasion; *Cartwright* v. *Smith*, 1 Mood. & Rob. 284.

(*s*) *Williams* v. *Stiven*, 9 Q. B. 14.

(*t*) *Doe* d. *David* v. *Williams*, 7 Car. & Pay. 322.

(*u*) *Nuttall* v. *Staunton*, 3 Barn. & Cres. 51; 6 Dowl. & Ryl. 155.

(*x*) *Lewis* v. *Harris*, 1 H. Black. 7, n.; *Beavan* v. *Delahay*, 1 H. Black. 8.

(*y*) *Knight* v. *Benett*, 3 Bing. 364; 11 Moore, 222.

(*z*) *Taylerson* v. *Peters*, 7 Ad. & El. 110; 2 Nev. & Per. 622; Will. Wol. & Dav. 644.

the original tenant died, as well as for what accrued afterwards (*a*). But a termor, who lets to an under-tenant, cannot, after his term has expired, enforce the continuance of the under-tenancy by distress, if the under-tenant, although he still retain the possession, refuse to acknowledge him as landlord, or pay him under threat of distress (*b*).

(f) *How to be impounded.*

Of Impounding at Common Law.

At common law, when a distress was made, the cattle or goods were to be kept in a pound—which is nothing more than a public prison for that purpose, and is either overt, that is open, or covert, that is shut. It was considered that all living chattels should regularly be put into a pound overt, because the owner at his peril was to sustain them, wherefore they ought to be put into such open place as he could resort to for the purpose: and if they were placed in a private pound, the distrainer was bound to keep them at his peril with provision, for which he had no satisfaction, and if they died for want of sustenance, he was considered answerable for them (*c*). By the 5th section of 12 & 13 Vict. c. 92, repealing 5 & 6 Will. IV. c. 59, every person impounding any cattle is bound to provide them with food and water, on pain of forfeiting forty shillings. By sect. 6, where the animal is not so supplied for a certain time, any person may enter the pound without being a trespasser, and may supply the animal with food and water at the expense of the owner. The distrainer cannot tie or bind a beast in the pound, though it be to prevent its escape; for any act of his which tends to the injury of the thing distrained is done at his peril: but if cattle distrained die in the pound, without any fault of the distrainer, in such case, he who made the distress shall have an action of trespass, if the distress was for damage feasant, or may distrain again, if the distress was for rent (*d*). A distrainer is liable for any injury which cattle distrained receive in consequence of the unfit state of the pound at the time of impounding (*e*). The distrainer cannot work or use the thing distrained, whether it be in pound overt or covert; because the distrainer has only the custody of the thing as a pledge: but the owner may make profit of it at his pleasure. An exception to this rule exists in respect to milch kine, which may be milked by the dis-

(*a*) *Braithwaite* v. *Cooksey*, 1 H. Black. 465.

(*b*) *Burne* v. *Richardson*, 4 Taunt. 720.

(*c*) 1 Inst. 4.

(*d*) *Vaspar* v. *Edwards*, 1 Salk. 248; 12 Mod. 658; Holt, 256; 1 Lord Raym. 719. A pound-keeper is bound to receive everything offered to his custody, and is not answerable whether the thing were legally impounded or not; *Branding* v. *Kent*, Cowp. 476; 1 Term Rep. 62: an action of trespass, therefore, will not lie against him merely for receiving a distress, though the original taking be tortious; for the pound being the custody of the law, if the distress be wrongfully taken, the distrainer is answerable, not he. When the cattle are once impounded, he cannot let them go without a replevin or the consent of the party; if, however, the pound-keeper goes one jot beyond his duty, and assents to the trespass, that may be a different case. Neither can a pound-keeper bring an action if the pound be broken, but it must be brought by the party interested.

(*e*) *Wilder* v. *Speer*, 8 Ad. & El. 547; 3 Nev. & Per. 536; 1 Will. Wol. & Hod. 378.

trainer, because it may be necessary to their preservation, and consequently of benefit to the owner (*f*).

Statutory Enactments as to what Pound. 1 & 2 P. & M. c. 12.

By the statute 1 & 2 Philip & Mary, c. 12, s. 1, no distress of cattle is to be driven out of the hundred, rape, wapentake or lathe, where the same is taken, except it be to a pound overt within the same shire, nor above three miles from the place where the same is taken, nor impounded in several places, whereby the owner may be constrained to sue several replevins, on pain of forfeiting to the party grieved one hundred shillings and treble damages. And by sect. 2 of the same act, no person shall take for keeping in pound or impounding any distress, above fourpence for any one whole distress; and where less has been used, there to take less, on pain of forfeiting 5*l.* to the party grieved, besides what he should take above fourpence. On this statute it has been held, that where lands lying in two adjoining counties were let under one demise at one entire rent, and the landlord distrained cattle in both counties for rent in arrear, that he might chase them all into one county; but that if the counties had not adjoined, it would have been otherwise (*g*). The offence created by this statute for impounding a distress in a wrong place is but a single offence, and shall be satisfied with one forfeiture, though three or four are concerned in doing the act, as the offence cannot be severed so as to make each offender separately liable to the penalty; the meaning of the statute being, that the penalty shall be referred to the offence, not to the person (*h*): thus where three persons distrained a flock of sheep, and severally impounded them in three several pounds, it was held, that they should forfeit but one 5*l.*, and one treble damages (*i*). In such an action the venue may be laid in either county (*k*). The second section of the statute does not extend to cases where the goods are impounded on the premises by virtue of the statute next mentioned (*l*).

Enactments of 11 Geo. II. c. 19.

There was formerly considerable difficulty as to the pound in which the distress was to be placed: thus beasts were to be put in a public pound, but household goods, &c., which might receive damage from the weather, were to be put in a pound covert. To remedy the inconvenience to which this frequently gave rise, the statute 11 Geo. II. c. 19, s. 10, enacted, that any person distraining may impound or otherwise secure the distress, of what kind soever it be, in such place, or on such part of the premises as shall be most convenient, and may appraise and sell the same as any person before might have done off

(*f*) Bac. Abr. tit. *Distress*, (D 2). Cases in the books cast some degree of doubt on the legality of this *dictum* in Cro. Jac. 148 (see Gilbert's Law of Distress, 65); but the reason of the thing is so forcible, that the *dictum* of that day respecting this point would clearly be recognized as law at this period.

(*g*) *Walter* v. *Rumball*, 1 Lord Raym. 53; 12 Mod. 76; 1 Salk. 247.

(*h*) *Rex* v. *Clarke*, Cowp. 612.

(*i*) *Partridge* v. *Naylor*, Cro. Eliz. 489; Moore, 453.

(*k*) *Pope* v. *Davis*, 2 Taunt. 252; 2 Camp. 266.

(*l*) *Child* v. *Chamberlain*, 5 Barn. & Adol. 1049; 3 Nev. & Man. 520.

the premises. In one case the law was admitted to be, that without consent, the distrainer ought either to put the goods all into one room, and keep possession of that only, or remove the goods out of the house; but very slight evidence will support a consent (*m*). It has also been held, that if necessary to secure a distress in a cottage, it might be locked up so as to exclude the tenant altogether (*n*). An open field is a sufficient pound for cattle (*o*). The agent of a landlord went into a field where the tenant's cattle were feeding, and placing his hand on one of the beasts, said he distrained them all, counted them, and took a note of them, which he left with the tenant, and then went away, doing nothing further with the beasts; the next morning he left with the tenant a notice, stating he had distrained the cattle, and had impounded them in the place or places therein mentioned, and the notice afterwards stated they were impounded "on the premises:" it was held, that this impounding was sufficient to make a tender of the rent and costs afterwards too late (*p*).

(g) *How disposed of.*

Statutory Enactment allowing the Sale of Distress.

The distress being considered merely as a pledge, could not at the common law be sold; but by the statute 2 Will. & Mary, sess. 1, c. 5, s. 2, it is enacted, that where any goods shall be distrained for rent reserved and due upon any demise, lease or contract whatsoever; and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof, with the cause of such taking, left at the chief mansion-house or other most notorious place on the premises, replevy the same; in such case, the person distraining shall, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish or place where such distress shall be taken, cause the goods so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff or constable shall swear to appraise the same truly, according to the best of their understandings), and after such appraisement may sell the same for the best price that can be gotten for them, for satisfaction of the rent and charges of the distress, appraisement and sale; leaving the overplus, if any, with the sheriff, under-sheriff or constable, for the owner's use. The statute 11 Geo. c. 19, s. 9, requires that the tenants have notice of the place where the distress is lodged.

What is a sufficient Notice of Distress.

The notice of distress must be in writing (*q*); and its object being to enable the distrainer to sell under the 2 Will. & Mary, sess. 1, c. 5, s. 2, it ought to inform the tenant or the person whose effects are taken

(*m*) *Washborn* v. *Black*, 11 East, 405, n.

(*n*) *Cox* v. *Painter*, 7 Car. & Pay. 767; see also *Woods* v. *Durrant*, 16 Mees. & Wels. 149.

(*o*) *Castleman* v. *Hicks*, 1 Car. & Mar. 266.

(*p*) *Thomas* v. *Harries*, 1 Scott, N. R. 524; 1 Man. & Gr. 695. As to tender, see ante, 350.

(*q*) *Wilson* v. *Nightingale*, 8 Queen's B. Rep. 1034.

by expressing what are the goods taken, and also what is the amount of rent in arrear (*r*). A notice stated that the distrainer "had distrained the goods, chattels and things mentioned in the inventory thereunder written." The inventory referred to mentioned one of the articles in question, and contained the following words: "and *any other* goods and effects that may be found in and about the premises." This was held to be a good notice (*s*). But where a notice stated a distress of the several goods specified in the schedule, which, after enumerating certain goods, concluded thus—"and *all other* goods that may be *required*, in order to satisfy the above rent, together with all necessary expenses;" it was held, that this notice was too vague and uncertain to justify the sale of the goods of a stranger which he had deposited on the premises (*t*). The notice need not set forth at what time the rent became due for which the distress has been made (*u*); nor need the time even of taking the goods be expressed therein, since a man may distrain for one cause and justify for another (*x*). Notice to the owner is sufficient as against him, unless a replevin has been sued by the tenant, in which case there must be personal notice to the tenant to warrant a sale under the statute: in all cases, indeed, a personal notice is preferable to notice left at the mansion-house, on account of the difficulty of proof (*y*): a want of notice, however, does not render a distress invalid (*z*).

Time of Removing and Selling the Distress.

The landlord cannot sell the goods distrained before the expiration of the five days allowed by the statute, and those days must be calculated as in other cases, inclusively of the last and exclusively of the day of taking. If, therefore, a distress has been taken on any hour of the 1st of January, for example, the sale would not be lawful until the morning of the 7th (*a*), which five days are inclusive of the *day* of the sale, but exclusive *of the time of the sale;* therefore, it seems the distress may be removed on the sixth day: thus where a distress was made, and a regular notice of sale given on the 12th day of May, and on the afternoon of the 17th day of the same month the goods were removed and sold; it was held, that on the evening of the 17th, the five days from the time of the distress had completely expired, and therefore that the removal and sale were regular according to the time allowed by the statute. The landlord should remove the goods at the end of five days from the tenant's premises, as he may be deemed a trespasser for keeping them there (*b*): thus where *A.* entered under

(*r*) *Kerby* v. *Harding*, 6 Exch. Rep. 234.
(*s*) *Wakeman* v. *Lindsey*, 19 Law J., Q. B., 166.
(*t*) *Kerby* v. *Harding*, 6 Exch. Rep. 234.
(*u*) *Moss* v. *Gallimore*, 1 Dougl. 279.
(*x*) *Crowther* v. *Ramsbottom*, 7 Term Rep. 654; *Etherton* v. *Popplewell*, 1 East, 139; *Wootley* v. *Gregory*, 2 You. & Jer. 536.
(*y*) *Walter* v. *Rumball*, 1 Lord Raym. 53; 12 Mod. 76; 1 Salk. 247.
(*z*) *Trent* v. *Hunt*, 9 Exch. Rep. 14.
(*a*) *Robinson* v. *Waddington*, 13 Queen's B. Rep. 753; overruling *Wallace* v. *King*, 1 H. Black. 13; and *Harper* v. *Taswell*, 6 Car. & Pay. 166; as far as those cases tend to establish a contrary doctrine.
(*b*) *Griffin* v. *Scott*, 2 Stra. 717; 3 Lord Raym. 1424.

a warrant of distress for rent in arrear, and continued in possession of the goods upon the premises fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the distress; it was held, that he was liable to an action of trespass for continuing on the premises, and disturbing the plaintiff in the occupation of his house, after the time allowed by law (*d*): but a reasonable time after the expiration of the five days from the time of the distress is allowed by law to the landlord to remain on the premises for appraising and selling the goods distrained (*e*). It is usual for the tenant to give a consent for the landlord to remain beyond the five days, as it is for the tenant's advantage that the goods be not sold, or if that is the case, sacrificed by hurrying on the sale: if such consent be given, it is prudent, although not absolutely necessary, to have it in writing. If a landlord has distrained for rent, but does not sell within the five days, by an arrangement between him and the tenant, that is no proof per se of collusion (*f*): and the request of the tenant will justify the landlord in detaining the goods of a lodger upon the premises beyond the proper time of selling, if he did not know which were the goods of the lodger, and which were those of the tenant (*g*). Standing corn and growing crops seized as a distress for rent, cannot be sold before they are ripe, for the tenant may tender the rent before they are ripe (*h*).

(h) *Appraisement and Mode of Sale.*

By and before whom the Appraisers are to be sworn.

Before the distress can be sold, it must be appraised by *two* (*i*) sworn appraisers, who must be reasonably competent, but need not be professional appraisers (*k*): it must not be appraised by the party making it (*l*), as it is illegal to swear the person who distrains as one of the appraisers (*m*), for he is interested in the business: and the statute says that *he*, with the sheriff, &c., shall cause the goods to be appraised by two sworn appraisers. In a late case, where a broker, having distrained goods for rent, was afterwards sworn one of the appraisers, and together with another broker valued them to the plaintiff, who became the purchaser according to such valuation; it was held, that the sale was irregular under the statute 2 Will. & Mary, sess. 1, c. 5, s. 2 (*n*). It was formerly laid down, that the appraisers need be

(*d*) *Winterbourne* v. *Morgan*, 11 East, 395; 2 Camp. 117, n.; see also *Etherton* v. *Popplewell*, 1 East, 139.

(*e*) *Pitt* v. *Shew*, 4 Barn. & Ald. 208.

(*f*) *Harrison* v. *Barry*, 7 Price, 690.

(*g*) *Fisher* v. *Algar*, 2 Car. & Pay. 374.

(*h*) *Owen* v. *Leigh*, 3 Barn. & Ald. 470; *Proudlove* v. *Twemlow*, 1 Cromp. & Mees. 326; 3 Tyr. 260.

(*i*) It is necessary that there should be two sworn appraisers under the 2 W. & M. sess. 1, c. 5, s. 2, notwithstanding the schedule of the 57 Geo. III. c. 93, speaks of an appraisement "by one broker or more;" *Allen* v. *Flicker*, 10 Ad. & El. 640; 4 Per. & Dav. 735; *Bishop* v. *Bryant*, 6 Car. & Pay. 484; but see contra *Fletcher* v. *Saunders*, 6 Car. & Pay. 747; 1 Mood. & Rob. 375.

(*k*) *Roden* v. *Eyton*, 6 C. B. Rep. 427.

(*l*) *Westwood* v. *Cowne*, 1 Stark. 172.

(*m*) *Andrews* v. *Russell*, Bull. N. P. 81.

(*n*) *Lyon* v. *Welden*, 2 Bing. 334; 9 Moore, 629. It has been held, that if the tenant, to save expense, requests that appraisers may not be called in, and in con-

sworn only by the constable of the hundred in which the distress is impounded: but it has been recently held, that the appraiser of a distress must be sworn before the constable of the parish where it is taken; as the constable of the adjoining parish cannot interfere, though the proper constable is not to be found when wanted (*o*).

t of Appraisement.

The constable must attend with the appraisers at the time of the appraisement, and must swear them before they make it (*p*); he usually endorses a memorandum of his having done so upon the inventory. In a recent case, an objection was taken to a similar memorandum made on the replevin bond, on the ground of its not having been stamped with an affidavit stamp; but the court held, that, in effect, such a memorandum was not an affidavit, but a mere note of the fact of the oath having been administered, and therefore that it need not be stamped (*q*). Having been sworn, the appraisers proceed to appraise the goods, and usually write their appraisement upon the inventory (*r*). Where goods are distrained, and at the end of the five days appraised but not sold, the act of appraisement does not take away the tenant's right to replevy them (*s*).

Mode of Selling the Goods distrained.

Before any sale takes place, the sheriff's office should be searched to see if the goods have been replevied; if that is not the case, and the rent and charges remain unpaid at the end of the five days allowed by law, the goods should be sold for the best price which can be got for them (*t*). The whole produce, if necessary, may be applied in satisfaction of the rent and expenses of the distress; but if the produce be more than sufficient for that purpose, the residue should be left in the hands of the sheriff, under-sheriff or constable—usually the latter—for the use of the owner of the goods distrained. It seems that there is no order required by law to be observed on the sale of goods,—as that the beasts of the plough should be postponed to other goods; nor is it therefore a cause of action that the beasts of the plough should be sold before the other goods are disposed of, where the distress itself was not wrongful (*u*). Where the goods have been valued, it is not unusual for the appraisers to buy them at their own valuation; a receipt for the amount at the bottom of the inventory, witnessed by the person who swore them, is usually considered a sufficient discharge: but if the distress be of considerable value, it is more advisable to have

sequence the broker who made the seizure values the goods, the tenant cannot in an action complain of that which was done as an irregularity; *Bishop* v. *Bryant*, 6 Car. & Pay. 484.

(*o*) *Avenell* v. *Croker*, Mood. & Malk. 172.

(*p*) *Kenny* v. *May*, 1 Mood. & Rob. 56.

(*q*) *Dunn* v. *Lowe*, 4 Bing. 193; 12 Moore, 407.

(*r*) By statute 55 Geo. III. c. 184, the stamps on appraisements, where the amount of the valuation does not exceed

50*l*., must be.....	£0	2	6
if it exceeds 50*l*. but not 100*l*.	0	5	0
if it exceeds 100*l*. but not 200*l*.	0	10	0
if it exceeds 200*l*. but not 500*l*.	0	15	0
and if it exceeds 500*l*.....	1	0	0

(*s*) *Jacob* v. *King*, 5 Taunt. 451; 1 Marsh. 135.

(*t*) If the distress is for less than 20*l*., a person selling the goods by auction need not have an auctioneer's licence; see stat. 8 & 9 Vict. c. 15, s. 5.

(*u*) *Jenner* v. *Yolland*, 6 Price, 5; 2 Chit. 167.

a proper bargain and sale between the landlord and the person who swears them, the appraisers and purchasers, for the better proof of the transaction afterwards. A distress sold at the appraised value is intended to have been sold at the best price, since the law *relies* upon the appraisers having been sworn (*x*): it has, however, been held, that upon a count for not selling goods distrained at the best prices, the plaintiff may go into evidence to show that the goods were allowed to stand in the rain, and that they were improperly allotted (*y*). If a tenant is under a covenant not to carry hay and straw off the premises, the landlord is not entitled to sell hay and straw that he has taken as a distress, subject to a condition that the purchaser shall consume it on the premises (*z*). Where goods, which were on the tenant's lands, were sold under a distress with a condition, to which the tenant was a party, that they might remain on the land up to a certain day, and that the buyer might enter and take the goods, the tenant cannot revoke this licence to enter on the land (*a*). But such a licence is not implied by law, though the goods may have remained on the land with the tenant's assent (*b*).

(i) *Second Distress.*

When a Second Distress may be made.

By statute 17 Car. II. c. 7, s. 4, in all cases where the value of the cattle distrained shall not be found to be of the full value of the arrears distrained for, the party to whom such arrears are due, his executors or administrators, may distrain again for the said arrears: but a second distress cannot, it seems, be at all justified, where there is enough which might have been taken upon the first, if the distrainer had then thought proper; for a man who has an entire duty (as rent, for example) shall not split the entire sum, and distrain for one part of it at one time, and for the other part of it at another time, and so toties quoties for several times; for that is great oppression (*c*). And therefore trover will lie against a landlord for the goods taken on a second distress, where he might have taken sufficient on the first, or where he has voluntarily abandoned it (*d*). So where a landlord, having distrained a tenant who had committed an act of bankruptcy, withdrew the distress in consequence of a creditor of the tenant stating that he was proceeding in bankruptcy against the tenant, and warning the landlord not to sell, it was held, that a second distress was illegal (*e*). If a man, however, seize for the whole sum that is due to him, and

(*x*) *Walter* v. *Rumball*, 1 Lord Raym. 53; 12 Mod. 76; 1 Salk. 247.

(*y*) *Poynter* v. *Buckley*, 5 Car. & Pay. 512.

(*z*) *Ridgway* v. *Lord Stafford*, 6 Exch. Rep. 404; post, Chap. IV., sect. 4; overruling *Abbey* v. *Petch*, 8 Mees. & Wels. 419; and see *Frusher* v. *Lee*, 10 Mees. & Wels. 709; and *Roden* v. *Eyton*, 6 C. B. Rep. 427.

(*a*) *Wood* v. *Manley*, 11 Ad. & El. 34; 3 Per. & Dav. 5; see also *Wood* v. *Leadbitter*, 13 Mees. & Wels. 838.

(*b*) *Williams* v. *Morris*, 8 Mees. & Wels. 488.

(*c*) *Gambrell* v. *The Earl of Falmouth*, 4 Ad. & El. 73; see also *Lear* v. *Caldecott*, 4 Queen's B. Rep. 123; 3 Gale & Dav. 491.

(*d*) *Dawson* v. *Cropp*, 1 Com. B. Rep. 961.

(*e*) *Bagge* v. *Mawby*, 8 Exch. Rep. 641.

only mistake the value of the goods seized, which may be of uncertain or imaginary value, as pictures, jewels, race-horses, &c., there is no reason why he should not afterwards complete his execution by making a further seizure (*f*). If a plaintiff in replevin be nonsuited, the defendant may again distrain the same goods for rent subsequently accrued, previously to executing his retorno habendo, without waiving his action against the sureties on the bond (*g*). Where to a cognizance for rent in arrear, there was a plea in bar, that the defendant, on a former occasion, made a distress for the same rent, and took goods liable to distress sufficient to discharge the rent in arrear and the costs of the distress, and might thereby have paid the arrears of rent, but neglected so to do, and wrongfully made a second distress for the same rent; it was held ill on special demurrer, assigning for cause that the plea did not show that the rent was satisfied by the former distress (*h*). And where to an avowry by executors, for rent due in the lifetime of their testator, there was a plea in bar that the testator took as a distress for the same rent goods of a sufficient value to satisfy such rent and the costs of taking the distress; it was held insufficient, as it should have shown that such distress produced a satisfaction of the rent (*i*).

(j) *Rescue and Pound-Breach.*

What amounts to a Rescue.

Rescue is where the owner, or other person, by force takes away a thing distrained from the person distraining, after the latter has been actually in possession; but if he never in fact had possession—as when disturbed in making the distress—it is no rescue (*k*). If cattle distrained go on to the premises of the owner while being driven to the pound, and he refuse to deliver them up upon demand by the distrainer, it is a rescue in law (*l*): but where the plaintiff distrained the defendant's cattle damage feasant, and went to apprize the defendant, and during his absence the cattle escaped for half an hour into the defendant's grounds, from whence the plaintiff on his return drove them to his own yard; it was held, that the defendant having taken them from thence, it was no rescue (*m*). Where the landlord employed a sheriff's officer, who took possession under the distress, and then, on receiving a fi. fa., sold the goods under it, this, though done by the same person, is a rescue and pound-breach (*n*). The following facts,

(*f*) *Hutchins* v. *Chambers*, 1 Burr. 579; 1 Wms. Saund. 201, n. 1.

(*g*) *Hefford* v. *Alger*, 1 Taunt. 218.

(*h*) *Hudd* v. *Ravenor*, 2 Brod. & Bing. 662; 5 Moore, 542; see also *Dawson* v. *Cropp*, 1 Com. B. Rep. 961; 3 Dow. & Low. 225.

(*i*) *Lingham* v. *Warren*, 2 Brod. & Bing. 36; 4 Moore, 409.

(*k*) Bull. N. P. 84. It is also called rescous, from recourser, recuperare, to take from, recover. It is defined by Coke to be a taking away and setting at liberty against law a distress taken, or a person arrested by the process or course of law. Co. Lit. 160.

(*l*) 1 Inst. 161.

(*m*) *Knowles* v. *Blake*, 5 Bing. 499; 3 Moore & Pay. 214.

(*n*) *Reddell* v. *Stowey*, 2 Mood. & Rob. 358. See also *Turner* v. *Ford*, 15 Mees. & Wels. 212.

however, were held insufficient to enable the plaintiff to maintain an action for a pound-breach or rescue: the plaintiff levied a distress for rent in arrear, and impounded the goods upon the premises; whilst his bailiff was removing them, the defendant, a sheriff's officer, came into the house, and said that he had a fi. fa. against the plaintiff, and that he would not allow the goods to be removed; plaintiff's tenant thereupon ejected plaintiff's bailiff, and brought back the goods which had been removed (*o*). By the 12 & 13 Vict. c. 92, s. 6, where animals impounded are not properly supplied with water, any person may enter a pound for the purpose of so supplying them, without being a trespasser.

When a Rescue may be made.

If a distress be taken without cause, the party may lawfully make a rescue before it is impounded (*p*): but if it is impounded, he cannot justify a breach of the pound to take it out; because the distress is then in the custody of the law; if, however, the pound be unlocked, it seems he may take it.

Remedies for Rescue and Pound-breach.

By the common law, if a man broke the pound, or the lock of it, or any part of it, he greatly offended against the peace, and committed a trespass against the king, and to the lord of the fee, the sheriffs and hundredors in breach of the peace, and to the party in delay of justice; wherefore hue and cry was levied against him as against those who broke the peace; and the party who distrained might take the goods again wheresoever he found them, and again impound them (*q*). Besides the old remedy by writ of rescous, by statute 2 Will. & Mary, sess. 1, c. 5, s. 4, on any pound-breach or rescous of goods distrained for rent, the person grieved thereby shall, in a special action upon the case, recover treble damages and costs against the offender, or against the owner of the goods, if they be afterwards found to come into his use or possession (*r*): but where goods fraudulently removed and distrained on the premises of a third party are rescued by him, it may be a question whether an action in respect of such rescue can be maintained under this section (*s*). In an action on this statute, it has been adjudged that it is no answer that the rent and demand were tendered after the distress and impounding (*t*); and that the word "treble" shall refer as well to the word "costs" as to the word "damages," and consequently that the costs shall be trebled as well as the damages (*u*). A plea of recaption upon a rescue must aver that the recaption was on fresh pursuit (*x*). It would seem that trover is not maintainable by the landlord for goods distrained by him (*y*).

(*o*) *Story* v. *Finnis*, 2 Low. M. & P. 198.
(*p*) 1 Inst. 47.
(*q*) Ibid.
(*r*) Where a distress is taken damage feasant, a summary remedy is given by stat. 6 & 7 Vict. c. 30.
(*s*) *Harris* v. *Thirkeld*, 20 Law Times, 98.
(*t*) *Firth* v. *Purvis*, 5 Term Rep. 432.
(*u*) *Hanson* v. *Storey*, 1 Ld. Raym. 10; as to treble costs, see post, Book III., Chap. I., Sect. 9.
(*x*) *Rich* v. *Woolley*, 7 Bing. 651; 5 Moore & Pay. 663.
(*y*) *Turner* v. *Ford*, 15 Mees. & Wels. 212; *Wilbraham* v. *Snow*, 2 Saund. 47 a; *Moneux* v. *Goreham*, Selw. N. P. 1384, 9th edit.

SECT. 5.—*Expenses of Distresses.*

Amount of Expenses where Distress for less than 20*l.*

By the statute 57 Geo. III. c. 93, for regulating the costs of distresses levied for payment of small rents, after reciting that divers persons acting as brokers, and distraining on the goods and chattels of others, or employed in the course of such distresses, had of late made excessive charges, to the great oppression of poor tenants and others, and that it was expedient to check such practices, it was enacted, sect. 1, "that no person making any distress for rent, where the sum demanded and due shall not exceed 20*l.* for and in respect of such rent, nor any person whatsoever employed in any manner in making such distress, or doing any act whatsoever in the course of such distress, or for carrying the same into effect, shall have, take or receive out of the produce of the goods or chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other or more costs and charges for and in respect of such distress, or any matter or thing done therein, than such as are fixed and set forth in the schedule hereunto annexed, and appropriated to each act which shall have been done in the course of such distress; and no person or persons whatsoever shall make any charge for any act, matter or thing mentioned in the schedule, unless such act shall have been really done."

Remedy for party aggrieved by Extortion.

By section 2 it is enacted, that if any person shall in any manner levy, take or receive from any person whatsoever, or retain or take from the produce of any goods sold for the payment of such rent, any other or greater costs and charges than are mentioned and set down in the schedule, or make any charge whatsoever for any act, matter or thing mentioned in the schedule, and not really done, the party aggrieved by such practices may apply to any one justice of the peace for the county, city or town, and acting for the division where such distress shall have been made, or in any manner proceeded in, for redress; whereupon such justice shall summon the person complained of to appear before him, and shall examine into the matter of such complaint, and hear the defence of the person complained of; and if the fact shall appear to such justice, he shall order and adjudge treble the amount of the monies so unlawfully taken, to be paid by the person so having acted, to the party who shall have made complaint thereof, together with full costs; and, in case of non-payment, shall issue his warrant to levy the same by distress and sale of the goods and chattels of the party ordered to pay, rendering the overplus (if any) to the owner; and in case no sufficient distress can be had, he shall commit the party to prison, there to remain until such order or judgment be satisfied.

Exception in favour of the Landlord.

Section 4 provides, that nothing therein contained shall empower such justice to make any order or judgment against the landlord for

whose benefit any such distress shall have been made, unless such landlord shall have personally levied such distress; and that no person who shall be aggrieved shall be barred from any legal or other suit or remedy which he might have had before the passing of the act, excepting so far as such complaint shall have been determined by the order and judgment of the justice, and which may be given in evidence under the plea of the general issue in all cases where the matter of such complaint shall be made the subject of any action (*z*).

Schedule of Expenses for Distresses under 20*l.*

The following is the schedule of expenses referred to in the above statute:—

	£	s.	d.
Levying distress	0	3	0
Man in possession, per day	0	2	6
Appraisement, whether by one broker or more, 6*d.* in the pound on the value of the goods.			
Stamp, the lawful amount thereof.			
All expenses of advertisements, if any such	0	10	0
Catalogues, sale and commission, and delivery of goods, 1*s.* in the pound on the net produce of the sale.			

The statute does not apply to a case of a distress taken for more than 20*l.*, though made upon goods which are appraised at and sold for less than 20*l.* (*a*).

Costs of Distresses for more than 20*l.*

For distresses where the sum distrained for exceeds the sum of twenty pounds, the costs are not specified. The general practice, however, appears to be, to charge one shilling in the pound for the levy, and three shillings and sixpence per day for the man in possession. By the above statute, section 6, "every broker or other person who shall make and levy any distress whatsoever shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied, although the amount of the

(*z*) By statute 7 & 8 Geo. IV. c. 17, it is enacted, "that all the rules, regulations, clauses, provisions, penalties, matters and things in the above act contained, shall extend and be construed to extend, and shall be applied and put in execution—so far as the same are applicable and capable of being put in execution—with respect to any distress or levy which shall be made for any land tax, assessed taxes, poor's rates, church rates, tithes, highway rates, sewer rates or any other rates, taxes, impositions or assessments whatever, in all cases where the sum demanded and due for or in respect of such taxes, rates, tithes, assessments or impositions, shall not exceed the sum of 20*l.*; and in all cases where the whole of the several sums sought to be levied by distresses taken for different purposes at the same time shall not exceed the sum of 20*l.*; and that such costs and charges, and no other, shall be taken and payable as the costs and charges of the levy and disposition of such distresses; and that all such proceedings shall and may be had and taken against any and every person transgressing the regulations of the said act, in the levying or distraining for any such taxes, rates, impositions or assessments; and all such persons shall be liable to and shall incur such and the like penalties as by the said act are directed, required and imposed, with respect to persons making any distress for rent contrary to the directions of the said act; and that in any order or judgment of any justices before whom any complaint shall be preferred in consequence of this act, such order shall be expressed to be made upon a complaint for the breach of the said recited act as amended by this act, and that the said recited act and this act shall be taken and construed together as one act to all intents and purposes whatsoever."

(*a*) *Child* v. *Chamberlain*, 5 Barn. & Adol. 1049; 3 Nev. & Man. 520.

rent demanded shall exceed the sum of twenty pounds." This section does not apply to the landlord, unless he interferes personally in making the distress (*b*).

Sect. 6.—*Indemnity on Distresses.*

Where a landlord gave authority to a broker to distrain the goods of his tenant, and an indemnity against all costs and charges that he might be at "on that account;" and upon making the distress, the broker's men, being told by the son of the tenant that a cask contained spent liquor of no value, took the cask to pieces, and let the liquor run off, when in fact it was cochineal dye belonging to a third person, who for wasting it recovered damages in trover against the broker; it was held, that he could not recover the amount of those damages from the landlord in an action on the indemnity; and that such an indemnity could apply only to such cases where the distress was illegal because the landlord had no right to distrain (*c*). Where the landlord's agent employed a broker to levy a distress on the premises of an auctioneer, and urged him to make the levy forthwith, as there was a large quantity of furniture in the auction room, and by the warrant he directed him to distrain the several goods and chattels on the premises, whereupon the broker seized all the goods, but some of them turned out to be privileged from distress; it was held, that an indemnification of the broker was implied to be given by the agent: but it seems that a broker in an ordinary case who takes goods which are privileged from distress, cannot look for an indemnity from his employer (*d*).

Sect. 7.—*Distresses for other than Rent.*

Distress of Cattle or Goods damage feasant, Annuities, Rates, and Taxes, Tolls, Tithes, &c.

Distresses may also be taken for other matters besides rent in arrear. Cattle damage feasant may be taken as a distress, so a railway engine (*e*); and distresses may be made in respect of the arrears of annuities and rent-charges for rates and taxes, for penalties imposed by bye-laws, for tolls; and by the act for the commutation of tithes, 6 & 7 Will. IV. c. 71, power is given to distrain for the rent-charge, which is to be substituted in lieu of tithes (*f*).

Sect. 8.—*Wrongful Distress.*

General Remedies for Wrongful Distress.

Where the goods or cattle of a person have been taken as a distress, whether on the ground that they are liable for rent in arrear or damage

(*b*) *Hart* v. *Leach*, 1 Mees. & Wels. 560; 2 Gale, 172; Tyr. & Gr. 1010.

(*c*) *Draper* v. *Thompson*, 4 Car. & Pay. 84.

(*d*) *Toplis* v. *Grane*, 5 Bing. N. C. 636; 7 Scott, 620; 2 Arn. 110.

(*e*) *Ambergate Railway* v. *Midland Railway*, 2 El. & Bl. 793.

(*f*) See post, Chap. VIII., Sect. 5. By 42 Geo. III. c. 116, s. 88, ecclesiastical corporations who have redeemed the land tax may distrain for the amount as an additional rent.

feasant, or where they have been taken unlawfully, though not as a distress (*g*), the party so distrained upon may contest the distrainer's right either by an action of replevin; an action of trespass de bonis asportatis or quare clausum fregit for damages; an action of detinue for the thing distrained itself, or trover for its value; an action of trespass, or on the case, for double value under the statute 2 Will. & Mary, sess. 1, c. 5, s. 5, where no rent is in arrear or due, and the goods have been distrained and sold by virtue or color of that act, may also be maintained (*h*). The action of trespass quare clausum fregit was the remedy commonly resorted to formerly, not merely as a remedy for a distress wrongfully taken, but as a means of trying the title to lands and tenements, the title frequently coming in question in the course of that action; it has, however, of late years been in some degree superseded by the action of replevin in the one case and ejectment in the other; still, however, these actions of trespass and that of trover are open to the party who means to contest the validity of a distress (*i*). The proceedings have in effect much similarity, but the action of replevin, being more strict than that of trespass for taking and carrying away the goods with respect to proof of title, has been generally preferred (*k*). If the cattle or goods wrongfully taken and detained have been converted into money, the party may waive the tort, and bring assumpsit for money had and received (*l*); but the plaintiff having once made his election, cannot afterwards bring another action for the same cause, either whilst the former is depending, or after it has been determined.

Remedy for Distress irregularly taken.

An action also lies for an irregularity in the distress, as where, although a right to distrain exists, the distrainer has been guilty of an irregularity in availing himself of his right, as by taking such things as are not lawfully the subject of distress, or where he has omitted to conduct himself with propriety in the subsequent disposition of it, or conduct respecting it, as by turning the plaintiff's family out of possession, and keeping possession of the premises on which he has impounded the distress; but an irregularity in this proceeding does not now, since the statute 11 Geo. II. c. 19, s. 19, render the distrainer, as he was at the common law, a trespasser ab initio; but the party grieved may recover satisfaction for the special damage in an action of trespass or on the case, at his election: and by sect. 20 no tenant shall recover in such action if tender of amends have been made before the action brought (*m*).

(*g*) *Mellor* v. *Leather*, 22 Law J., M. C., 76.

(*h*) The plaintiff will not be allowed to retain in his declaration an ordinary count in trespass together with a count under this section; *Hoare* v. *Lee*, 5 Dowl. & L. 765. By statute 2 & 3 Vict. c. 71, c. 39, power is given to a magistrate within the metropolitan police district, to give summary relief against oppressive distresses, in cases where the rent does not exceed 15*l.* a year.

(*i*) Post, Book III., Chap. IV., Sect. 6, (a).

(*k*) Post, Book III., Chap. VI.

(*l*) Post, Book III., Chap. IV., Sect. 1, (d).

(*m*) Post, Book III., Chap. V., Sect. 6, (a).

Remedy for Excessive Distress.

Distresses ought not to be excessive, but in proportion to the sum distrained for, according to the statute of Marlbridge, 52 Hen. III. c. 4: thus if the lord distrain two or three oxen for 12*d.* it is unreasonable: so if he distrain a horse or an ox for a small sum, where a sheep or a swine may be had, it is an excessive distress; but if there be no other distress on the land, then the taking of one entire thing, though of considerably greater value, is not unreasonable (*n*); and an action will not lie for taking an excessive distress where one thing only could be taken, though greatly exceeding in value the amount required (*o*). In order to support an action for an excessive distress, the excess must be considerable, as it is not for every trifling excess that this action is maintainable (*p*): and where the amount produced at the sale of the goods is slightly in excess of the rent due, it is not an excessive distress, and no action will lie (*q*). A wheat rick worth 62*l.* having been seized as a distress for 39*l.* arrears of a rent-charge under the Tithe Act, 6 & 7 Will. IV. c. 71, and it being doubtful in point of law whether the straw could be sold (*r*), the tenant being under covenant with his landlord to consume it on the farm, the wheat only was sold, the buyer to thrash it on the premises and leave the straw; the wheat was worth 42*l.*, the straw 20*l.*: it was held, that the seizure of the entire rick was justifiable, although there was other property on the premises, and that the distress was not excessive (*s*). Nor is such an action maintainable for the mere taking or selling on a *claim* of more than is due, the amount taken or sold not being unreasonable. And where, in an action brought in respect of such claim, the defendant paid money into court, and a verdict was found against him with damages, it was held, in error, that it could not be inferred therefrom that the amount taken or sold was unreasonable in respect of what was actually due (*t*); and the law is the same though the distress is made maliciously (*u*). So in another case it was held, that an arrangement between the parties after the distress, but before sale, did not divest the tenant of his right of action (*x*). An action will lie for an excessive distress, in taking growing crops (*y*). It would seem that no joint action for an excessive distress can be brought by two parties, where the goods taken belong partly to one and partly to the other (*z*). A man is not liable to a criminal prosecution for taking an excessive distress (*a*);

(*n*) 2 Inst. 106.

(*o*) *Field* v. *Mitchell*, 6 Esp. 71; *Avenell* v. *Croker*, Mood. & Malk. 172.

(*p*) *Sells* v. *Hoare*, 1 Bing. 401; 8 Moore, 451; 1 Car. & Pay. 28.

(*q*) *Fitzgerald* v. *Longfield*, 7 Ir. Jurist, C. B., 21.

(*r*) See post, Chap. IV., Sect. 4, in notis.

(*s*) *Roden* v. *Eyton*, 6 C. B. Rep. 427.

(*t*) *Tancred* v. *Leyland*, 16 Queen's B. Rep. 669; overruling in that respect *Taylor* v. *Henniker*, 12 Ad. & El. 488; 4 Per. & Dav. 242; and supporting the dicta in *Avenell* v. *Croker*, Mood. & Malk. 172; and *Wilkinson* v. *Terry*, 1 Mood. & Rob. 377: see also *Crowder* v. *Self*, 2 Mood. & Rob. 190.

(*u*) *Stevenson* v. *Newnham*, 12 C. B. 285 (in error).

(*x*) *Sells* v. *Hoare*, 1 Bing. 401; 8 Moore, 451; 1 Car. & Pay. 28.

(*y*) *Piggott* v. *Birtles*, 1 Mees. & Wels. 447; 2 Gale, 18: Tyr. & Gr. 729.

(*z*) *Bail* v. *Mellor*, 19 Law J., Exch., 279.

(*a*) *Rex* v. *Ledgingham*, 1 Vent. 104; 1 Mod. 200.

the proper remedy is a special action of case founded upon the statute of Marlbridge (*b*). In an action for an excessive distress the question is, what the goods seized would have sold for at a broker's sale: if the distress be excessive, the plaintiff is entitled to recover the fair value of the goods (*c*).

SECT. 9.—*Recovery of Rent otherwise than by Distress.*

(a) *When the Tenant's Goods are taken in Execution.*

Enactments respecting the Payment of Rent in Execution. 8 Anne, c. 14.

It has been before stated (*d*), that the landlord cannot distrain goods which are taken in execution, or in the custody of the law, as it is called; but it being thought hard that landlords should not have something like a specific lien, parliament, by statute 8 Anne, c. 14, gave them a remedy for one year's rent, but no more, because vigilantibus et non dormientibus jura subveniunt. That statute, section 1, enacts, "that no goods or chattels whatsoever lying or being in or upon any messuage, lands or tenements which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution, or extent, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of the act;" and the sheriff or other officer is thereby empowered and required to levy as well the money so paid for rent as the execution money. Section 8 provides, that nothing in the act contained shall extend or be construed to extend to let, hinder or prejudice her Majesty, her heirs or successors, in the levying, recovering or seizing any debts, fines, penalties or forfeitures due, payable or answerable to her, but that it shall and may be lawful for her to levy, recover and seize the same in the same manner as if the act had never been made.

7 & 8 Vict. c. 96, s. 67.

The power given to landlords under that statute is, however, restrained by the statute 7 & 8 Vict. c. 96 (*e*), s. 67, which enacts, "that no landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent; and if such

(*b*) See post, Book III., Chap. V., Sect. 6, (a).

(*c*) *Wells* v. *Moody*, 7 Car. & Pay. 59.

(*d*) Ante, 374.

(*e*) Repealed in part as to other matters by 12 & 13 Vict. c. 106.

tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment."

10 Vict. c. 107.

Also by the Small Debts Recovery Act, 9 & 10 Vict. c. 95, amended by 12 & 13 Vict. c. 101, and extended by 13 & 14 Vict. c. 61 (*f*), it is enacted (sect. 107), that so much of the statute, 8 Ann. c. 14, "as relates to the liability of goods taken by virtue of any execution, shall not be deemed to apply to goods taken in execution under the process of any court holden under this act; but the landlord of any tenement in which any such goods shall be so taken shall be entitled, by any writing under his hand or under the hand of his agent, to be delivered to the bailiff or officer making the levy, which writing shall state the terms of holding and the rent payable for the same, to claim any rent in arrear then due to him, not exceeding the rent of four weeks where the tenement is let by the week, and not exceeding the rent accruing due in two terms of payment where the tenement is let for any other term less than a year, and not exceeding in any case the rent accruing due in one year: and in case of any such claim being so made the bailiff or officer making the levy shall distrain, as well for the amount of the rent so claimed, and the costs of such additional distress, as for the amount of money and costs for which the warrant of execution issued under this act, and shall not proceed to sell the same or any part thereof within five days next after such distress taken: and if any replevin be made of the goods so taken, such of the goods shall be sold under the execution as shall satisfy the money and costs for which the warrant of execution issued, and the costs of the sale; and the overplus of such sale (if any), and also the residue of the goods, shall be returned as in other cases of distress for rent and replevin thereof." The high bailiff of the court is entitled to take for costs of the additional distress those fees only which are given by statute 57 Geo. III. c. 93 (*g*). The 107th section, requiring the landlord to state in writing the terms of the holding and the rent, having in practice been found to create technical objections and unnecessary prolixity, and having from its silence as to the landlord's right to priority of payment given rise to difficulties of construction, the 13 & 14 Vict. c. 61 (the County Court Extension Act), after reciting the above matters, enacts, sect. 20, "That so much of the said act as requires that the said writing and claim should state the terms of holding shall be and is hereby repealed, and that it shall be a sufficient notice of claim, to entitle the landlord to all the benefit given to landlords under the said act, that such writing and claim shall state the amount of the rent claimed to be in arrear and unpaid, and the time for and in respect of which such rent is claimed to be due, in like manner as is now required by law in

(*f*) See post, Book III., Chap. IX.

(*g*) Ante, 396.

cases of ordinary distress of rent, and no further or otherwise; and also that no execution creditor under the said act or this act shall be satisfied his debt out of the proceeds of such execution and distress, or execution only when the tenant shall replevy, until the landlord who shall conform to the provisions of the said act, as amended by this act, shall have been paid the rent in arrear for the periods in the said act limited."

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Sect. 21. "That the enactments contained in the said act, as altered and amended in this act, relating to the claims of landlords for rent in arrear when goods on the premises demised have been taken in execution, shall apply and extend to goods taken in execution under the authority of this act, in as full and beneficial a manner as if the same enactments were re-enacted in the like terms in this act."

Cases to
the Statu
8 Ann. c.
extends.

The statute 8 Anne, c. 14, only extends to cases in which there is an existing tenancy at the time of the execution (*h*): thus where growing crops of a tenant having been seized under a fieri facias, a writ of habere facias possessionem was subsequently delivered to the sheriff in an ejectment at the suit of the landlord, founded on a demise made long before the issuing of the fieri facias; it was held, that the growing crops could not be legally considered as belonging to the tenant, he being a trespasser from the day of the demise laid in the declaration of ejectment: and that the sheriff was not bound to allow to the landlord a year's rent under the statute, which contemplates an existing tenancy only at the time of the execution, which, under the circumstances, must be taken to have ceased on the day of the demise in the ejectment (*i*). The rent must also be certain; and therefore where the tenant occupied under an agreement for a lease merely, and no rent appeared to have ever been paid, it was held, the sheriff was not liable under the statute for not paying a year's rent (*j*). Where, upon the goods of a tenant being taken in execution, an agent of the landlord took from the sheriff's officer an undertaking for a year's rent, and then consented to the goods being sold; it was held, that the landlord could not afterwards maintain an action against the sheriff on the statute for not paying a year's rent on making the levy, although the rent was not paid according to the undertaking, and although the undertaking was void under the Statute of Frauds for not stating any consideration (*k*).

To whom the
Statute 8 Ann
c. 14, extends.

The statute 8 Anne, c. 14, is to have a liberal construction; and the words "party at whose suit the execution is sued out," are construed to mean either the plaintiff or defendant, whose judgment and

(*h*) *Riseley* v. *Ryle*, 10 Mees. & Wels. 101.

(*i*) *Hodgson* v. *Gascoigne*, 5 Barn. & Ald. 88.

(*j*) *Riseley* v. *Ryle*, 11 Mees. & Wels. 16. See ante, Sect. 2, (a), p. 352. If there is a lease it is as well that the sheriff should see it; *Augustien* v. *Challis*, 1 Exch. Rep. 279.

(*k*) *Rotherey* v. *Wood*, 3 Camp. 24; see *Wharton* v. *Naylor*, 12 Queen's B. Rep. 673.

execution it is; but the provisions of the statute extend only to the immediate landlord of the premises, and not to the ground landlord distraining the goods of an under-lessee (*l*). It also applies to the case of lessee and under-tenant of apartments of a house, as well as to the case of landlord and lessee (*m*). After demand made, either an executor or administrator of a deceased landlord may have the like remedy under the statute as the landlord himself (*n*): but it does not extend to an administrator to whom administration was granted after the goods were sold under an execution, and who consequently could not make a demand whilst they were in the hands of the sheriff (*o*). It has been held, that the trustees of outstanding satisfied terms, assigned in trust to attend the inheritance, may sue the sheriff for not retaining a year's rent due to the landlord, after notice so to do, in an execution against the tenant: that a notice to the sheriff, stating that the rent was due to *J. S.* and the mortgagees of his estate, and signed by a person who was not the receiver appointed by the mortgage deed, is sufficient; and that the sheriff is liable if he remove any of the tenant's goods, without retaining the year's rent (*p*). The statute applies only to cases where the judgment creditor claims adversely to the landlord, and not where the execution is issued out at the instance of the landlord himself (*q*).

To what Rent the Statute 8 Ann. c. 14, extends.

The rent to which the landlord is entitled is that due for a year immediately preceding the execution; and therefore if the tenant hold under a lease at one rent, and afterwards under a second demise at another the landlord cannot demand the amount of a year's rent unpaid upon the expired lease (*r*). The landlord is entitled to a full year's rent, although he has been used to remit some portion of it to the tenant (*s*). The statute extends to forehand rent to be paid in advance (*t*): but the landlord can claim from the sheriff only the rent due at the time of taking the goods, and not that which accrued after the taking and during the continuance of the sheriff in possession (*u*); thus a sheriff who takes corn in the blade under a fi. fa., and sells it before the rent is due, is not liable to account to the landlord of the defendant under the statute for rent accruing subsequently to the levy and sale, although he has given notice, and though the corn be not removed from the premises until long afterwards (*x*). But now, by 14 & 15 Vict. c. 25, s. 2, "In case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any

(*l*) *Bennett's case*, 2 Stra. 787.

(*m*) *Thurgood* v. *Richardson*, 7 Bing. 428; 5 Moore & Pay. 266; 4 Car. & Pay. 481.

(*n*) *Henchett* v. *Kimpson*, 2 Wils. 140; *Palgrave* v. *Windham*, 1 Stra. 212; *Twells* v. *Colville*, Willes, 376.

(*o*) *Waring* v. *Dewberry*, 1 Stra. 97.

(*p*) *Colyer* v. *Speer*, 2 Brod. & Bing. 67; 4 Moore, 473.

(*q*) *Taylor* v. *Lanyon*, 6 Bing. 536; 4 Moore & Pay. 316.

(*r*) *Cook* v. *Cook*, Andr. 219.

(*s*) *Williams* v. *Lewsey*, 8 Bing. 28; 1 Moore & Scott, 92.

(*t*) *Harrison* v. *Barry*, 7 Price, 690.

(*u*) *Hoskins* v. *Knight*, 1 Maule & Selw. 245; *Reynolds* v. *Barford*, 8 Scott, N. R. 233; 7 Man. & Gran. 449; 2 Dow. & Low. 66.

(*x*) *Gwillim* v. *Barker*, 1 Price, 274.

sheriff or other officer by virtue of any writ of fieri facias or writ of execution, such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer." The landlord cannot claim to be allowed to him, upon a writ of execution, rent which has accrued due since the day of the demise laid in an ejectment, under which he has recovered possession (*y*). Where, in an agreement for assigning a lease for a sum of money to be paid on or before a distant day, the lessee agreed to make some alterations on the premises which his assignee was to occupy, paying, until the completion of the assignment, *at the rate of* 100*l. per year in half-yearly payments;* it was held, that the sheriff, levying on goods of the assignee under a fi. fa., was bound to pay over to the lessee half a year's rent due (*z*). Before the sheriff pays the rent, he must have some evidence that it is due; for if it turn out that none is due, he is liable to answer for it; but slight evidence of the fact will be sufficient (*a*).

To what Executions the Statute 8 Ann. c. 14, extends.

The statute 8 Anne, c. 14, extends to executions levied upon any description of judgment (*b*), whether for the plaintiff or defendant in the action; therefore a landlord is entitled to a year's rent before a defendant can sell upon an execution for the costs on a nonsuit (*c*). He is also entitled to a year's rent before the sheriff can sell goods seized under a pone per vadios, or any writ of extract thereon, issuing out of the Court of Pleas of Durham (*d*). The sheriff is liable to an action at the suit of the landlord, for not paying a year's rent, though the sheriff ought not to have seized the goods on account of the tenant having become bankrupt, and may therefore be liable also to an action at the suit of the assignees (*e*): but a commission of bankrupt is not an execution within the meaning of the statute of Anne; and therefore, where a sheriff seized and sold goods under a fi. fa., he was held to be liable to pay the whole of the proceeds to the assignees of the tenant, though he had paid a year's rent to the landlord, it not appearing that the payment was before the sheriff had notice of the commission (*f*). It follows that, in order to enforce a landlord's

(*y*) *Hodgson* v. *Gascoigne*, 5 Barn. & Ald. 88.

(*z*) *Saunders* v. *Musgrave*, 6 Barn. & Cres. 524; 9 Dowl. & Ryl. 529; 2 Car. & Pay. 294.

(*a*) *Keightly* v. *Birch*, 3 Camp. 521.

(*b*) See ante, Sect. 3, (h), p. 374, as to the application of this statute in cases of executions at the suit of the crown.

(*c*) *Henchett* v. *Kimpson*, 2 Wils. 140.

(*d*) By statute 11 Geo. IV. & 1 Will. IV. c. 11. *S. P.* contra, *Brandling* v. *Barrington*, 6 Barn. & Cres. 467; 9 Dowl. & Ryl. 609.

(*e*) *Duck* v. *Braddyll*, M'Clel. 217; 13 Price, 455.

(*f*) *Lee* v. *Lopes* (*Bart.*), 15 East, 230.

claim for a year's rent against assignees of a bankrupt tenant, after a seizure under a fieri facias which is illegal as against them, there must be an actual distress; unless, perhaps, the sheriff has paid the amount before he had notice of the fiat (*g*). Where a landlord himself seizes his tenant's goods under an execution, the case is not within the statute, and therefore the execution being invalid as against the assignees of the tenant, who had become insolvent, the landlord must refund the whole proceeds of the sale to the assignees (*h*). It seems that a sequestration is an execution within the statute; and that, therefore, in such case the landlord will be entitled to recover a year's rent in preference to the other creditors (*i*). Where there were two executions on the tenant's goods, it was held that the landlord could demand his year's rent under the statute out of one of them only (*k*). Where the sheriff seizes, under a fi. fa., goods which are not the property of the judgment debtor, and afterwards pays the whole of the proceeds of the sale to the real owner, he is still liable under the statute for not paying a year's rent to the landlord (*l*). Under a fi. fa. against *A.*, the sheriff seized the goods of *B.*; *B.* claiming them, the sheriff obtained an order under the Interpleader Act, and *C.*, the landlord, claimed 25*l.* for a quarter's rent. The goods were sold under the order, and the amount, after deducting the 25*l.*, was paid by the sheriff into court. On the trial of the issue, *B.* established his claim; it was held, that, under the circumstances, the sheriff was not justified in paying the rent. The statute does not apply unless the goods have actually been removed; for if they still remain on the premises, the landlord may distrain, and therefore is not injured (*m*). The goods of a tenant are liable for a year's rent, notwithstanding they are taken on an outlawry in a civil suit (*n*).

Sheriff's Duty.

Notice to the sheriff is necessary in order to subject him to an action for removing the goods before a year's rent be paid; for neither a plaintiff nor defendant has any right to go upon the premises; but see 14 & 15 Vict. c. 25, s. 2, supra, p. 404; and the law gives the entry to the sheriff only by virtue of the execution: but after he has had notice of rent being due to the landlord, he cannot remove the goods before he has satisfied the landlord one year's rent. The sheriff is not bound to sell the goods, whatever their value may be, unless the execution creditor, having notice of it, first satisfies the landlord's rent (*o*). If the sheriff proceeds to a sale, it is his duty to levy for the rent in the first instance, and then for the execution; and he must retain a

(*g*) *Gethin* v. *Wilks*, 2 Dowl. 189.
(*h*) *Taylor* v. *Lanyon*, 6 Bing. 536; 4 Moore & Pay. 316.
(*i*) *Dixon* v. *Smith*, 1 Swanst. 457.
(*k*) *Dod* v. *Saxby*, 2 Stra. 1024.
(*l*) *Forster* v. *Cookson*, 1 Queen's B. Rep. 419; 1 Gale & Dav. 58.
(*m*) *White* v. *Binstead*, 13 C. B. 304.
(*n*) *St. John's College, Oxford* v. *Murcott*, 7 Term Rep. 259.
(*o*) *Cocker* v. *Musgrove*, 9 Queen's B. Rep. 223.

sufficient sum to satisfy such rent, before he remove any of the goods from off the premises (*p*). He is bound to retain the year's rent out of the proceeds of the tenant's goods taken in execution, provided he has notice of the landlord's claim at any time while the goods remain in his hands; and the court, in one case, ordered the same to be paid to the landlord, even where the notice was given after the goods were removed off the premises (*q*). The sheriff is not obliged to find out what rent is due to a landlord, and pay it him (*r*): but although he have no specific notice given him by the landlord of rent being due, yet if he is aware of the fact, and proceed to sell under a fi. fa. without retaining a year's rent, he will be liable to that amount (*s*). In an action against the sheriff for removing goods under an execution, without satisfying the landlord's claim of a year's rent, it was held that a notice to the sheriff, before the removal, stating that a year's rent was due from the tenant to the mortgagor (naming him) and the mortgagees of his estates, and signed by the receiver of the rents, was sufficient, although such receiver was not appointed by the mortgage deed (*t*). When a sheriff receives a notice of a year's rent being due, and the goods on the premises are not sufficient to satisfy it, he must withdraw: his best course will be to give notice to the execution creditor of the claim for rent (*u*); but if he sells, the court will not stay proceedings in an action against him on the statute, on his paying over the proceeds of the sale (*x*).

What is a sufficient Removal of the Goods.

If the goods seized be not sold or removed by the sheriff, so as to transfer the property therein, but the defendant pay the debt and costs, the landlord, though he has given notice and demanded the rent, is not entitled to a year's rent. There must be either an actual or constructive removal, but a bill of sale taken on a fi. fa. is not a constructive removal within the statute (*y*).

Operation of Interpleader Act.

By the Interpleader Act, 1 & 2 Will. IV. c. 58, s. 6, protection is given to sheriffs in levying executions where claims are made to the goods by third persons. That statute sometimes comes into operation in cases where the landlord has also made a claim for rent. In such a case it has been held, that where the landlord having such a claim gives notice in proper time, the sheriff ought to pay him, otherwise the court will make the sheriff pay the costs of appearing on an interpleader rule (*z*). Where the sheriff seized goods in execution which were under distress for rent, the court refused to grant him relief under

(*p*) *Riseley* v. *Ryle*, 11 Mees. & Wels. 19.
(*q*) *Arnett* v. *Garnett*, 3 Barn. & Ald. 440.
(*r*) *Smith* v. *Russell*, 3 Taunt. 400; *S. P. Waring* v. *Dewberry*, 1 Stra. 97; *Palgrave* v. *Windham*, 1 Stra. 212.
(*s*) *Andrews* v. *Dixon*, 3 Barn. & Ald. 645; *Riseley* v. *Ryle*, 11 Mees. & Wels. 16.
(*t*) *Colyer* v. *Speer*, 2 Brod. & Bing. 67; 4 Moore, 473.
(*u*) *Cocker* v. *Musgrove*, 9 Queen's B. Rep. 223.
(*x*) *Foster* v. *Hilton*, 1 Dowl. 35.
(*y*) *Smallman* v. *Pollard*, 6 Man. & Gran. 100; 1 Dowl. & Low. 901; but see *Wharton* v. *Naylor*, 12 Queen's B. Rep. 673; 17 L. J., Q. B., 278; and see Law Magazine for May, 1849.
(*z*) *Clarke* v. *Lord*, 2 Dowl. 55, 227.

Operation of 7 & 8 Vict. c. 96, s. 68.

the Interpleader Act, though he had applied to the execution creditor for an indemnity, and had been refused (*a*).

By the statute 7 & 8 Vict. c. 96 (*b*), s. 68, if a claim is made by a landlord for rent in respect of goods taken in execution under process of any court for the recovery of small debts, the clerk of the court may issue a summons to call the parties before the court, whereupon any action commenced shall be stayed; and the court may then adjudicate on the claim, and make any order it thinks fit.

Form of the landlord's remedy.

The remedy which a landlord has in cases where the sheriff proceeds to levy the execution and remove the goods without paying the rent, is in general by an action on the case against the sheriff (*c*); it is doubtful if an action lies against the execution creditor (*d*): and an action for money had and received cannot be maintained if the sheriff has sold the goods (*e*). The sheriff, however, is not bound by law to advance the money to pay the rent; such advance must be made by the execution creditor (*f*). The landlord is not always, however, driven to an action for his remedy, for there is a shorter way by motion to the court, that he may have restitution to the amount of the goods the sheriff has sold and removed (*g*); instead, therefore, of bringing an action against the sheriff when the goods are sold and removed after notice, the best way for the landlord is to move the court that he may have restitution to the amount of the goods which the sheriff has sold, if they amount to less than a year's rent, or if they amount to more, then to have so much as will satisfy a year's rent (*h*): and the same course may be taken where there has not been a removal of the goods, but merely a bill of sale by the sheriff and a receipt of the proceeds by him (*i*). Where a motion was made to have rent paid out of the money levied, and on showing cause it appeared that the sheriff's warrant on the execution after it was sealed had been altered, and a new bailiff's name inserted, the court held, that the warrant having been altered, no goods could be taken thereby. The court refused, on payment into court of the sum which the goods produced, to stay proceedings in an action against the sheriff, until the plaintiff undertook to pay the costs, in the event of his not recovering more (*k*). In another case, the Court of Exchequer refused to allow the proceeds of the sale by the sheriff to be paid into court with the costs of an action against him, though it was sworn that the sale was regularly conducted (*l*).

(*a*) *Haythorn* v. *Bush*, 2 Cromp. & Mees. 689; 2 Dowl. 641.

(*b*) Repealed in part, but not as to this point, by 12 & 13 Vict. c. 106.

(*c*) *Levy* v. *Goodson*, 4 Term Rep. 687; *Riseley* v. *Ryle*, 11 Mees. & Wels. 16; *Wintle* v. *Freeman*, 11 Ad. & El. 547.

(*d*) *Riseley* v. *Ryle*, 11 Mees. & Wels. 16.

(*e*) *Green* v. *Austin*, 3 Camp. 260.

(*f*) *Cocker* v. *Musgrove*, 9 Queen's B. Rep. 235.

(*g*) *Henchett* v. *Kimpson*, 2 Wils. 140; *West* v. *Hedges*, Barnes, 211, cited in *Smallman* v. *Pollard*, 6 Man. & Gr. 1001; 1 Dowl. & Low. 901.

(*h*) 2 Sel. Prac. 570.

(*i*) *Wharton* v. *Naylor*, 12 Queen's B. Rep. 673; 6 Dowl. & Low. 143.

(*k*) *Calvert* v. *Joliffe*, 2 Barn. & Adol. 418.

(*l*) *Groombridge* v. *Fletcher*, 2 Dowl. 353.

Extent of the Sheriff's Liability.

If the sheriff, after notice, wrongfully remove the goods, he is not liable to the rent beyond the amount of the goods sold, after making such deductions as may be allowed for expenses (*m*); and where the sheriff pays the landlord his rent according to the statute, he is entitled to deduct sheriff's poundage for such expenses only as were incurred before notice given to him by the landlord (*n*). Where the tenant was called as a witness, and, upon being objected to as interested, was released, it was held, that the release could not be pleaded puis darrein continuance in bar of the action; nor did it reduce the landlord to the necessity of taking a verdict against the sheriff for nominal damages only (*o*).

(b) *By Action at Law.*

Action at Law to recover Rent.

If the demise be by indenture or other written contract under seal, the landlord may either sue the tenant for rent in arrear by action of debt to recover the specific amount of rent due, or by action of covenant to recover damages for the non-payment of it when due; and if the contract of demise be by a written document under the hand of the parties, but not under seal, or by parol, he may sue by action of debt on simple contract for the specific amount of rent, or by action of assumpsit or debt, for the use and occupation of the premises. Although technically there is considerable difference in the form and mode of proceeding in these several actions (*p*), yet they essentially lead to the same result: thus in the action of debt the specific sum contracted for, as rent, which is unpaid, is recovered; whilst in the actions of covenant and assumpsit the plaintiff recovers the damages he has sustained by the non-payment of the rent; yet this practically is the same thing, for the measure of such damage is of course either the amount of rent the tenant has agreed to pay, or the reasonable value of the premises assessed by the jury. It seems also that where rent is due on a particular day, interest may be recovered as damages (*q*). When the tenant holds under a lease, the fact of rent being due cannot be proved without the production of the lease (*r*). If a rent-charge be granted out of a lease for years, it has been held that the grantee may bring an action of annuity when the lease is ended (*s*). In addition to these remedies for the recovery of rent, which are all founded upon the existence of a contract for the payment of it, if the fact of rent being in arrear amount to a forfeiture of the tenant's estate, as

(*m*) *Henchett* v. *Kimpson*, 2 Wils. 140.
(*n*) *Gore* v. *Gofton*, 1 Stra. 643.
(*o*) *Thurgood* v. *Richardson*, 7 Bing. 428; 5 Moore & Pay. 266; 4 Car. & Pay. 481.
(*p*) By the 15 & 16 Vict. c. 76, s. 3, it is not necessary to mention any form or cause of action in the writ of summons.
(*q*) Per Lord Ellenborough, in *Skerry* v. *Preston*, 2 Chit. 245.
(*r*) *Augustein* v. *Challis*, 1 Exch. Rep. 279.
(*s*) Moor, 450.

before mentioned, the landlord may consider the tenant as a trespasser, and recover his rent, together with the possession of the premises, by actions of ejectment and trespass for mesne profits.

(c) *By Suit in Equity.*

Suit in Equity to recover Rent.

A bill in equity may also be brought for rent where the remedy at law is lost or become very difficult, and in such cases the courts of equity will relieve on the ground of length of time (*t*).

(*t*) 1 Atk. 598.

CHAPTER III.

TAXES, RATES, AND ASSESSMENTS.

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SECT. 1.—*Liability to Taxes, &c.*

(a) *By whom to be paid—Land Tax.*

By whom Taxes are to be paid generally.

IT is a general principle that the occupier of the premises is primarily liable to bear all public impositions, whether they be parliamentary taxes or poor rates, paving, lighting, watching, water rates, highway rates, county and borough rates and church rates: thus the land-tax is not the landlord's tax with respect to the public, though it is as between landlord and tenant; for the land itself in the hands of the occupier is the debtor to the public; the land-tax, therefore, is primâ facie the tenant's tax, because all the remedies are against him. The land-tax differs from the poor's rate in this respect, that the former is eventually paid by the landholder who receives the rent, but the latter is entirely charged upon the occupier (*a*). The land-tax acts, from 4 Will. & Mary, c. 1, s. 13, to the present time, direct the tenant to pay the land-tax in the first instance, and to deduct out of his rent so much of the rate as in respect of the said rent the landlord should and ought to pay and bear: and the landlords both mediate and immediate, according to their respective interests, are required to allow such deductions. The owner of a quit rent shall pay taxes only in proportion to what the land pays; but if the matter has been examined by the commissioners of the land-tax, the Court of Chancery will not re-examine it (*b*). Where land was mortgaged to secure an annual payment of 20*l.* to a widow, in satisfaction of her dower, the annual payment

(*a*) 2 Bott's P. L. 273; *In re St. Lawrence*, Cald. 379; 4 Dougl. 190; *Exall* v. *Partridge*, 8 Term Rep. 308.

(*b*) *Brickman* v. *Honeywood*, 1 P. Wms. 328.

being secured out of land, it was considered, ought to answer taxes as the land did (c).

What Premises are chargeable with Land-Tax.

Houses and buildings appropriated to public purposes are not liable to land-tax (d). By statute 1 & 2 Vict. c. 58, a summary remedy is given by application to the Court of Exchequer, in cases where lands are rated for two or more divisions by reason of disputes in which they ought to be rated to the land-tax (e).

(b) *Assessed Taxes.*

What Property is liable to Assessed Taxes.

The only assessed taxes necessary to be adverted to are the house and window duties, the latter of which, now repealed, were formerly charged at an increasing amount on all windows above the number of seven. The 7 Geo. III. c. 7, exempting the owners of certain lands embanked from the river Thames from all taxes and assessments whatsoever, does not exempt the occupiers of houses built on such lands from the payment of the house and window duties imposed by statute 38 Geo. III. c. 40 (f). The 14 & 15 Vict. c. 36, imposes, in lieu of window duty, certain duties on inhabited houses, according to their value; that is, on dwelling-houses occupied by persons in trade, by publicans and beershop-keepers, and on farmhouses worth 20*l.* a year, sixpence in the pound, and on other houses ninepence in the pound (g).

(c) *Property Tax.*

By the statute 5 & 6 Vict. c. 35 (h), s. 60, Rule IV. 9, occupiers paying the duty of sevenpence in the pound on the annual value of lands, &c. in respect of the property thereof, may deduct so much thereof as a rate of sevenpence in the pound on their rent amounts to out of the first payment afterwards to be made on account of

(c) *East* v. *Thornbury*, 3 P. Wms. 128.

(d) *Harrison* v. *Bulcock*, 1 H. Black. 68.

(e) See *In re Glatton Land Tax*, 6 Mees. & Wels. 689.

(f) *Perchard* v. *Heywood*, 8 Term Rep. 468.

(g) The schedule is as follows:—

"The duties by this act made payable upon inhabited houses in and throughout Great Britain according to the annual value thereof; that is to say,

"For every inhabited dwelling-house, which, with the household and other offices, yards and gardens therewith occupied and charged, is or shall be worth the rent of 20*l.* or upwards by the year,—

"When any such dwelling-house shall be occupied by any person in trade who shall expose to sale and sell any goods, wares or merchandize in any shop or warehouse, being part of the same dwelling-house, and in the front and on the ground or basement story thereof.

"And also when any such dwelling-house shall be occupied by any person who shall be duly licensed by the laws in force to sell therein by retail beer, ale, wine or other liquors, although the room or rooms thereof in which any such liquors shall be exposed to sale, sold, drunk or consumed, shall not be such shop or warehouse as aforesaid.

"And also when any such dwelling-house shall be a farmhouse occupied by a tenant or farm servant, and bonâ fide used for the purposes of husbandry only.

"There shall be charged for every 20*s.* of such annual value of any such dwelling-house the sum of 6*d.*

"And when any such dwelling-house shall not be occupied and used for any such purpose and in manner aforesaid, there shall be charged for every 20*s.* of such annual value thereof the sum of 9*d.*"

(h) Continued by 8 & 9 Vict. c. 4; and 11 & 12 Vict. c. 8; and see 16 & 17 Vict. c. 34; and 17 Vict. c. 24.

rent (*i*), and the landlords shall allow the deduction under the penalty of 50*l.* (*j*). The amount may be set off in an action for the rent (*k*). A similar provision is contained in 16 & 17 Vict. c. 34, s. 40 (*l*). By the 17 Vict. c. 24, s. 1, the income-tax is increased to one shilling and twopence in the pound.

(d) *Recovery of Taxes.*

Distress for Land and Assessed Taxes.

Persons refusing or neglecting to pay the land-tax or assessed taxes are liable to be distrained upon.

SECT. 2.—*Contracts as to Taxes, &c.*

(a) *Construction.*

Covenants as to Taxes generally.

The liability to pay taxes is usually provided for in the lease or contract of tenancy; the tenant commonly engages to pay all taxes except the land-tax, that being a charge falling eventually upon the landlord, although often incorrectly described as a landlord's tax; but it is by no means unusual for the tenant to agree to pay all taxes, rates, impositions and assessments whatsoever (*m*): sometimes, again, there is an express stipulation on the part of the landlord to pay the land-tax.

Land-Tax.

Covenants relative to the land-tax are authorized by the land-tax acts, which provide, "that nothing therein contained shall be construed to alter, change, determine or make void any contracts, covenants or agreements whatsoever, between landlord and tenant, or any other persons, touching the payment of taxes and assessments."

Property-Tax.

By section 73 of the recent Property Tax Act, 5 & 6 Vict. c. 35, it was enacted, "that no contract, covenant or agreement between landlord and tenant, or any other person, touching the payment of taxes and assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon under this act, nor to be binding contrary to the intent and meaning of this act; but that all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this act authorized and allowed; and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants or agreements (*n*)."

(*i*) See *Clennell* v. *Read*, 7 Taunt. 50; 2 Marsh. 371; *Gabell* v. *Shevell*, 5 Taunt. 81; *Denby* v. *Moore*, 1 Barn. & Ald. 123; *Cumming* v. *Bedborough*, 15 Mees. & Wels. 438; ante, 335; post, Chap. III., Sect. 2; *Lampleigh* v. *Brathwait*, 1 Smith, Lead. Cas. 75.

(*j*) Sections 103, 185.

(*k*) *Franklin* v. *Carter*, 1 Com. B. Rep. 750; 3 Dowl. & Low. 213; see also *Tinkler* v. *Prentice*, 4 Taunt. 549.

(*l*) See ante, Book II., Chap. I., Sect. 5, p. 335.

(*m*) See a form of the covenant, post, Book IV., Chap. I., Sect. 2.

(*n*) See also sect. 103. When the former property-tax existed, a distinct covenant in a lease whereby the tenant bound himself to pay the property-tax and all other taxes imposed on the premises, or on the landlord in respect thereof, was void and illegal by the statute 46 Geo. III. c. 65, s. 115; but a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c. generally, was not void, for such general words were understood of such taxes as the tenant might lawfully engage to defray;

Construction of Contracts to pay Taxes.

Where a party contracted for an assignment of the lease of a public-house, which in the agreement was described as holden at a certain *net annual rent under usual and common covenants;* and the lease contained a covenant by the tenant to pay land-tax, sewers-rate and all other taxes; it was held, that the covenant to pay land-tax was a common covenant in a lease, reserving a *net* rent (*o*). A covenant to pay taxes generally includes parliamentary taxes, and consequently the land-tax; for when "taxes" are generally spoken of, if the subject-matter will bear it, parliamentary taxes given to the crown are included. If, therefore, a lease be made for years, rendering rent "free and clear from all manner of taxes, charges and impositions whatsoever," the lessee is bound to pay the whole rent without any manner of deduction for any old or new tax, charge or imposition whatsoever: thus on a grant of a fee-farm rent, "without any deduction, defalcation or abatement for or in any respect whatsoever," the grantee was held to be entitled to receive the full rent without deducting the land-tax (*p*): although in an earlier case (*q*), where rent was reserved in a lease payable "without any deduction or abatement whatsoever," it was held, that the tenant was entitled to deduct out of the rent the money paid by him for the land-tax. A bishop not being able to bind his successors unless certain conditions and formalities are observed by him, a covenant by him to pay all charges ordinary and extraordinary does not include land-tax (*r*); and where a tenant verbally agreed "to pay all taxes," it was held, that under this agreement he was bound to pay the land-tax, although it was not specifically mentioned (*s*). A covenant by the lessee to pay all parliamentary taxes, assessments, &c., will extend to the land-tax which has been redeemed or purchased by a former lessee, and is payable to him under the Land Tax Act, 42 Geo. III. c. 116 (*t*). But a sewer's rate is not a "parliamentary tax" (*u*). By certain acts of parliament pro-

Gaskell v. *King*, 11 East, 165; and see *Wigg* v. *Shuttleworth*, 13 East, 87; *Readshaw* v. *Balders*, 4 Taunt. 57; *Fuller* v. *Abbott*, 4 Taunt. 105; *Tinkler* v. *Prentice*, 4 Taunt. 549; *Morgan* v. *Edwards*, 6 Taunt. 395. Thus where the defendant by indenture demised to *J. H.* certain premises, reddendum 40*l.* annually, clear of land-tax, property-tax, &c., and *J. H.* covenanted to pay the said yearly rent in the manner the same was reserved to be paid as aforesaid, and to pay the land-tax, property-tax, &c., it was held, that by sect. 15, coupled with sect. 195 of the same act, so much of the reddendum and covenant as stipulated for payment of the rent clear of deduction on account of property-tax was void, but the residue was good for payment of the rent, subject to such deduction; *Fuller* v. *Abbott*, 4 Taunt. 105.

(*o*) *Bennett* v. *Womeck*, 7 Barn. & Cres. 627; 1 Man. & Ryl. 644; 3 Car. & Pay. 96.

(*p*) *Bradbury* v. *Wright*, 2 Dougl. 624; *Arran (Count)* v. *Crisp*, 12 Mod. 54; *Hopwood* v. *Barefoot*, 11 Mod. 237; Bac. Abr. tit. *Covenant*, (F); *Giles* v. *Hooper*, Carth. 135; *Davenant* v. *Salisbury (Bishop)*, 1 Vent. 223.

(*q*) *Cranston* v. *Clarke*, Say. 78.

(*r*) *Bishop of Oxford* v. *Wise*, cited in *Blandford* v. *Marlborough*, 2 Atk. 544; *Davenant* v. *The Bishop of Salisbury*. 1 Ventr. 223; *S. C.* 2 Lev. 68.

(*s*) *Amfield* v. *White*, Ry. & Mood. 246; and see *Manning* v. *Lunn*, 2 Car. & Kir. 13; *Brewster* v. *Kitchell*, 1 Salk. 198; *Giles* v. *Hooper*, Carth. 135; *Champernon* v. *Champernon*, cited in *Bradbury* v. *Wright*, 2 Dougl. 624; and see *Blandford* v. *Marlborough*, 2 Atk. 542.

(*t*) *The Governors of Christ's Hospital* v. *Harrild*, 2 Man. & Gr. 707; 3 Scott, N. R. 126.

(*u*) *Palmer* v. *Earith*, 14 Mees. & Wels. 428.

vision was made for making rates on certain lands which were before liable ratione tenuræ to repair a bridge, for raising a fund for such repairs; a lessee of part of those lands covenanted to pay his rent free and clear of and from any land-tax and all other taxes and deductions whatsoever, either parliamentary or parochial, imposed upon the premises or upon the lessor; it was held, that the rate for the repair of the bridge was not a parliamentary tax within this covenant (*x*). A covenant by the tenant to pay the land-tax, and all other taxes, rates, assessments and impositions whatever, will not oblige him to pay contribution towards the rebuilding of a party-wall (*y*). But where a tenant covenanted to pay "all taxes, rates, duties, assessments and impositions," "it being the true intent and meaning of these presents, that the lessor should have the said yearly rent of 60*l.* hereby reserved, in net money, without any deduction, defalcation or allowance out of the same, on any account whatsoever," and there was also a special covenant as to repairing party-walls, it was held, he could not compel his lessor to contribute to the expense of rebuilding a party-wall (*z*). It has been held, that a covenant to discharge from taxes extends to subsequent taxes of the same nature as those in being at the time the covenant was made, but not to those of a different nature (*a*). Where a party took a part of certain premises, the whole of which were rated at a certain annual value, and the lessor covenanted to pay all taxes then chargeable thereon, and the lessee covenanted to pay all fresh taxes which might thereafter be charged on the premises, or any part *thereof*; it was held, that the true construction of these covenants was, that the lessor should pay such taxes as were charged on the premises at the time of making the lease, at the then annual value, and that the lessee should pay all fresh taxes, and all such additions to those formerly chargeable as were occasioned by the improved value of the premises (*b*). So where a lessee covenanted that he would pay all taxes, charges, rates, tithes, or rent-charge in lieu of tithe dues and duties whatsoever as then were or should at any time thereafter during that demise be taxed, charged, assessed or imposed *upon the said demised* premises; it was held, that the covenant was not confined to rates payable by the landlord, but meant all rates then imposed on the lessee in respect of his occupation, and all future rates which might be imposed on the land itself (*c*). A tenant of marsh lands, who agreed to pay all outgoings whatsoever, rates, taxes, scots, whether parochial or parliamentary, that then were or should thereafter be chargeable upon the lands, the present land-tax excepted, is liable to

(*x*) *Baker* v. *Greenhill*, 3 Queen's B. Rep. 148; 2 Gale & Dav. 435.

(*y*) *Southall* v. *Leadbetter*, 3 Term Rep. 458; see also *Beardmore* v. *Fox*, 8 Term Rep. 214.

(*z*) *Barrett* v. *Bedford* (*Duke*), 8 Term Rep. 603.

(*a*) *Brewster* v. *Kitchell*, 1 Salk. 198; 1 Lord Raym. 317; 12 Mod. 166.

(*b*) *Watson* v. *Atkins*, 3 Barn. & Ald. 647; and see *Graham* v. *Wade*, 16 East, 29.

(*c*) *Hurst* v. *Hurst*, 5 Exch. Rep. 571.

pay an extraordinary assessment made by the commissioners of sewers for a work of permanent benefit to the land (*d*). A covenant to pay taxes on the land does not extend to the rates for the church and poor, for they are personal charges (*e*). A covenant by the tenant to pay all taxes, rates, duties, levies, assessments and payments will extend to the costs for paving footways, which, by a local act passed before the lease was made, were made payable by the tenants of the adjoining houses, and which they were allowed to deduct from their rents (*f*). If a tenant covenant to pay a rent without deducting taxes, a statute, authorizing the tenant to deduct, will not repeal the covenant.

(b) *Rate of Payment.*

What Proportion Taxes, &c. are to be paid.

Where this is either an agreement to pay land-tax, or it is specifically excepted, the amount to be paid in order to satisfy the contract is not affected by any subsequent improvement in the property, by which the amount of tax is increased: thus a landlord who covenants to pay the land-tax, and save the tenant harmless, will discharge his covenant, if he pay the tax according to the rent he receives, although the premises may be taxed at a higher rate (*g*); so if the tenant be under-rated, he can only deduct pro ratâ (*h*). Where the tenant of a piece of ground, at a fixed annual rent, covenanted not to build without the license of the lessor, and the lessor covenanted to pay all taxes charged or to be charged during the term; and at the time of executing the lease, the lessor gave the lessee a license to build, which he did, and thereby much increased the annual value of the premises; it was held, that the lessor was liable to pay taxes in proportion to the rent received, and not according to the improved value (*i*). Upon the same principle, where *A.* granted a building lease to *B.* at the yearly rent of 7*l.*, who covenanted to pay all taxes except the land-tax, and afterwards improved the estate, and underlet it at 54*l.* per annum; it was held, that *A.* was liable only to pay the land-tax in proportion to the old rent. Under a covenant by a tenant for the payment of 80*l.* yearly rent, all taxes thereon being to him allowed; and also that he would pay all *further* or additional rates on the premises, or on any additional buildings or improvements made by him; and a covenant by the landlord to pay all rates on the premises or on the tenant, in respect of the said yearly rent of 80*l.*, except such further or additional taxes as may be assessed on the demised premises; the tenant is

(*d*) *Waller* v. *Andrews*, 3 Mees. & Wels. 815; 1 Horn. & Hurl. 87.

(*e*) *Theed* v. *Starkey*, 8 Mod. 314; *Jeffrey's case*, 5 Rep. 66 b; *Paget* v. *Crumpton*, Cro. Eliz. 659; *Milward* v. *Caffin*, 2 W. Black. 1330; *R.* v. *St. Luke's Hospital*, 2 Burr. 1063.

(*f*) *Payne* v. *Burridge*, 12 Mees. & Wels. 727.

(*g*) *Whitfield* v. *Brandwood*, 2 Stark. 440; *S. P. Yaw* v. *Leman*, 1 Wils. 21; 2 Stra. 1191; *Barnfather* v. *Lee*, cited by Buller, J., in 3 Term Rep. 379; *Bramston* v. *Robins*, 12 B. Moo. 68.

(*h*) *Sherrington* v. *Andrews*, Comb. 483.

(*i*) *Watson* v. *Home*, 7 Barn. & Cres. 285; 1 Man. & Ryl. 191; *S. P. Hyde* v. *Hill*, 3 Term Rep. 377; and see *Rex* v. *Scott*, 3 Term Rep. 602.

bound to defray all increase of the old as well as the new rates, beyond the proportion at which the premises were rated at the time of the deed, which was 20*l.* in respect of the 80*l.* rent (*k*). Where the owner of a house, in consideration of a premium, demised it at one-third of its annual value, and afterwards redeemed the land-tax, it was held, that he was entitled to receive from the tenant an annual payment equal to two-thirds of the land-tax so redeemed (*l*).

(c) *Remedies for Breach.*

Remedies of the Parties generally.

If the contract stipulate for the payment of taxes and assessments by the tenant, a breach of such agreement on his part can hardly be of material importance to the landlord; because they are charged upon and payable by him as the occupier, and if he do not pay them, he suffers by subjecting himself to the inconvenience of the proceedings taken for their recovery. On the other hand, if the burden of payment lie upon the landlord, and he refuse to perform his agreement, considerable difficulty will be sustained by the tenant. If he has been called upon to pay taxes or assessments on account of the premises, which his landlord is bound to pay, he has several means of enforcing the performance of the contract on the part of his landlord. He may deduct the sum he has paid out of his next rent, if it be less than the amount of rent due; if the contract on which he relies was under seal, he may bring an action upon the covenant; or, if not under seal, an action of assumpsit for the money paid, if it exceed the amount of his rent, or he does not choose to wait for its liquidation in the regular course of making the payments of his rent; or, lastly, if his landlord sue him for the rent, he may claim such payments in reduction of the demand.

Tenant's Remedy by Deduction from Rent.

Whenever the landlord is bound to pay taxes, the tenant may deduct the amount of any sum he has been compelled to pay for them out of the rent due, unless there is an express agreement to the contrary; but such deduction should be made from the rent of the current year; and the tenant cannot claim it from his landlord at any subsequent period (*m*): a plea in bar, therefore, to a cognizance for a distress for rent, which stated, that "divers sums, amounting to a certain sum had been, from time to time, duly assessed and rated on the premises for land-tax, and from time to time paid by the plaintiff, wherefore he deducted the said sum, being the amount of the tax which the defendant, as landlord, was liable to bear in respect of the rent," was held bad, for not stating the specific periods for which the respective sums were assessed or paid; and in not showing that the payment claimed to be deducted was made after the rent distrained for had

(*k*) *Graham* v. *Wade*, 16 East, 29; and see *Watson* v. *Atkins*, 3 Barn. & Ald. 647.

(*l*) *Ward* v. *Const*, 10 Barn. & Cres. 635; 5 Man. & Ryl. 402. And see as to redemption of land-tax by bishops, *Doe* d. *Murray* v. *Bridges*, 1 Barn. & Adol. 847.

(*m*) *Andrew* v. *Hancock*, 1 Brod. & Bing. 37; 3 Moore, 278.

accrued, or was then accruing (*n*). Where the landlord covenants to pay the land-tax, the lessee is not entitled to deduct for more than would be assessed on the amount of his rent, although he may have actually paid more (*o*). Where by lease rent is to be paid without deduction, except for land-tax and sewers rate, the deduction is to be made, not on the value of the premises, but on the *rent;* and it is immaterial whether the value of the premises has been augmented above the rent by erections or improvements prior to or after the lease (*p*). In one case, a succeeding tenant, who came in at Michaelmas (at which time a quarter's rent was due), and received from the former tenant a receipt for a year's property-tax also due at Michaelmas, was held to be entitled to deduct the amount upon the landlord's distraining for half a year's rent at Christmas (*q*). A broker, who, when receiving rent under a distress, deducts a sum purporting to be for land-tax, is not to be considered as *allowing* the land-tax, so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money without the sum deducted (*r*).

Remedy by Action for Damages.

Where a tenant has paid a tax, which his landlord is bound to pay, he may recover the amount paid by action (*s*): but where a tenant has voluntarily paid his full rent without deducting a landlord's tax for a considerable time, he can neither recover it back, nor plead it as a payment in replevin: thus where the tenant of premises under a lease, which contained no reservation as to the payment of land-tax, claimed a deduction for such tax, which was refused by the landlord, who afterwards distrained, and was paid the whole rent, and the tenant afterwards paid his full rent for five successive years, without claiming to deduct such tax; it was held, that such acquiescence was equivalent to a dereliction of his claim in the first instance; and that he could not recover back any of the sums so paid by him for land-tax, in an action of assumpsit for money paid, on the ground of their being involuntary payments (*t*): and where an occupier of lands had, during a course of twelve years, paid to the collector of taxes the landlord's property-tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid; it was held, that the occupier could not recover back from the landlord any part of the property-tax so paid (*u*). In a case since a late property-tax act, it was held that the tenant could not recover as

(*n*) *Stubbs* v. *Parsons*, 3 Barn. & Ald. 516.

(*o*) *Whitfield* v. *Brandwood*, 2 Stark. 440.

(*p*) *Smith* v. *Humble*, 3 Com. Law Rep., C. B., 225.

(*q*) *Clennel* v. *Read*, 7 Taunt. 50; 2 Marsh. 371. With respect to property-tax, the assessment, not the collector's receipt, was held under the former Property Tax Act to be the criterion of how much the tenant may deduct; *Gabell* v. *Shevell*, 5 Taunt. 81.

(*r*) *Saunderson* v. *Hanson*, 3 Car. & Pay. 314.

(*s*) *Graham* v. *Tate*, 1 Maule & Selw. 609.

(*t*) *Spragg* v. *Hammond*, 2 Brod. & Bing. 59; 4 Moore, 431; *Andrew* v. *Hancock*, 1 Brod. & Bing. 37; 3 Moore, 278; and see *Fuller* v. *Abbott*, 4 Taunt. 105; and *Walker* v. *Andrews*, 3 Mees. & Wels. 312; 1 Horn. & Hurl. 87; *Stubbs* v. *Parsons*, 3 Barn. & Ald. 516; and see *Brisbane* v. *Dacres*, 5 Taunt. 143.

(*u*) *Denby* v. *Moore*, 1 Barn. & Ald. 123.

money paid to the use of his landlord an amount of tax which he omitted to deduct from the next payment of rent (*x*). So if a tenant pays taxes, which he alleges ought to have been paid by his landlord, and afterwards pays rent for two years subsequently, without making any deduction, he cannot recover the amount in an action against the landlord (*y*). But where a local act provided that a drainage-tax of one shilling per acre should be paid by the tenants of the land charged with the same, and that the tenants might deduct the same out of the rents payable to their landlords; it was held, that a tenant who on the determination of his tenancy, paid the full rent then due, without deducting the tax falling due on the determination of the tenancy, but not then called for, might recover from the landlord the amount of tax which he (the tenant) was afterwards compelled to pay (*z*). Where the plaintiff demised a house to the defendant, who by the agreement was to pay a rent clear of all deductions for taxes and parochial rates; and after occupying the premises for some time, the defendant quitted them, leaving claims for land-tax and poor's rates, which latter the landlord was obliged by a local act of parliament to pay, and he did pay them; it was held, that he could not recover the amount from the defendant in an action for money paid, but should have declared specially on the agreement, because, as there was no original liability on the defendant to pay, it could not be said to be money paid to his use (*a*).

Remedy by Defence to Action for Rent.

In an action for rent, the tenant may plead as to part, that he has paid a landlord's tax to that amount, in respect of the rent due to the plaintiff claimed by the declaration, after he has in fact paid the tax (*b*): and where he has paid a landlord's tax before action brought, he has a right to deduct it at the trial (*c*): and to enable him to deduct such tax, he need not produce the assessment, but it will be sufficient to prove the payment to the collector by calling him (*d*). A bill in equity will not lie for the relief of a tenant out of the arrears of rent, for taxes which he has actually paid on account of rent reserved to a landlord, who appears not to be liable for such taxes (*e*).

SECT. 3.—*Poor Rates.*

(a) *Generally.*

Origin and Nature of Poor Rates.

The 43 Eliz. c. 2, which may be considered the foundation of the present poor laws, empowers the churchwardens of every parish to

(*x*) *Cumming* v. *Bedborough*, 15 Mees. & Wels. 438.

(*y*) *Saunderson* v. *Hanson*, 3 Car. & Pay. 314; and see *Rich* v. *Jackson*, 4 Bro. Chan. Cas. 515; 6 Ves. jun. 334, n.

(*z*) *Dawson* v. *Linton*, 5 Barn. & Ald. 521; *S. C.* 1 D. & R. 117.

(*a*) *Spencer* v. *Parry*, 3 Ad. & El. 331; 4 Nev. & Man. 770; 1 Har. & Wol. 179.

(*b*) *Tinckler* v. *Prentice*, 4 Taunt. 549.

(*c*) *Baker* v. *Davis*, 3 Camp. 474; *S. P. Pocock* v. *Eustace*, 2 Camp. 181.

(*d*) *Phillips* v. *Beer*, 4 Camp. 266; but see *Gabell* v. *Shevell*, 5 Taunt. 81.

(*e*) *Wild* v. *Coopers' Company*, 1 P. Wms. 128, n.

raise rates for the support of the poor "by taxation of every inhabitant, parson, vicar and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines or saleable underwoods in the said parish."

Appeal.

By the 17 Geo. II. c. 38, s. 4, the appeal against a poor rate must in all cases be made to the next practicable sessions after the allowance of the rate. A further power of appeal is given by the statute 6 & 7 Will. IV. c. 96, ss. 6, 7, which directs justices to hold special petty sessions for hearing appeals against rates, as to the incorrectness of the valuation of any hereditaments, and their determination is to be binding, unless notice is given within fourteen days of an intention to appeal against it to the quarter sessions.

Most important alterations have been made in the whole system of the poor laws by the 4 & 5 Will. IV. c. 76 (*f*). The recent statutes place the entire superintendence of the management of the poor into the hands of a board of commissioners. They provide for the formation of unions, and appointment of guardians of the poor; and prohibit, in general, the distribution of pecuniary relief, by enacting that relief is to be afforded in the workhouse.

(b) *Persons to be rated.*

The Occupier is rateable generally.

The poor rate is not a tax on the land, but a personal charge in respect of the land: in general, therefore, the farmer or occupier, and not the landlord, is liable to this tax: for the rate is a charge upon the occupier in respect of his possession, and not on the lessor in regard to the rent received (*g*). Any one of several joint occupiers is liable for the whole amount of their joint assessment to a poor rate; and a warrant of distress against any one alone is good (*h*). It has been held, that a landlord cannot be rated to the poor even in respect of houses let to tenants, who have been excused their rates on account of their poverty (*i*). As the *occupier* of land is rateable, it is immaterial by what tenure he holds, or whether he has any title or not: thus if a disseisor obtain possession of land, he is rateable as the occupier of it (*k*): but it has been considered, that an administrator is not liable to pay poor's rate for the intestate, at least that he is not distrainable without a summons (*l*). A corporation may be inhabitants and occupiers of land, and as such liable to be rated in their corporate capacity (*m*). A warehouse may be rated to the proprietor or occupier

(*f*) Continued and amended by 2 & 3 Vict. c. 83; 5 Vict. c. 10; 5 & 6 Vict. c. 57; 7 & 8 Vict. c. 101; 10 & 11 Vict. c. 109.

(*g*) *Rowls* v. *Gells*, Cowp. 452; 1 Dougl. 304.

(*h*) *Paynter* v. *The Queen*, 10 Queen's B. Rep. 908.

(*i*) *Rex* v. *Hull Dock Company*, 3 Barn. & Cres. 516; 5 Dowl. & Ryl. 359.

(*k*) *Bute* (*Lord*) v. *Grindall*, 2 H. Black. 260; 1 Term Rep. 343; *S. P. Rex* v. *Bell*, 7 Term Rep. 398; *Rex* v. *Skingle*, 7 Term Rep. 549; 1 Bott's P. L. 127.

(*l*) *Stevens* v. *Evans*, 1 W. Black. 234; 2 Burr. 1152.

(*m*) *Rex* v. *Gardiner*, Cowp. 79; *S. P. Rex* v. *Sudbury* (*Mayor*), 1 Barn. & Cres. 389; 2 Dowl. & Ryl. 651.

according to the use to which it is applied; if it be let, for instance, to the excise or custom-house for public purposes, the burden must be borne by the proprietor; but if it be afterwards converted to a private use, the occupier of it will be liable to the rates. Payment of a poor rate assessed on the occupier of a house, is not evidence of an occupation by the party so paying; this was ruled by Lord Kenyon, C. J., on an indictment against a person for keeping a disorderly house, his Lordship observing, that to construe such payment into an occupation would be straining the law (*n*). The proprietor of a toll traverse who demises it from year to year by parol is properly rateable, as the lessee is a mere bailiff for the collection of it (*o*). A lessee for a term of years of a private box in a theatre is rateable under a local act, by which all persons are rateable who "inhabit, hold, occupy, possess or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement or hereditament, or other persons who by law are chargeable" (*p*). Where premises are unoccupied, the rates upon them commence from the time of entry only.

Where there is an Occupancy by a Servant only.

The words "inhabitant or other," in the 43 Eliz mean *resident* inhabitant or other inhabitants. The residence in a lighthouse by the servant of the owner, at an annual salary, to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the lighthouse (*q*). A servant who engaged and occupied a house and garden, the rent and taxes of which were paid by his master, was held liable to be rated as occupier, and not the master (*r*). The trustees of premises not demised to any one, but who meet occasionally on the premises for the purposes of the trust, the actual occupants being the servants and others, who are employed in the objects of the trust, are the persons rateable (*s*). It has been doubted whether the owner of a farm, composed partly of grass land, who, upon the determination of a lease, takes possession of the farm by a servant who occupies it for the purposes of protection, but without dealing with the land, is liable to be rated as a party beneficially occupying it (*t*).

Where there is Partial Occupancy only.

If the owner of a house occupy part of it, he is liable to be rated for the whole, unless there be a distinct occupation of the rest by some other person (*u*): and where a man went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off

(*n*) *Rex* v. *Bristow*, Sitt. at Westm. after E. T. 1800, MS.

(*o*) *Reg.* v. *Salisbury* (*Marquis*), 8 Ad. & El. 716; 1 Will. Wol. & Hod. 444; 3 Nev. & Per. 476.

(*p*) *Reg.* v. *St. Martin's* (*Inhabitants*), 3 Queen's B. Rep. 204; 2 Gale & Dav. 426.

(*q*) *Rex* v. *Tynemouth*, 12 East, 46. If a man do not live within a parish, he is to be assessed according to his land; but if he live within the parish, he is to be rated as dwelling there.

(*r*) *Reg.* v. *Lynn*, 8 Ad. & El. 379; 3 Nev. & Per. 411; 1 Will. Wol. & Hod. 366.

(*s*) *Reg.* v. *Sterry*, 12 Ad. & El. 84; 4 Per. & Dav. 122.

(*t*) *Rex* v. *Bucks* (*Justices*), 3 Nev. & Man. 68.

(*u*) *Rex* v. *St. Mary the Less* (*Durham*), 4 Term Rep. 477.

by laths from the rest; and he left the key of the house door with a friend, and had the garden cultivated for his own benefit as usual; it was held, that he was liable to be rated to the relief of the poor as occupier of the whole house (*x*).

Where Premises are let at less than Quarterly Rents.

By statute 59 Geo. III. c. 12, s. 19, after reciting, that in many parishes, and more especially in large and populous towns, the payment of poor rates is evaded by the houses being let in lodgings, or in separate apartments, or for short terms, it is enacted, that the inhabitants of any parish, in vestry assembled, may direct landlords who have let their houses to occupiers at rents not exceeding 20*l.* nor less than 6*l.* per year, for terms less than a year, or at rents payable at less than quarterly periods, to be rated instead of the occupiers; but sect. 20 provides, that the goods of the occupiers may be distrained for such rates, to the amount of the rent actually due, and that they may deduct such rates out of their rent.

The principle of this act is still further extended by the 13 & 14 Vict. c. 99, for assessing and collecting the poor rates and highway rates in respect of small tenements. Sect. 1 empowers the vestry to order the owners of small tenements whereof the yearly rateable value shall not exceed 6*l.*, to be rated to the poor (*y*) instead of the occupiers. Sect. 4 enacts that such owners shall be assessed on a reduced scale. Sects. 5, 6, 7 & 8 provide for the recovery of the rates, confer on owners the right of appeal and of voting in vestry, secure municipal privileges to the occupiers, and empower owners paying rates to add the amount thereof, under certain circumstances, to the rent, and also empower certain occupiers to deduct the amount of rates paid from the rent (*z*).

(c) *Lands, Houses, &c. and Profits annexed.*

General Rules respecting Rates on Lands, &c.

The statute of Elizabeth mentions lands and houses only; but in order to be rateable they must be such as furnish a profit. It may therefore be stated, as a general proposition, that the immediate profits of land or houses are properly the subject of assessment; or to speak more correctly, that the person who is in possession of the immediate profits of land or houses may be taxed to the relief of the poor in respect of those profits (*a*). All persons, however poor they be, are rateable in respect of the annual value of the houses or premises they occupy; for otherwise poor persons would be exempted, and cottage property would become more valuable to the landlord. It is advisable in such cases for the landlord to compound

(*x*) *Rex* v. *Aberystwith*, 10 East, 354.

(*y*) (*Sic.*) Highway rates are omitted from this part of the section evidently by mistake; see the recital and sect. 3.

(*z*) The costs of distraining are recoverable by 12 Vict. c. 14.

(*a*) Although the amount of the poor rate is in fact paid by the occupier, it is in reality a charge upon the landlord; for its effect is of course to reduce the amount of rent received by the latter.

with the overseers for the whole of such property, and to pay the rates himself.

Palaces, Government and Public Buildings.

The possessions of the Crown or of the public are not rateable to the relief of the poor; therefore the royal palaces are not rateable: but where the site of a palace is demised to a subject for a certain permanent interest, the grantee who occupies it is rateable to the poor (*b*); so also persons occupying apartments in Hampton Court Palace have been held rateable (*c*): and servants who occupy separately a house and land, part of the royal domains, whether they pay for them by rent or services, are rateable (*d*).

Hospitals and Places of Charity, &c.

Neither the governors, servants, nor the poor in hospitals, are rateable to the poor (*e*); but the officers of Chelsea Hospital, who had separate and distinct apartments, which were considered their dwelling houses, and in which they and their families resided, were held rateable (*f*): and a master of a free-school, appointed by the minister and inhabitants of the parish under a charitable trust, whereby a house, garden, &c. were assigned "for the habitation and use of the master and his family, freely without payment of any rent, income, gift, sum of money, or other allowance whatsoever," for the teaching of ten poor boys of the inhabitants, was held to be rateable for his occupation of the same (*g*): although a person employed by the Philanthropic Society to superintend the children at annual wages, under an agreement that she should have a "dwelling free from taxes," &c. with certain other perquisites, and who might be dismissed at a minute's warning on receiving three months' wages, was held not rateable as the occupier of the house provided by the society; she having no distinct apartments in the house but a bedchamber, and her family not being allowed to live there (*h*). Governors of the poor hiring a house without their district, for the purpose of setting their own paupers to work there, and using it for that purpose only, have been held to be rateable, whether the employment of the paupers be profitable or not (*i*). The objects of a charity in the actual occupation

(*b*) *Portland* (*Duke*) v. *St. Margaret's, Westminster*, Cald. 3, n.; 1 Bott's P. L. 131. With respect to the poor rates, those are public buildings which are applied to public purposes.

(*c*) *Reg.* v. *Ponsonby*, 3 Queen's B. Rep. 14; 1 Gale & Dav. 713.

(*d*) *Rex* v. *Matthews*, Cald. 1. As to the non-rateability of the Royal Academy, see *R.* v. *Shee*, 4 Queen's B. Rep. 2; 2 Gale & Dav. 8; of stables rented by a colonel of a regiment, *Amherst* (*Lord*) v. *Somers* (*Lord*), 2 Term Rep. 372; *R.* v. *Hurdis*, 3 Term Rep. 497; of the apartments of a commanding officer in barracks, *R.* v. *Terrott*, 3 East, 506; see also *Holford* v. *Copeland*, 3 B. & Pul. 139; of the ranger of a royal park, *Bute* (*Lord*) v. *Grindall*, 2 H. Black. 265; 1 Term Rep. 338; of judges' lodgings, &c., *R.* v. *Worcestershire* (*Justices*), 11 Ad. & El. 57; 3 Per. & Dav. 8; and of the house, &c. of the governor of a gaol, *R.* v. *Shepherd*, 1 Queen's B. Rep. 170; 4 Per. & Dav. 434.

(*e*) *Rex* v. *St. Bartholomew's*, 4 Burr. 2435; 1 Bott's P. L. 139; *S. P. Rex* v. *St. Luke's Hospital*, 2 Burr. 1053; 1 W. Black. 249. Bethlem and Bridewell Hospitals were held not to be rateable; *Reg.* v. *St. George the Martyr*, 10 Queen's B. Rep. 852, 859; 16 Law J., N. S., M. C., 129.

(*f*) *Ayre* v. *Smallpiece*, Cald. 3; 1 Bott's P. L. 131.

(*g*) *Rex* v. *Catt*, 6 Term Rep. 332.

(*h*) *Rex* v. *Field*, 5 Term Rep. 587.

(*i*) *The Governor, &c. of the Poor of Bristol* v. *Wait*, 5 Ad. & El. 1; 2 Har. & Wol. 70; 6 Nev. & Man. 383.

of almshouses, paying no rent for the same, are rateable to the relief of the poor in respect of such occupation (*k*).

Tolls, &c. generally.

Tolls are not rateable of themselves, but only in connection with some local real property (*l*). A lessee of tolls is not rateable in respect of the tolls, although he occupy a toll-house under the same demise (*m*). And the trustees of docks are not rateable in respect of the dock dues, nor of the premises purchased or hired for the use of the docks, if they have no beneficial occupation, but are merely servants of the public, being directed by act of parliament to apply the whole of the rates, first to paying off the debt incurred in making the docks, and then to lower the rates, reserving sufficient to keep the docks in repair (*n*). Commissioners for paving and lighting a town, who were empowered to levy rates to make gas for the town, and to let out private lamps, and who applied all the profits therefrom for the purposes directed by the acts of parliament under which they acted, have no beneficial occupation of the gas works, and cannot be rated for them (*o*). The lessee of the tolls of a public bridge is not rateable as such, whatever rent he may pay; if it do not appear that he is the occupier of any local visible property within the parish, nor that he was an inhabitant resiant there, deriving profit there from such tolls beyond the rent paid by him for the same, which was applicable to the public purposes of the bridge (*p*).

Ferries.

The owner of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, is not rateable for such tolls in the parish where they were so collected, and where one of the termini of the ferry was situated, and on which shore the ferry-boats were secured by means of a post in the ground; the soil itself of the landing places being the king's common highway; and the owner of the ferry having no property in, or exclusive possession of it (*q*). The lessee and occupier of an ancient and exclusive ferry, not being an inhabitant resiant within the township in which one of the termini of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry (*r*).

Quit-rents, Heriots, Ground-rents.

Neither quit-rents, nor heriots, nor other casual profits of a manor, are rateable to the poor (*s*); but ground-rents are rateable (*t*).

Fisheries.

The lessee of all those fishings of the halves and havendoles, with the appurtenances to the halves due and accustomed within the river Severn, between certain limits within a manor bordering on the said

(*k*) *Rex* v. *Green*, 9 Barn. & Cres. 203; 4 Man. & Ryl. 164; *Rex* v. *Munday*, 1 East, 584; but see *Rex* v. *Waldo*, Cald. 358.

(*l*) *Rex* v. *Leicester*, 6 Maule & Selw. 400; and see *Rex* v. *Aire and Calder Navigation*, 3 Barn. & Adol. 533.

(*m*) *Rex* v. *Snowden*, 1 Nev. & Man. 459.

(*n*) *Rex* v. *Liverpool*, 7 Barn. & Cres. 61; 9 Dowl. & Ryl. 780.

(*o*) *Rex* v. *Beverley* (*Commissioners*), 6 Ad. & El. 645; 1 Nev. & Per. 646; Will. Wol. & Dav. 221.

(*p*) *Rex* v. *Eyre*, 12 East, 416.

(*q*) *Williams* v. *Jones*, 12 East, 346.

(*r*) *Rex* v. *Nicholson*, 12 East, 330.

(*s*) *Rex* v. *Vanderwall*, 2 Burr. 991; 1 W. Black. 212.

(*t*) Bott's P. L. 115.

river, and of all royal fishes taken between the said limits, putt and wheel fishing excepted, under an annual rent, is liable to be rated to the poor for such fishery (*u*).

Right of Common.

A mere easement, as a mere right of common, is not rateable; therefore where certain persons, as burgesses of a town and occupiers of ancient messuages within it, had a right to turn cattle upon lands at certain periods of the year, to the exclusion of the owners of the soil; it was held, that they had a mere right of common in respect of which they were not rateable to the poor (*x*): and in a case where there were very large and unusual rights, yet as they appeared to be in the nature of a right of common, it was held that they were not rateable (*y*). But it seems that land in respect whereof the owners have a right of common may be rated higher on account of that right (*z*).

Other Easements.

Where *A.* granted to *B.* a lease for years of way-leaves (for the purpose of carrying coals), and the liberty of erecting bridges and levelling hills over certain lands; and *B.* made the waggon-ways and inclosed them, thereby excluding all other persons, erected bridges and built two houses on the land for his servants; it was held, that *B.* was liable to be rated to the poor for "the ground called the waggon-way" (*a*).

Other Profits of Land, &c.

A dairyman who rents a stock of cows from a farmer, to be depastured on the land of the latter, is not liable to be rated for them, although he makes a profit of their produce, independent of the profit made by the farmer; for the rate upon him for the whole farm includes all the profit of the land and the stock appertaining to it (*b*).

(d) *Tithes.*

Tithe Commutation Act.

By the Tithe Commutation Act, 6 & 7 Will. IV. c. 71, ss. 69, 70 (*c*), amended by 7 Will. IV. & 1 Vict. c. 69, s. 8, and 2 & 3 Vict. c. 62, s. 3, the rent-charge payable instead of tithes is liable to the same rates that the tithes commuted were subject to; and if the occupier of the land out of which the rent-charge issues pays them, they may be recovered over.

When Tithes are rateable as such.

A parson is liable to be rated for the profits of his glebe lands and tithes, although he has let them out at a certain rent (*d*); in such case the rate must be made upon the parson and not the lessee. If the tenant bargain for a retainer of the tithes of his own lands, he is not the occupier, but merely the purchaser of them (*e*): but it has been

(*u*) *Rex* v. *Ellis*, 1 Maule & Selw. 652.
(*x*) *Rex* v. *Churchill*, 4 Barn. & Cres. 750; 6 Dowl. & Ryl. 635.
(*y*) *Reg.* v. *Alnwick* (*Chamberlains, &c.*), 9 Ad. & El. 444; 1 Per. & Dav. 343; 2 Will. Wol. & Hod. 72.
(*z*) *Kempe* v. *Spence*, 2 W. Black. 1244; *Rex* v. *Fox*, 1 Salk. 169.
(*a*) *Rex* v. *Bell*, 7 Term Rep. 398.
(*b*) *Rex* v. *Brown*, 8 East, 528.
(*c*) See post, Chap. VII., Sect. 5.
(*d*) *Rex* v. *Turner*, 1 Bott's P. L. 126; *S. P. Rex* v. *Skingle*, 7 Term Rep. 549; 1 Bott's P. L. 127. Tithes were held not rateable under a private act giving power to assess "any land, house, shop, warehouse, vault, mill or other tenement;" *Reg.* v. *Nevill*, 8 Queen's B. Rep. 452.
(*e*) *Rex* v. *Lambeth*, 1 Stra. 525; *Rex* v. *Bartlett*, 17 Vin. Abr. 427.

held, that where a rector made a verbal lease of his tithes for a year, and the lessee let the tithes to the respective landholders for sixpence per acre more than he was to pay the rector, the lessee was the occupier of the tithes, he having them in such a manner as to make a profit of them (*f*). It would seem that an occupier of land, to whom, on behalf of himself and the other tithe-payers of the parish, a lease of the tithes of the whole parish is granted by the vicar at an annual rent, the amount of which is apportioned, is liable to be rated in respect of the tithes, though he personally has no beneficial occupation (*g*). The parson is also rateable for his tithes if he have them in his own occupation; or for oblations or other offerings which constitute rectorial or vicarial dues.

When Money Payments in lieu of Tithes are rateable.

A sum of money made payable by the owners of lands in lieu of tithes by act of parliament, with a clause of distress annexed, is liable to the poor rate, for it is a mere composition for tithes which were before subject to the poor rate; and a superadding a power of distress does not turn it into a rent, but rather proves the contrary; for if it were a rent, the distress would be incident to it without any special provision in the act (*h*). So a money payment in lieu of tithes settled under a compromise between a parson and a parish, and confirmed by act of parliament, is rateable (*i*). But a money payment in lieu of tithes, settled by act of parliament to be paid free from all deductions, &c., other than land-tax, is not rateable (*k*). An act of parliament enacted, that the tithes of a parish should be held in fee by *A.*, who was owner of part of the lands in the parish, and that all *A.*'s lands in the parish should be charged with an annuity payable to the vicar for the time being, who had previously enjoyed the small tithes, and who by an agreement recited in the act was to receive such annuity in lieu of all his vicarial dues; it was held, that the vicar was not rateable to the poor in respect of such annuity, for that the tithes were not extinguished (*l*). A modus for tithes is rateable. Tithes for which compositions have been entered into by the respective occupiers may be rated in the hands of the rector in one entire sum (*m*).

When Corn Rents in lieu of Tithes are rateable.

Where the tithes of a parish are extinguished by act of parliament, and in lieu thereof certain annual corn rents are substituted, the money, when paid, is rateable to the poor in the hands of the rector, unless the liability is taken away by express words in the statute (*n*). Where, by a private inclosure act, the tithes of a parish were abolished, and in

(*f*) *Rex* v. *Fairclough*, 8 Mod. 62.

(*g*) *Rex* v. *Wilson*, 5 Nev. & Man. 119; 1 Har. & Wol. 407. As to the assessment of tithes and tithe rent-charges in the same manner as land, see the 14 & 15 Vict. c. 50, post, Book II., Chap. VII., Sect. 5.

(*h*) *Lowndes* v. *Horne*, 2 W. Black. 1252.

(*i*) *Raus* v. *Pickin*, Cald. 196; 1 Dougl. 406, n.

(*k*) *Reg.* v. *Shaw*, 12 Queen's B. Rep. 419.

(*l*) *Rex* v. *Churchwardens of Great Hambleton*, 1 Ad. & El. 145.

(*m*) *Rex* v. *Sussex* (*Justices*), 3 Nev. & Man. 263.

(*n*) *Rex* v. *Boldero*, 4 Barn. & Cres. 467; 6 Dowl. & Ryl. 557; *Rex* v. *Wistow*, 5 Ad. & El. 250; 2 Har. & Wol. 95; 6 Nev. & Man. 567; *Rex* v. *Joddrell*, 1 Barn. & Adol. 403; *Rex* v. *Nockolds*, 1 Ad. & El. 245; 3 Nev. & Man. 334.

lieu thereof a yearly money payment by way of compensation (to be calculated with reference to the annual value of the tithes, and the price of corn for a certain number of bygone years) was directed to be paid to him (*o*); and where by an inclosure act it was provided that a certain corn rent, "free from all taxes and deductions whatsoever, except land-tax," should be issuing out of the lands to be inclosed and other lands in the parish, and be paid to the rector in lieu of all great and small tithes, &c.; it was held, that this corn rent was not liable to be assessed to the relief of the poor (*p*).

(e) *Mines, Quarries, and Mineral Works.*

Generally.

The express mention in the statute 44 Eliz. c. 2, s. 1, of coal-mines, is a virtual exclusion of all other mines, and consequently other mines are not rateable to the poor (*q*).

Mines of Lead, Tin, &c.

Lead-mines are not rateable to the poor (*r*), but the lessee (under the crown) of lead-mines is rateable to the poor for the profits arising from *lot* and *cope;* which are duties paid to him by the adventurers, without any risk on his part: and a person entitled to toll tin and farm dues (which are certain portions of the tin raised by the adventurers in the tin-mines) is liable to be rated in respect thereof (*s*). Where a rate was imposed upon the owner of the lead-ore in certain lead-mines, in respect of the lead-duty reserved in a lease of the mines, being one-fifth share of the lead to be smelted from the ore raised from the mines; it was held, that this reservation was in the nature of rent, and therefore not rateable (*t*): and the trustees under the will of a person seised in fee of two-third parts of a manor, subject to certain leases to a company of adventurers of the mines of lead, tin, and copper ore, and other minerals, under the moors, commons, or wastes of the manor, at a rent certain, have been held not to be rateable to the relief of the poor for such rent (*u*). Landlords not resident within the parish, having leased lead-mines and other minerals, with liberty to the tenants to dig, &c., reserving a certain annual rent, and also certain proportions of the ore which should be raised, are not at any rate assessable to the relief of the poor for such certain rent, no ore being raised; whatever the question might be as to the proportion of ore reserved when in fact any should be raised (*x*): but a landlord and owner of the soil, not resident within a parish, having granted a license by indenture for twenty-one years to certain adventurers, to dig for tin and other ore under a close, reserving to himself one-eighth share of the ore in an improved and merchantable state, and granting to the adventurers the

(*o*) *Chatfield* v. *Ruston*, 8 Barn. & Cres. 863; 5 Dowl. & Ryl. 675.

(*p*) *Mitchell* v. *Fordham*, 6 Barn. & Cres. 274; 9 Dowl. & Ryl. 335.

(*q*) *Rex* v. *Sedgley*, 2 Barn. & Adol. 65.

(*r*) *Lead Company* v. *Richardson*, 3 Burr. 1341; 1 W. Black. 389; *S. P. Rowls* v. *Gells*, Cowp. 453; 1 Dougl. 304.

(*s*) *Rex* v. *St. Agnes*, 3 Term Rep. 480.

(*t*) *Rex* v. *Pomfret* (*Earl*), 5 Maule & Selw. 139.

(*u*) *Rex* v. *Welbank*, 4 Maule & Selw. 222.

(*x*) *Rex* v. *Rochester* (*Bishop*), 12 East, 353.

exclusive occupation of the mine for the purpose of procuring the ores, is rateable for the relief of the poor of the parish in which the mine is situate, in respect of such reserved proportion or eighth share; and in respect thereof is to be considered as an occupier of the land by the hands of the adventurers; the reservation operating as an exception out of the demise, and not being in the nature of a rent (*y*). A person who was entitled under the Duke of Cornwall, as lord of a manor, by custom, to one-tenth of the tin gained by the owner of tin bounds, and who demised to the owner himself, for a term, liberty to enter on the mines and dig and carry away the tin, yielding 1*s.* in the pound on the gross value of all tin gotten, was held not to be an occupier, and therefore not rateable to the poor, the demise not being found to be fraudulent (*z*). But the Duke of Cornwall's lessee, who receives the tenth of the tin gained, is rateable as an occupier, though not an inhabitant (*a*). The owner of a mine who leased it for years, the lessee to yield one-fifth of the ore raised, well cleaned and made fit for the smelting mill, is liable for the poor rate as an occupier in respect of his fifth (*b*).

Coal-Mines.

The lessee of a coal-mine is liable to be rated, though he derive no profit from the mine (*c*): but where a coal-mine, becoming unproductive, ceases to be worked, the lessee is no longer liable to be rated for it to the relief of the poor, although he be still bound by his covenant to pay the rent reserved to his landlord; but it is otherwise where the mine is itself productive, although it be worked to a loss by the lessee after deducting the proportion of the gross value of the produce reserved to the owner (*d*). The owner and occupier of coal-mines is rateable to the poor at the sum for which the mine would let subject to outgoings; and the lessee of coal-mines is rateable for the amount of royalty or rent which he pays; and in neither case is any allowance to be made for money expended on rendering the mines productive (*e*). Where a lessee of a coal-mine, being the occupier, erected a steam-engine for working the mine, and thereby improved its annual value, he was held liable to be rated for such improved annual value (*f*).

Iron-Mines.

Iron-mines are not rateable to the relief of the poor, although occupied jointly with coal-mines, the coal whereof was raised by the owner of the lands for his own use in smelting the iron (*g*). Where the owner and occupier of an iron-stone-mine erected an engine for the purpose of drawing the water from the mine and used it for no other purpose; it

(*y*) *Rex* v. *St. Austell*, 5 Barn. & Ald. 693; 1 Dowl. & Ryl. 351.

(*z*) *Reg.* v. *Crease*, 11 Ad. & El. 677; 3 Per. & Dav. 434.

(*a*) *Crease* v. *Sawle*, 2 Queen's B. Rep. 862; 2 Gale & Dav. 812; see also *Reg.* v. *Paynter*, 7 Queen's B. Rep. 255; and *Paynter* v. *The Queen*, 10 Queen's B. Rep. 909; 16 Law J., N. S., M. C., 136; 11 Jurist, 973.

(*b*) *Reg.* v. *Todd*, 12 Ad. & El. 816; 4 Per. & Dav. 335; Arn. & Hod. 100.

(*c*) *Rex* v. *Parrott*, 5 Term Rep. 593.

(*d*) *Rex* v. *Bedworth*, 8 East, 387.

(*e*) *Rex* v. *Attwood*, 6 Barn. & Cres. 277; 9 Dowl. & Ryl. 328.

(*f*) *Rex* v. *Granville* (*Lord*), 9 Barn. & Cres. 188; 4 Man. & Ryl. 171.

(*g*) *Rex* v. *Cunningham*, 5 East, 478.

was held, that he was not rateable to the poor in respect of the engine, as it was parcel of the mine itself (*h*).

Other Mines and Works.

The lessees, under the lord of the manor, of lot and free share of all calamine raised within the manor, are liable to be rated to the poor as occupiers of land in the parish where the manor lies, none of them being resident in the parish (*i*): so the occupier of a clay-pit is rateable (*k*), or a slate-work (or, as improperly called, a slate-mine) (*l*): and lime-works are rateable in the hands of the occupier, though there be risk and expense in the working, and the profits are uncertain (*m*). The owner of the soil who has granted to adventurers liberty to dig, mine, work, and search for manganese, for twenty-one years, and the same to take and convert to their own use, and to make adits, &c., rendering to him 1*l.* 15*s.* for every ton weight of manganese raised during the term, is not an occupier of any portion of the soil, and not rateable (*n*).

(f) *Proportion and Value.*

Proportion as regards Time.

By statute 17 Geo. II. c. 38, s. 12, it is enacted, "that where any person or persons shall come into or occupy any house, land, tenement, or hereditament or other premises, out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming into or occupying the same, shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively, in the same manner, and under the like penalty of distress, as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate; which said proportion, in case of dispute, shall be ascertained by two justices of the peace."

Principle of Rating.

By the statute 6 & 7 Will. IV. c. 96, s. 1, it is enacted, that "no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any; and deducting therefrom the probable average annual costs of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent; provided always, that nothing therein contained shall be construed to alter or affect the principles or different

(*h*) *Rex* v. *Bilston*, 5 Barn. & Cres. 851; 8 Dowl. & Ryl. 734.

(*i*) *Rex* v. *Baptist Mill Company*, 1 Maule & Selw. 612.

(*k*) *Rex* v. *Brown*, 8 East, 528.

(*l*) *Rex* v. *Woodland*, 2 East, 164.

(*m*) *Rex* v. *Alderbury* (*Churchwardens*), 1 East, 534; *Rex* v. *Sedgley*, 2 Barn. & Adol. 65.

(*n*) *Rex* v. *Tremayne*, 4 Barn. & Adol. 162.

relative liabilities, if any, according to which different kinds of hereditaments are now by law rateable."

SECT. 4.—*Sewers Rates.*

Jurisdiction of Sewers Commissioners to make Rates.

Every person whose property derives benefit from the works of the commissioners of sewers (*o*) is liable to be rated, although the benefit be not immediate (*p*), and the commissioners may assess the lessor or lessee at their discretion (*q*).

SECT. 5.—*County Rates.*

The occupier and not the landlord is liable to the payment of county rates, and they are regulated by the principles applicable to the assessment to the poor rates (*r*).

SECT. 6.—*Highway Rates.*

Enactments respecting Highway Rates.

The occupier of premises is liable to the payment of highway rates. The recent act 5 & 6 Will. IV. c. 50, for consolidating and amending the laws relating to highways, places the duty of repairing the highways in the hands of a surveyor, and by sect. 27 he is empowered to levy a rate "upon all property now liable to be rated and assessed to the relief of the poor, provided that the same rate shall also extend to such woods, mines and quarries of stone or other hereditaments as have heretofore been usually rated to the highways." Sect. 33 provides, "that when property, or the owner and occupier in respect thereof, has, previous to the passing of this act, been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property, and the owners and occupiers thereof, shall be exempt from the payment of the rate hereby imposed." Sect. 30 provides, that in parishes where the overseers of the poor have power by local acts to rate landlords as occupiers for the poor rates, the surveyors shall have the same powers to assess landlords to the highway rates. As to the liability of owners to be rated instead of occupiers, see 13 & 14 Vict. c. 99, ante, p. 422 (*s*).

(*o*) The regulations as to sewers are now consolidated by a recent act, the 3 & 4 Will. IV. c. 22. By section 18, the rates are to be apportioned between outgoing and incoming tenants. This act is amended by 4 & 5 Vict. c. 45. The Sewers Laws are further amended by 12 & 13 Vict. c. 50. The Metropolitan Commissioners of Sewers are governed by the 11 & 12 Vict. c. 112, amended by 12 & 13 Vict. c. 93. See also the General Towns Improvement Clauses Act, 10 & 11 Vict. c. 34; and the Act for promoting Public Health, 11 & 12 Vict. c. 63.

(*p*) *Soady* v. *Wilson*, 3 Ad. & El. 248; 4 Nev. & Man. 777; 1 Har. & Wol. 256.

(*q*) *Newton* v. *Young*, 1 New Rep. 187; and see *Rooke's case*, 9 Co. Rep. 99.

(*r*) The 12 & 13 Vict. c. 65, provides for the collection of county rates under certain circumstances.

(*s*) The costs of the distress are recoverable under 12 Vict. c. 14.

SECT. 7.—*Paving, Watching, Lighting and Water Rates.*

How Rates for Paving, Watching and Lighting are made.

The rates made for the purpose of paving, lighting, and cleansing the streets, are generally under the management of commissioners appointed for that purpose, who are appointed by local acts passed for the regulation of the particular places to which they relate (*t*). They are generally directed to be paid by the occupiers, although sometimes the burden is thrown upon the landlord: thus by the statute 57 Geo. III. c. xxix., passed for the regulation of the pavement of London, Westminster, Southwark, and the parishes of St. Mary-le-Bone and St. Pancras, the paving rates are directed to be paid by the landlord in certain cases; when this is the case, there is not in general anything that will operate to control the private agreement of the parties upon the subject (*u*).

By the General Waterworks Clauses Act, 10 & 11 Vict. c. 17, s. 72, the owners of dwelling-houses, the annual value of which does not exceed 10*l.*, are made liable to the payment of water rates instead of the occupiers; "and the person receiving the rents of any such house or tenement as aforesaid from the occupier thereof on his own account, or as agent or receiver for any person interested therein, shall be deemed the owner of such house or tenement." Sect. 73 gives power to owners of tenements, where the occupation is under a lease or agreement made prior to the passing of the special act, to recover such payments from the occupiers in the same manner that arrears of rent may be recovered.

SECT. 8.—*Church Rates.*

How Church Rates are Assessed, and for what.

The rates raised for the repair of the church, and expenses attending the office of churchwarden, are charges upon the occupier and not upon the landlord: thus it has been held, that a covenant to pay taxes on the land does not extend to the church rates, for they are personal charges. They are levied upon the same valuation as the poor rate, in proportion to the sum required.

(*t*) See statute 11 Geo. IV. & 1 Will. IV. c. 27, for lighting and watching parishes generally. See also the General Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, and the Act for promoting Public Health, 11 & 12 Vict. c. 63.

(*u*) That act applies to districts which were before regulated by local acts; and enlarges the power of recovering rates by action, where the local acts give only a right to recover by action in cases where no sufficient distress can be made. Rates within the operation of the act are not recoverable by means of distress warrants; *Rex* v. *Middlesex* (*Justices*), 5 Nev. & Man. 126; 1 Har. & Wol. 462. The act does not give the commissioners authority to take under their jurisdiction, or to make a rate for lighting and watching footpaths on the side of a turnpike road; *Loveridge* v. *Hodsall*, 2 Barn. & Adol. 602.

CHAPTER IV.

REPAIR, CULTIVATION, FIXTURES, &c.

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BOOK II. CHAPTER IV. SECT. 1.

SECT. 1.—*The Obligation of the Parties generally.*

Obligation to repair generally.

THE burden of repairs has been always thrown as much as possible, by the spirit of the common law, upon the occupier or tenant, not only upon the principle of "qui sentit commodum, sentire debet et onus," but also because it would be contrary to all justice that the expense of accumulated dilapidation should, at the end of the period of tenancy, fall upon the landlord, when a small outlay of money on the part of the tenant, in the first instance, would have prevented any such expense becoming necessary; to which may be added, that generally the tenant alone has the opportunity of observing, from time to time, when repairs become necessary. The law, however, has been very careful in adapting the obligation to repair to the respective terms which tenants enjoy; as it would be very unjust that a tenant at will, or from year to year, should be liable to the same obligations as a tenant under a long term of years; and therefore, before entering more minutely into the subject, it will be necessary to premise, that there are two kinds of repairs, which may be termed *substantial* and

ordinary. Substantial repairs, as those to the main walls and other essential parts of edifices, and the replacing of beams, girders, roofs, and other main constructive timbers; whilst ordinary repairs are the more common reparations to windows, shutters, doors, and the like (*a*).

Obligation to cultivate according to Custom or Contract.

The obligation to cultivate, either according to the ordinary rules of good husbandry, or the express terms of the contract between the parties, which either restrict or enlarge the powers usually possessed, forms another very important branch of the rights and liabilities which subsist between persons in the relative situation of landlord and tenant.

Other Obligations.

There is no implied covenant on a lease of a house or of land, that it is reasonably fit for habitation, occupation or cultivation (*b*). A tenant is obliged to use the demised premises generally in what is called a tenant-like manner (*c*); and it has been held that a covenant to occupy premises in a proper manner is not broken by the tenant allowing footpaths to be made across them (*d*).

SECT. 2.—*Repair of Houses.*

(a) *Implied Liability.*

Implied Liability of Landlord or Tenant generally.

When no agreement or stipulation respecting repairs has been entered into, the tenant or lessee is always liable (*e*). The landlord is never liable to repair, except where he has bound himself by contract so to do (*f*); even if the house, being insured, has been burnt down, and he has received the value from an insurance office (*g*): and even where there is a covenant for quiet enjoyment, it does not create any implied contract to rebuild in case the premises are burnt down (*h*). When it is stated, however, that the landlord is never liable to repairs, it must be understood only that an action cannot be maintained against him for not repairing, as it will be perceived in many of the cases hereafter stated, that the tenant is bound only to ordinary repairs. It is now settled that on a lease of a house there is no implied covenant on the part of the lessor, that it is reasonably fit for habitation or occupation (*i*), or that it will endure during the term (*k*), and he can-

(*a*) Elmes on Dilapidations, 81. The author, an architect, uses the division of repairs into *substantial* and *necessary*; but it is difficult to understand how the repair of a decayed main wall, or a tottering roof, is other than necessary; and yet it does not belong to the division of ordinary, which he terms *necessary*, repairs. Using words of this general import has given rise to most of the difficulty which arises concerning the liability to repair.

(*b*) *Hart* v. *Windsor*, 12 Mees. & Wels. 68; *Sutton* v. *Temple*, 12 Mees. & Wels. 52.

(*c*) *Dietrichsen* v. *Giubilei*, 14 Mees. & Wels. 845; 3 Dow. & Low. 292.

(*d*) *Doe* d. *Worcester School Trustees* v. *Rowlands*, 9 Car. & Pay. 734.

(*e*) *Shrewsbury (Countess) case*, 5 Rep. 13 b.

(*f*) *Pindar* v. *Ainsley*, cited 1 Term Rep. 312; *Gott* v. *Gandy*, 2 El. & Bl. 845; *Pomfret* v. *Ricroft*, 1 Wms. Saund. 322, n. 1.

(*g*) *Belfour* v. *Weston*, 1 Term Rep. 312; *Leeds* v. *Cheetham*, 1 Sim. 151; *Bayne* v. *Walker*, 3 Dow. 233.

(*h*) *Brown* v. *Quilter*, Ambl. 619.

(*i*) *Hart* v. *Windsor*, 12 Mees. & Wels. 68, overruling *Edwards* v. *Etherington*, 7 Dowl. & Ryl. 117; Ry. & Mood. 268; *Collins* v. *Barrow*, 1 Mood. & Rob. 112; *Salisbury* v. *Marshall*, 4 Car. & Pay. 65; and *Cowie* v. *Goodwin*, 9 Car. & Pay. 378.

(*k*) *Arden* v. *Pullen*, 10 Mees. & Wels. 321.

not therefore be called upon to do repairs under such an implied covenant, even though the tenant can have no beneficial occupation without them (*l*). If the landlord is to do the repairs, there is no implied condition that the tenant may quit if they are not done (*m*). The question of implied liability to repair can in ordinary cases arise only where no lease has been granted; as leases at the present day almost invariably contain either covenants to repair generally, or special covenants to repair after notice, in which the landlord's and tenant's repairs are particularly prescribed. Where there is an express written agreement for the hire of a house, and for keeping it in repair, the implied provision to use it in a tenant-like manner is part of the same contract (*n*). So the implied contract arises, notwithstanding a clause by which the tenant agrees to leave the premises in the same state they were in at the commencement of the tenancy (*o*).

Tenants for greater Terms than from Year to Year.

It is laid down, that a tenant for life is obliged to keep the houses on the estate in repair, even though he be such without impeachment of waste (*p*). Where a tenant took premises by written agreement, which was neither stamped as a lease, nor signed by both parties, for three years and a quarter, and engaged to keep them in good repair during the time they should be in his occupation, it was held that he was bound by the covenant to repair, though the agreement was void as to the duration of the term, by the Statute of Frauds (*q*). A mortgagee in possession, like another tenant, is obliged to keep the buildings and other parts of the estate in ordinary repair (*r*).

Of Tenants from Year to Year.

The implied liability of a yearly tenant to repair has been the subject of some misconstruction: the principle may be clearly collected from an early case (*s*), in which it was laid down, that such a tenant was only liable where injury happened to the demised premises through *voluntary* negligence, and not for injuries arising from accidental fire, wear and tear of time, or the like (*t*); and accordingly it has been held, that a tenant from year to year is only bound to fair and *tenantable* repairs, to keep the house wind and water-tight (*u*), so far as to prevent waste or decay of the premises, and not to substantial and lasting repairs, such as new roofing, &c. (*x*). Although no difficulty is felt by the courts upon the extent of the liability of a yearly tenant, the principle at first stated is recommended to the notice of the general reader, as the words "tenantable repairs" and

(*l*) See ante, 98, 282, and post, Book III. Chap. IV. Sect. 1, (b).

(*m*) *Surplice* v. *Farnsworth*, 7 Man. & Gr. 576; 8 Scott, N. R. 307.

(*n*) *Holford* v. *Bennett*, 7 Mees. & Wels. 348; Hurl. & Walm. 67. But see *Standen* v. *Christmas*, 16 Law J. (N. S.) Q. B. 265; 11 Jurist, 694.

(*o*) *White* v. *Nicholson*, 4 Man. & Gran. 95; 4 Scott, N. R. 707.

(*p*) *Partridge* v. *Powlet*, 2 Atk. 383.

(*q*) *Richardson* v. *Gifford*, 1 Ad. & El. 52; 3 Nev. & Man. 325; *Arden* v. *Sullivan*, 14 Q. B. Rep. 832, infra.

(*r*) *Godfrey* v. *Watson*, 3 Atk. 517.

(*s*) *Salop* (*Countess*) v. *Crompton*, Cro. Eliz. 777, 784.

(*t*) *Torriano* v. *Young*, 6 Car. & Pay. 8.

(*u*) *Auworth* v. *Johnson*, 5 Car. & Pay. 239; *Leach* v. *Thomas*, 7 Car. & Pay. 327.

(*x*) *Ferguson* v. ——, 2 Esp. 590.

"husband-like manner," commonly used, are sufficiently general to create a doubt. Where a party has entered into an agreement intended to operate as a lease for a term of years, but which has not such operation in consequence of the 7 & 8 Vict. c. 76, and the 8 & 9 Vict. c. 106, and which agreement binds the tenant to repair, he may be liable under such agreement to do such repairs as are not inconsistent with a yearly tenancy (*y*). It is laid down by a learned writer, that a strict tenant at will is not bound to repair or sustain houses like a tenant for years (*z*).

In case the Premises are destroyed by Fire.

The old building act, 14 Geo. III. c. 78, s. 86 (*a*), provides, that no action shall be maintained against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall accidentally begin (*b*), but contracts and agreements between landlord and tenant respecting repairs are expressly excepted (*c*). It has been considered (*d*), that these enactments extend to fires caused by negligence, as well as by pure accident, in the limited sense of that word, but latterly that doctrine has been questioned (*e*); and it has since been decided in an action against a person for negligently lighting a fire in his close, whereby his neighbour's crops were burnt, that he was liable, and that those enactments did not protect him (*f*). It would appear from this case that tenants would still be liable under the Statute of Gloucester to their landlords, as for waste (*g*), for the consequences of a fire caused by the negligence of the tenant or his servants. Where there is no contract to that effect the landlord is not bound to rebuild (*h*).

Where the Tenant holds over after an express Contract to repair.

Where a tenant holds over after the expiration of a lease, it has been held, that the law presumes that he holds the premises under all those of the old covenants in the lease, which are applicable to his new situation: therefore, if, after the expiration of a written lease, containing a covenant by the tenant to keep the premises in repair, he verbally agree to hold over, paying an additional rent, nothing more

(*y*) *Arden* v. *Sullivan*, 14 Q. B. Rep. 832; and see *Doe* d. *Davenish* v. *Moffatt*, 15 Q. B. Rep. 257.

(*z*) 1 Cruise's Dig. tit. IX. ss. 14, 15.

(*a*) The previous stat. 6 Anne, c. 31, s. 6, made perpetual by 10 Anne, c. 14, is repealed by 12 Geo. III. c. 73, as appears by 14 Geo. III. c. 78, s. 101.

(*b*) These provisions are not repealed by the new building act, 7 & 8 Vict. c. 84.

(*c*) See post, 440, and also Chap. V. Sect. 1. By the law of Scotland the tenant is liable to his landlord if premises demised are burnt down by the negligence or misconduct of the tenant's servant in the ordinary scope of his employment. The defendant's servant burnt down a house demised to the defendant in Scotland, by lighting furze and straw, with a view to cleanse a chimney which smoked, although he had been cautioned against the danger of such a proceeding. In an action brought against the defendant by his landlord for this injury, it was held that it was properly left to the jury to say whether the servant was acting within the general scope of her duty, and the jury having found for the defendant the Court refused to grant a new trial; *M'Kenzie* v. *M'Leod*, 10 Bing. 385; 4 Moore & Scott, 249.

(*d*) 1 Black. Com. 431.

(*e*) *Lord Canterbury* v. *Attorney-General*, 1 Phill. Rep. 306, where all the authorities are collected and commented on.

(*f*) *Filliter* v. *Phippard*, 11 Q. B. Rep. 347.

(*g*) See post, Sect. 7, and Chap. V. Sect. 1.

(*h*) *Bayne* v. *Walker*, 3 Dowl. 233; *Belfour* v. *Weston*, 1 Term Rep. 312; *Leeds* v. *Cheetham*, 1 Sim. 146.

being expressed between the parties respecting the terms of the new tenancy, he is presumed to hold under the covenants of the former lease, as far as they are applicable; and if the premises are afterwards burnt down by an accidental fire, he is bound to rebuild them (*i*). But a tenant so holding over is not liable in assumpsit, on an implied contract, to put the premises in such repair, and in the same state, as they were in at the commencement of the term (*k*). The assignees of a void lease, which had been treated by all parties as valid, were held liable for repairs and rent up to the end of the term, according to the covenants in the lease (*l*).

(b) *General Contract to Repair.*

Contract to repair generally.

In town leases (*m*) the lessee usually covenants to keep the premises in good repair generally—to repair party-walls, pavements, glass windows and sashes, whenever occasion shall require—to paint the inside and outside wood and iron work once in a certain number of years agreed upon—to empty and cleanse in the last year the privies, drains and cesspools—and at the end of the term peaceably to leave the premises, and the party-walls, windows, &c. well repaired, together with all doors, locks, bolts, &c. which at the time of the demise or during the term shall have been fixed or fastened to the premises. Occasionally the landlord covenants to repair and keep in repair all the outside walls and timbers, and the roof, and the tenant to repair the inside of the premises only. A lessee is not liable for breaches of covenant to repair committed before the execution of the lease, although subsequent to the day from which the habendum states the term is to commence (*n*). As before stated, whatever form a covenant to repair assumes, it runs with the land, for it affects the estate and reversion in the hands of every person who may have them (*o*). Where the demise is not under seal, and the right to sue on an agreement to repair consequently does not pass to the assignee of the lessor by the statute 32 Hen. VIII. c. 34, the lessor may maintain an action notwithstanding the assignment (*p*).

Extent of the Tenant's Liability in ordinary Cases.

Covenants to repair have been always construed liberally by the courts in favour of the landlord; a general covenant to repair is, however, satisfied by the lessee keeping the premises in substantial repair, a literal performance of the covenant is not required (*q*). A covenant

(*i*) *Digby* v. *Atkinson*, 4 Camp. 275.

(*k*) *Johnson* v. *St. Peter's, Hereford*, 4 Ad. & El. 520; 6 Nev. & Man. 106; 1 Har. & Wol. 720.

(*l*) *Beale* v. *Sanders*, 3 Bing. N. C. 850; 5 Scott, 58; 3 Hodges, 147.

(*m*) As to the effect of covenants to repair in leases of premises within the district of the Metropolitan Building Act, see post, Chap. VII. Sect. 11.

(*n*) *Shaw* v. *Kay*, 1 Exch. Rep. 412.

(*o*) See also ante, Book I. Chap. IV. Sect. 5, (c), p. 84. As to the liability of a lessee to repair where the lessor has not executed the lease; see ante, Book I. Chap. IV. Sect. 11, p. 108.

(*p*) *Bickford* v. *Parson*, 17 Law J. (N. S.) C. P. 192; 12 Jurist, 377.

(*q*) *Harris* v. *Jones*, 1 Mood. & Rob. 173.

to paint at the end of every five years is not a continuing covenant (*r*). A covenant to repair "forthwith" must receive a reasonable construction, and is not to be limited to any specific time (*s*). An agreement made on the 31st August to take premises from the 29th September following, the landlord agreeing to take back the fixtures at the end of the term, provided "they are in as good a condition then as they *now* are," and the tenant agreeing to leave the premises "in the same state as they *now* are," there being at the time another tenant in possession, and the new tenant not taking possession until the 29th September, refers to the state of the premises as they were on the 29th September (*t*). A covenant to leave the premises at the end of the term sufficiently maintained, repaired, paled and fenced, was held to have been broken when the pavement was out of repair and the glass in the windows broken; for, as was justly remarked, such non-repairing might be of much prejudice to the lessor (*u*); so under a covenant that the tenant "should and would substantially repair, uphold and maintain" a house, he is bound to keep up the inside painting (*x*). Breaking a doorway through the wall of a demised house into an adjoining house, is a breach of the general covenant to keep in repair, and so is the continuing it so broken (*y*); but enlargement of windows, opening external doors, and taking down partitions, are no breach of a covenant to repair and keep in repair a dwelling-house, together with all such buildings, improvements or additions as should be executed, set up or made by the lessee (*z*). A covenant by a lessee that he will, during the term, repair, uphold, support, sustain and maintain the brick walls to the demised premises belonging, is broken if he pull down a brick wall which divides the court-yard at the front of the house from another yard at the side of the house (*a*). A covenant to repair the external parts of a demised house, comprises the partition wall between it and an adjoining house (*b*). Ordinary and natural decay, however, has been said to be no breach of a covenant to keep a house in repair, and to deliver it up in as good condition as at the commencement of the lease (*c*); but the better opinion seems to be, that a tenant who covenants to repair is to sustain and uphold the premises (*d*): he is clearly bound to do his best to keep it in the same condition, and therefore should keep it covered, and use other necessary care (*e*). Where a very old house is demised with the usual covenants to repair and yield up in repair, it is not meant that the house

(*r*) *Davis* v. *Burrell*, 17 Law T. 76, per Jervis, C. J.
(*s*) *Doe* d. *Pittman* v. *Sutton*, 9 Car. & Pay. 706.
(*t*) *White* v. *Nicholson*, 4 Man. & Gran. 95; 4 Scott, N. R. 707.
(*u*) *Pyot* v. *St. John*, Cro. Jac. 329.
(*x*) *Mark* v. *Noyes*, 1 Car. & Pay. 265.
(*y*) *Doe* d. *Vickery* v. *Jackson*, 2 Stark. 293.
(*z*) *Doe* d. *Dalton* v. *Jones*, 4 Barn. & Adol. 126; 1 Nev. & Man. 6.
(*a*) *Doe* d. *Wetherell* v. *Bird*, 2 Nev. & Man. 285; 6 Car. & Pay. 195.
(*b*) *Green* v. *Eales*, 2 Queen's B. Rep. 225; 1 Gale & Dav. 468.
(*c*) Fits. Ab., tit. *Covenant*, fol. 4.
(*d*) *Auworth* v. *Johnson*, 5 Car. & Pay. 239; *Soward* v. *Leggatt*, 7 Car. & Pay. 613.
(*e*) *Ferguson* v. ——, 2 Esp. 590.

should be restored in an improved state, or that the consequences of the action of the elements should be averted; but the tenant has the duty of keeping the house in the same state in which it was at the time of the demise, by the timely expenditure of money and care (*f*). But a covenant to *keep* a house and outbuildings in good repair, order and condition, will oblige a tenant to *put* them in that condition if not so when he enters, but the extent of repairs to be done by him must be measured by the age and class of the buildings (*g*). A covenant to repair the buildings demised, and to rebuild them if necessary, compels the tenant to keep them always in good repair, and a deduction in damages for their age was disallowed (*h*). Where a tenant agrees "to put the premises in habitable repair," he is to put them into a better state than that in which he found them, and into a state reasonably fit for the occupation of the class of persons likely to inhabit them (*i*). If the lessor covenant to repair the outside and the lessee the inside, it is conceived that the former could not recover damages from the latter for the non-repair of the inside of the main walls of the building which remained unbuilt by himself (*k*). In covenant for non-repair of premises held under a lease which has several years to run, the measure of damages is not the amount that would be required to put the premises in repair, but the amount to which the reversion is injured (*l*). So where the contract is to repair during the tenancy, and an action is brought before the termination, the plaintiff is entitled to nominal damages only (*m*). In an action for breach of a covenant in an under-lease to repair, whereby the plaintiff's term in the premises was forfeited, the plaintiff cannot recover the value of his term if the superior landlord has brought his ejectment for the non-repair, as well as for breach of other covenants not contained in the under-lease, if it is not proved that the forfeiture was caused by the acts of the defendant; but he may recover the amount of dilapidations at the time of the ejectment, though his own term is determined (*n*). In covenant on an under-lease for not repairing, in which the covenants differed from those in the original lease, and in which there was no covenant to indemnify the lessee against breach of covenants in the original lease, the lessee cannot recover the costs of an action brought against him by the original lessor for the mere dilapidations, which he might have paid for before that action was commenced (*o*); or which he might have

(*f*) *Gutteridge* v. *Munyard*, 7 Car. & Pay. 129; 1 Mood. & Rob. 334; see also *Burdett* (*Bart.*) v. *Withers*, 7 Ad. & El. 136; Will. Wol. & Dav. 444; 2 Nev. & Per. 122; *Stanley* v. *Towgood*, 3 Bing. N. C. 4; 3 Scott, 313; 2 Hodges, 132; and *Young* v. *Mantz*, or *Mantz* v. *Goring*, 4 Bing. N. C. 451; 1 Arn. 198; 6 Scott, 277.

(*g*) *Payne* v. *Naine*, 16 Mees. & Wels. 541.

(*h*) *Worcester School* (*Trustees*) v. *Rowlands*, 9 Car. & Pay. 734.

(*i*) *Belcher* v. *M'Intosh*, 3 Car. & Pay. 720; 2 Mood. & Rob. 186.

(*k*) 4 Jarm. Prec. 414, 3rd ed.

(*l*) *Doe* d. *Worcester School* (*Trustees*) v. *Rowlands*, 9 Car. & Pay. 734; *Smith* v. *Peat*, 9 Exch. Rep. 161.

(*m*) *Marriott* v. *Cotton*, 2 Car. & Kir. 553.

(*n*) *Clow* v. *Brogden*, 2 Man. & Gr. 39; 2 Scott, 303.

(*o*) *Penley* v. *Watts*, 7 Mees. & Wels. 601. See also *Legan* v. *Hall*, 4 C. B. 598.

afterwards paid into court (*p*). A covenant to repair contained in an under-lease, though in the same language as the covenant in the original lease, yet may be different in effect, owing to the under-lease having been granted subsequently to the original lease, and when the premises had become in a different condition (*q*). If a lessee assign over, subject to the performance by the assignee of the covenants in the lease from the day of assignment, and one of the covenants is a general one to repair and keep in repair, on which the lessor afterwards recovers against the lessee, the latter can recover over against his assignee for those dilapidations only which have taken place after the assignment (*r*).

Tenant's Liability to repair Buildings erected during the Term.

A general covenant to repair and to deliver up in repair, has been held to extend to all buildings erected during the term (*s*); thus if a man upon taking a lease of a house and land covenant to leave the demised premises in good repair at the end of the term, and erect a messuage upon part of the land besides that which was there before, he must keep and leave the last in good repair also (*t*). But where in a lease of land with buildings on it, the covenant was to repair the buildings demised, and to rebuild them if necessary, and to keep the fences in repair; it was held, that the tenant was not bound to keep in repair additional buildings erected on other parts of the land (*u*). A covenant to yield up in repair all buildings and improvements erected during the term, has been held to be broken by the removal of a veranda, the lower part of which was attached to posts fixed in the ground (*x*); but if the buildings erected during the term be solely for the purpose of trade and manufacture, and rest merely upon blocks or pattens, the covenant to yield up in repair all buildings to be erected during the term does not extend to them (*y*), although it would be otherwise if they had been let into the soil: on this point, however, many distinctions in favour of trade have been taken. Where a tenant erects fixtures for the purposes of his trade on the demised premises, and afterwards takes a new lease to commence at the expiration of the former one, and the latter lease contains a general covenant to repair, such lessee is bound to repair such fixtures, unless it can be satisfactorily shown that they were not intended to pass under the general words of the second lease (*z*).

Tenant's Liability in Case of Fire or other extraordinary Contingency.

Under a general covenant to repair and leave repaired at the end of the term, the lessee or his assignee is liable to rebuild in case of

(*p*) *Walker* v. *Hatton*, 10 Mees. & Wels. 249; 2 Dowl. N. S. 263.
(*q*) Ibid.
(*r*) *Hawkins* v. *Sherman*, 3 Car. & Pay. 459.
(*s*) 1 Esp. N. P. 277; *Dowse* v. *Cale*, 2 Ventr. 126; *S. C. Douse* v. *Earle*, 3 Lev. 264.
(*t*) Bac. Abr. *Covenant* (F).
(*u*) *Doe* d. *Worcester School Trustees* v. *Rowlands*, 9 Car. & Pay. 734.
(*x*) *Penry* v. *Brown*, 2 Stark. 403.
(*y*) *Naylor* v. *Collinge*, 1 Taunt. 19.
(*z*) *Thresher* v. *East London Waterworks Company*, 2 Barn. & Cres. 608; 4 Dowl. & Ryl. 62; see further, as to fixtures, post, Sect. 8.

the destruction of the premises by accidental fire (*a*), or by any other unavoidable contingency, as extraordinary floods (*b*); and if there be a covenant by the tenant to keep the premises in repair, and also a covenant to insure them for a specific sum against fire, on their being burnt down, his liability on the former covenant is not limited to the amount of the sum to be insured under the latter (*c*). In order to obviate the hardship which is thus thrown upon the lessee, an exception of accidents by fire and tempest is therefore now in most cases introduced into leases, to protect the lessee. Upon this covenant and exception it was formerly held, that where the lessee of a house and wharf covenanted to repair, (accidents by fire excepted,) and the house was burnt down, and the lessor having insured received the insurance money, but neglected to rebuild, an injunction might be granted against an action at law for the rent till the house was rebuilt (*d*); but it is now held, that the tenant has no equity, and cannot restrain the landlord from suing for the rent (*e*). Although such an exception will protect the lessee from his covenant to repair, yet he is liable under the covenant to pay rent, even where he is deprived of all use and enjoyment of the premises by their having been burnt down, and not rebuilt by the lessor; and it is doubtful whether the landlord is bound to repair in the excepted cases (*f*).

What steps the Tenant should pursue in case of Casualty.

Since, under a covenant to pay rent, the lessee is bound to pay it, whatever injury may happen to the demised premises, and even though he be not bound by his covenant to rebuild in case of fire (*g*), a very nice question arises, which has not received much light from any recorded decision, as to what steps a tenant under a lease should pursue when the premises are burnt down or destroyed by casualty. The fact of the tenant not being bound to rebuild by the words of his covenant and yet obliged to pay rent, though the landlord is not obliged to rebuild (*h*), seems to be a very hard case; and in *Weigall* v. *Waters*, where the tenant covenanted to repair, "casualties by fire and

(*a*) *Chesterfield* (*Earl*) v. *Bolton* (*Duke*), Comyn, 267; *Poole* v. *Archer*, Skin. 210; *Bullock* v. *Dommett*, 6 Term Rep. 650; 2 Chit. 608; *Digby* v. *Atkinson*, 4 Camp. 275; *Clark* v. *Glasgow Assurance Company*, 1 Macq. Sco. App. Cas. (H. of L.) 668.

(*b*) *Brecknock Company* v. *Pritchard*, 6 Term Rep. 750. The principle upon which this doctrine is held is laid down in the above-cited case, and is recognized by Lord Kenyon: it is, that if a party by his own contract creates a duty or a charge upon himself, he is bound to make it good if he can, notwithstanding any accident by inevitable necessity; for if he had chosen to guard against any loss of this kind, he should have introduced it into the contract by way of exception.

(*c*) *Digby* v. *Atkinson*, 4 Camp. 275.

(*d*) *Brown* v. *Quilter*, Ambl. 619; *Camden* v. *Morton*, 2 Eden, 219, cited 18 Ves. jun. 118; Selw. N.P. 464; *Steel* v. *Wright*, cited 1 Term Rep. 708.

(*e*) *Holtzappfel* v. *Baker*, 18 Ves. jun. 115; *Leeds* v. *Cheetham*, 1 Sim. 146; *Paris* v. *Gilham*, Coop. 56.

(*f*) *Weigall* v. *Waters*, 6 Term Rep. 488. A tenant from year to year also is liable in an action for use and occupation for the period which elapses between a fire and the regular determination of the tenancy; *Izon* v. *Gorton*, 5 Bing. N. C. 501; 7 Scott, 537; 2 Arn. 39; see also *Packer* v. *Gibbins*, 1 Queen's B. R. 421; 1 Gale & Dav. 10; and post, Book III. Chap. IV. Sect. 1, (b).

(*g*) *Monk* v. *Cooper*, 2 Strs. 763; 2 Ld. Raym. 1477; *Belfour* v. *Weston*, 1 Term Rep. 310; *Brown* v. *Quilter*, Ambl. 619; *Weigall* v. *Waters*, 6 Term Rep. 488.

(*h*) Per Lord Mansfield in *Pindar* v. *Ainsley*, M. T. 1767, cited 1 Term Rep. 312.

tempest excepted," an attempt was made to set off, in an action for rent, the amount of expenses laid out in rebuilding the premises burnt down, but it was disallowed; and Lord Kenyon said, "I do not see by what covenant the landlord is bound to repair damages occasioned by fire or tempest, the exemption being introduced into the lessee's covenant for his benefit, and to exempt him from particular repairs:" his lordship suggested that a court of equity would perhaps relieve the tenant if he had fairly laid out money in repairing premises which he was not bound to repair. It had been previously intimated in the case of *Monk* v. *Cooper*, that the tenant might have his remedy by action against the landlord; but the authority of that case seems doubtful; the best plan, perhaps, for the tenant to free himself from his liability in such a case, would be to tender to his landlord an abandonment of his lease, upon either the refusal or the neglect of the latter to rebuild; and Lord Mansfield, in the case of *Pindar* v. *Ainsley*, evidently inferred that the tenant possessed such a power in similar circumstances. It seems that the lessee cannot charge the lessor for not repairing without notice, for the lessor may not know what repairs are necessary (*i*).

Lessor's Liability to repair.

In an early case it was decided, that a covenant by the lessee that he would, after the repair of the messuages by the lessor, repair them during the term, and leave them repaired, imposed no obligation on him to make repairs of a dove house, part of the premises, until it had been once repaired by the lessor, though it was in good repair at the beginning of the term (*k*). The same principle seems to have guided the decision of another case, in which it was held that the words "it is agreed that the lessee shall keep the house demised in good repair, the lessor putting it in good repair," created a covenant on the part of the lessor to repair; and that an action lay against him if he did not put it into repair (*l*). If a lessor sell premises let under a lease not expired, and bind himself to do repairs at the expiration of the tenancy, it appears that he is liable to the repairs whenever and however the tenancy is determined: thus where the owner of premises sold them, and at the same time entered into an agreement with the vendee to do all such repairs as should be left undone by a third party *A.*, (who was in possession of the premises under an agreement for four years, of which three were unexpired,) at the expiration of the tenancy; and the purchaser immediately entered into an agreement with *A.* to quit before the expiration of the four years, and upon *A.*'s quitting commenced an action against the vendor for not having put the premises in repair at the expiration of *A.*'s tenancy, according to his agreement; Best, C. J., was of opinion, that the words in the de-

Extent of Lessor's Liability on his Contract to repair.

(*i*) *Moore* v. *Clark*, 5 Taunt. 96.

(*k*) *Slater* v. *Stone*, Cro. Jac. 645. It has been questioned whether this be good law now; see 4 Jarm. Prec. 407, 3rd edit.

(*l*) 1 Esp. N. P. 278. As to allowance of rough timber by the landlord; see *Martyn* v. *Clue*, 22 Law J., Q. B., 147.

claration "at the expiration of her tenancy" might be rejected as surplusage; and that it was immaterial when *A.* quitted, because at that time, whenever it was, the defendant might have entered to make the repairs (*m*). A covenant by lessor to repair the external parts of a demised house comprises the partition wall between it and an adjoining house; and where the adjoining house was pulled down by other persons whereby the wall was damaged, and the lessor did nothing to prevent it sinking, and suffered it to continue in a ruinous state, and refused to repair it, he is liable for the expenses the lessee is put to in rebuilding the wall, and for glass broken by the sinking of it, but not for rent and the expenses of the lessee for other premises during the progress of the repairs (*n*).

(c) *Contracts to Repair after Notice.*

Construction of the Covenant to repair after Notice.

The covenant to repair generally, and the covenant to repair within so many months after notice, are generally held to be distinct and independent covenants, if they are found either in different parts of the lease, or if they do not immediately follow one upon another so that they must be joined to make the sentence complete; but if the latter be the case, they are construed as one entire covenant, and the latter part respecting notice is held to qualify the former (*o*). Where there was a covenant to repair at all times, (as often as occasion should require,) and at the farthest within three months after notice, Dallas, C. J., held it to be one sentence, comprising one entire covenant, in which the generality of the former part was restrained by the terms of the latter; and the plaintiff was accordingly nonsuited for having declared upon the former part of the covenant without setting out the qualifying part relative to notice (*p*). If the covenants are distinct, as if a lessee covenant to leave premises in repair at the expiration of the term, and also that the lessor might direct the lessee to complete the repairs by giving six months' notice in writing, they are separate and distinct covenants (*q*); and it has been held, that a covenant to keep premises in repair during the term, and a covenant by the tenant to repair within three months after notice served upon him by the landlord, are also independent and distinct covenants (*r*):—again, a covenant to repair during the term after three months' notice, and to leave the premises in repair at the end of the term, are distinct clauses: and therefore notice is not necessary to sustain an action for non-repair at the end of the term; for the notice refers only to repara-

(*m*) *Goodson* v. *Gouldsmith*, 2 Car. & Pay. 555.

(*n*) *Green* v. *Eales*, 2 Queen's B. Rep. 225; 1 Gale & Dav. 468.

(*o*) See ante, 92, 93.

(*p*) *Horsefall* v. *Testar*, 7 Taunt. 385; 1 Moore, 89.

(*q*) *Wood* v. *Day*, 7 Taunt. 646; 1 Moore, 389.

(*r*) *Roe* d. *Goatley* v. *Paine*, 2 Camp. 520; *S. P. Doe* d. *Morecraft* v. *Meux*, 4 Barn. & Cres. 606; 7 Dowl. & Ryl. 98; 1 Car. & Pay. 346.

tions within the term, to which the lessee is not tied without notice three months before (*s*).

Liability of Covenantor to repair after Notice.

These covenants being held to be distinct and independent, the question has arisen whether the forfeiture, occasioned by a breach of the general covenant, be waived by a subsequent notice to repair. It has been before stated, that a waiver of forfeiture is much countenanced by the courts, and that the slightest act, as a notice to quit after a breach of covenant (*t*), on the part of the landlord, which implies that the tenancy is still subsisting, amounts to a waiver (*u*): but where there was a covenant to repair generally, with a clause of re-entry for a breach, and a further covenant that the lessee should, within three months after notice, repair all defects therein specified; and, upon the premises being out of repair, the lessor gave notice to repair "forthwith," and at the same time brought an action of ejectment; Lord *Ellenborough* held, that the notice was no waiver of the forfeiture occasioned by the breach of the first covenant. In a later case, however, which will probably be thought to have weakened much the authority of the above Nisi Prius decision, where the lease contained a covenant by the lessee to keep the premises in repair, and also to repair within three months after notice, and there was a clause of re-entry as above; and the premises being out of repair, the lessor gave notice to repair within three months, and brought an action of ejectment before the expiration of the three months, but received rent which accrued due after giving the notice; the lessor was held to have waived the forfeiture incurred by the first breach; as his having sent the notice, and received the rent accruing afterwards, showed his intention not to insist upon the forfeiture at the time of sending it; and the distinction was taken, that where the notice was to repair forthwith, no such intention of the landlord appeared, and therefore he was not prevented from bringing ejectment at any time (*v*). The distinction between these two cases seems to consist rather in the fact of the tenancy having been recognized by receiving rent after the notice, than in the difference between a notice to repair forthwith, and to repair within three months after notice, which seems to be nothing more than verbal. In another case, the lease contained a general covenant to repair, and also a special covenant for the lessor to give notice of repairs, and in case they were not done within a certain time to enter and perform them, and to distrain upon the tenant for the expenses; and there was also a general power for the lessor to re-enter upon breach of any covenant; notice was given to the tenant to perform some repairs, and that if they were not done within a certain

(*s*) 1 Saund. 664; *S. P. Luxmore* v. *Robson*, 1 Barn. & Ald. 584.

(*t*) *Doe* v. *Scott* v. *Miller*, 2 Car. & Pay. 348.

(*u*) *Roe* d. *Goatley* v. *Paine*, 2 Camp. 520; see ante, Book I. Chap. VII. Sect. 5, (*f*), p. 259.

(*v*) *Doe* d. *Morecraft* v. *Meux*, 4 Barn. & Cres. 606; 7 Dowl. & Ryl. 98; 1 Car. & Pay. 346.

time that the lessor would perform them, and charge the tenant with the expenses: the repairs not being done within the time, after some further negociations, the lessor gave a notice that if the tenant did not agree to certain terms in three days, he would be held to the covenants in the lease; the tenant not having agreed, it was held that the lessor could not recover in ejectment for a forfeiture, he having elected to proceed on the special covenant, and that the general power to re-enter was not revived by the last notice (*x*). In an action for non-repair of "the premises particularly described in the lease," it was proved that there had been a notice to repair the premises, particularly describing them, and that before action the plaintiff's surveyors had made an estimate of the dilapidations and stated the amount to the defendant, who promised to pay it, and that particulars of breaches had been delivered in the action in the same terms as the notice to repair: it was held, it not appearing that there were any other premises of the non-repair of which the plaintiff complained, or that the defendant could have been misled, that there was sufficient evidence of the amount of damage, and that the Judge ought not to have directed a verdict for nominal damages on the ground that the admission, the notice, and the particulars were not identified with the premises demised and referred to in the declaration (*y*). In ejectment on an agreement for not repairing "to the satisfaction of the surveyor," the question is, whether the surveyor ought to be satisfied (*z*).

(d) *Contracts to Rebuild.*

Liability on special Contracts to rebuild.

In building leases, the covenants by the lessee to build and repair (*a*) are generally construed very strictly in favour of the lessor; and, therefore, where a lessee in a lease of three messuages, covenanted to pull down the houses, and rebuild three other houses, and that he would repair the houses so agreed to be built, *and also that he would repair the demised premises*, and leave the said premises in repair; and he pulled down the *three* and built *four* in their stead; it was held, that though he was obliged to build *only three* houses, yet he was bound to deliver up all in repair; the last covenant being general, and not confined, as the former, to the houses agreed to be built (*b*). Where, however, in a lease of four messuages for 99 years, the lessee covenanted within two years to put them in good repair, and keep them in repair during the term, and further, within the first fifty years of the term, to take down the messuages as *occasion may require*, and

(*x*) *Doe* d. *De Reutzen* v. *Lewis*, 5 Ad. & El. 277; 2 Har. & Wol. 162; 6 Nev. & Man. 764.

(*y*) *Mapleton* v. *Rawlings*, 3 Com. L. R., C. B., 237.

(*z*) *Doe* d. *Baker* (*Bart.*) v. *Jones*, 2 Car. & Kir. 743.

(*a*) See the Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, ss. 144, 145, as to the effect of that act on contracts for building.

(*b*) *Dowse* v. *Earle*, 3 Lev. 264; *S. C. Dowse* v. *Cale*, 2 Vent. 126.

in the place thereof to erect four new brick messuages; the Court of C. P. intimated, that if, within the fifty years, the houses should be so repaired as to make them completely and substantially as good as new houses, the "occasion" on which the new houses were to be built did not arise (c): according to this construction, the covenant to build must be taken to be a covenant qualified by the words "as occasion may require (d)." If a lessor covenant that he will, in case the premises demised shall be burnt down, "rebuild and replace" the same, in the same state as they were in before the fire, he is only bound to restore the premises to the state in which they were when he let them, and not rebuild any *additional* parts which may have been erected by his tenant (e). A tenant will be restrained by a court of equity from pulling down a house and building another to which the landlord objects (f).

(e) *Manner of doing Repairs.*

At what Time the Repairs may be done.

Upon a covenant to repair, and keep in repair, during the term, the old lawyers (g) held, that the covenant would be satisfied by the lessee's putting the premises into repair at any time during the continuance of the term; and that no action lay till the end of the term; but it is now held, that if the premises are at any time during the term out of repair, the lessee is subject to an action (h): and Lord Ellenborough said, "the common sense, the practice, and the general convenience of mankind, require this." A covenant to repair by a certain day, would, it seems, not be broken, if there was any thing very important (as plague in the house) to prevent the repairs being completed; but the repairs must "be done in a convenient time" afterwards (i).

Landlord's Right to enter to repair.

A landlord has no right to enter his tenant's premises to repair them, without some stipulation to that effect (k). Where premises which were underlet became out of repair, the superior landlord gave notice to his immediate lessee to repair them at the peril of forfeiting his lease; and the under-lessee, after receiving notice to repair, neglected to do so, whereupon the lessee, in order to avoid a forfeiture of his whole estate, entered on the premises, and put them in tenantable repair; it was held, that though he might be a trespasser

(c) *Evelyn* v. *Raddish*, 7 Taunt. 411; Holt, 543.

(d) In one case, where a lessee covenanted to repair and keep unbroken; the pulling down a ruinous old bakehouse, and building up a new one, was held to be a breach of the covenant; *Wood* v. *Avery*, Saville, 96; though this strict decision would not probably be recognized at the present day.

(e) *Loader* v. *Kemp*, 2 Car. & Pay. 375.

(f) *Smyth* v. *Carter*, 8 Beav. 78.

(g) *Main's case*, 5 Co. Rep. 67; F. N. B. 145 k; Plowd. 29; Shep. Touch. 173.

(h) *Luxmore* v. *Robson*, 1 Barn. & Ald. 584.

(i) Shep. Touch. 174; *Griffith's case*, Moore, 69.

(k) *Barker* v. *Barker*, 3 Car. & Pay. 557; *Neale* v. *Wyllie*, 3 Barn. & Cres. 533; 5 Dowl. & Ryl. 442; as to which last case, however, see *Walker* v. *Hatton*, 10 Mees. & Wels. 258; 2 Dowl. N. S. 263; *Logan* v. *Hall*, 4 C. B. 598.

for so doing, yet that he might recover against his under-tenant the whole expense so incurred, and even although the premises were afterwards entirely rebuilt before the action for the recovery of such expense was brought (*l*).

(f) *Remedies for Breach of Contract.*

By Action at Law for the breach of Contract.

With regard to the remedies which are in use in case of dilapidations or want of repairs, if the covenant be contained in a lease under seal, the remedy must be obtained by an action of covenant. When the covenant is either implied, or by parol—that is, not under seal,—assumpsit is the proper form of action (*m*). Where there are reciprocal covenants by both parties, the damage sustained by the one party cannot be set-off in an action brought upon the covenant of the other; but the remedy of each is by action against the other: thus where the lessor has covenanted to repair the outside, and the lessee the inside, the remedy of the parties against each other is by cross-actions of covenant (*n*). It has indeed been held, that if the lessor covenant to repair during the term, if he will not do it, the lessee may repair, and pay himself by way of retainer (*o*), but Holt, C. J., doubted of this, unless there was a covenant to deduct the expense of the repairs from the rent: and though cases occur in the books, wherein it has been thought by some of the judges that the lessee might expend part of the rent in repairs of the premises, if they required repair, and might set-off such expenditure in an action either of debt or covenant for rent; yet such an opinion is erroneous, for the lessor and lessee have their respective remedies on the several covenants contained in the lease; and the maxim of law, "so to judge of contracts as to prevent a multiplicity of suits," does not apply (*p*). In an action for non-repair, the jury may give to the landlord not only the amount of the actual expense of the repairs, but also a compensation for the loss of the use of the premises while they are undergoing repair (*q*). The method of obtaining redress by means of these several forms of action will be hereafter fully considered (*r*).

By Suit in Equity for a specific Performance.

With respect to any supposed remedy by suit in equity for a specific

(*l*) *Colley* v. *Streeton*, 2 Barn. & Cres. 273; 3 Dowl. & Ryl. 522.

(*m*) In the metropolitan police district compensation for wilful damage, done by tenants to premises or to furniture, may be awarded by a police magistrate to the extent of 15*l.*: see 2 & 3 Vict. c. 71, s. 38. Where a tenancy still exists, a landlord must proceed against his tenant within one month after the commission of an offence under this act; *Dowell* v. *Beningfield*, 1 Car. & Mar. 9.

(*n*) *Leeds* v. *Cheetham*, 1 Sim. 151.

(*o*) *Beale's case*, 1 Leon. 237; Cro. Eliz. 222.

(*p*) *Smith* v. *Mapleback*, 1 Term R. 446.

(*q*) *Woods* v. *Pope*, 6 Car. & Pay. 782.

(*r*) See post, Book III. Chap. II. and IV. In the case of joint-tenants and tenants in common, of a house or mill which has fallen into decay, and which one is willing to repair, but the other is unwilling; he who is willing might formerly have a writ de reparatione facienda, by which it appears that the owners were bound to repair for the public good. It would seem that such remedy was confined to houses and mills, and would not extend to other buildings—as garden and fence-walls, and the like—for the writ expressly says, ad reparationem et sustentationem ejusdem domus. Co. Lit. 54 b.

performance of a general covenant to repair, it may be remarked, that the courts of equity will not interfere, but will leave the party to his remedy by action at law for the breach of contract (*s*); but it is otherwise as to a covenant to build (*t*). Where a lessee becomes bankrupt, a court of equity has no jurisdiction except in cases under the bankrupt act (*u*).

By proceeding for a Forfeiture.

Wherever the lease contains a proviso or condition for re-entry, either on non-performance of the covenants therein contained—when the lease contains a covenant to repair,—or for non-repair specifically, and a breach of a covenant to repair has occurred, which induces a forfeiture, it is open to the lessor or reversioner to get rid of the lessee, and recover back the premises by proceeding in ejectment. By this mode of proceeding the lessor will at least have the satisfaction of preventing any further injury to the premises by the lessee's breach of contract, if he cannot entirely recompense himself for the damage he has sustained; although it frequently happens, that by this course the lessor is greatly benefited by obtaining possession of premises which have been considerably improved by the tenant. The same remedy by ejectment may be pursued by the lessor, in cases where the tenant holds under an agreement for a lease merely which contains a clause of re-entry, but there is no actual term granted (*x*). The method of proceeding by ejectment is fully considered in another part of this work (*y*).

SECT. 3.—*Husbandry Repairs.*

(a) *Implied Liability.*

Extent of the implied Liability to repair Farming Premises.

In leases of farming premises there is also an implied liability for the tenant to repair; but it differs from the implied liability to repair houses, in this respect, that it extends in general only to the dwelling-house occupied by the tenant; the burden of repairing the out-buildings, homesteads, and other erections on the farm, being sustained either by the landlord or the tenant, as regulated by express provisions in the lease, or by particular customs of the country. A tenant from year to year of farming premises is bound, as has been observed with respect to yearly tenants of houses, only to fair and tenantable repairs, so as to prevent waste or decay of the premises, and not to substantial and lasting repairs (*z*): for the law will not imply a contract on the part of such a tenant to repair generally, or to do any particular acts; but merely to use the farm in a tenant-like and husband-like manner, according to the custom of the country in which the farm is situated (*a*).

(*s*) *Hill* v. *Barclay*, 16 Ves. jun. 405.
(*t*) 4 Jarm. Prec. 407, 3rd edit.
(*u*) *Ex parte Warwick*, Buck, 326.
(*x*) *Doe* d. *Oldershaw* v. *Breach*, 6 Esp. 105; *Doe* d. *Thompson* v. *Amey*, 12 Ad. & El. 476; 4 Per. & Dav. 177.
(*y*) Post, Book III. Chap. VII.
(*z*) *Ferguson* v. ——, 2 Esp. 590.
(*a*) *Horsefall* v. *Mathew*, Holt, 7; *Gibson* v. *Wells*, 1 New Rep. 291.

He is liable for commissive but not for permissive waste, and as the suffering buildings to be out of repair is of the latter description, he is not liable for such want of repairs as arise from mere neglect (*b*). The occupation of farms and premises, however, creates so much a duty in tenants to repair, that the courts are always ready to extend this obligation upon them as much as possible: thus an agreement by the tenant to leave a farm as he found it, has been held to be an agreement to leave it in tenantable repair, if he found it so, and will maintain a declaration so laid (*c*): so a tenant who had been let into possession under an instrument, which did not amount to a present lease, and had paid rent under the agreement, was held liable in an action for the mismanagement of the farm, under a count stating the premises to have been demised to him (*d*).

(b) *Express Contracts to Repair.*

Extent and Construction of express Contracts to repair Farming Premises.

In leases of farming lands and premises, the covenants on the part of the lessee are usually expressed, to repair, and deliver up in repair, all the buildings on the demised premises, and all erections to be placed thereon during the term, and the kilns, mills, &c. as specified in the schedule usually annexed to or written under the lease. As there is nothing different in the construction of these covenants to repair, from those inserted in town leases, the reader is referred back to the former part of this chapter, where the extent of the liability of the lessee under them is considered.

Sect. 4.—*Obligation to Cultivate.*

(a) *According to the Custom of the Country.*

Under what Circumstances the Liability arises.

The mere relation of landlord and tenant creates an implied obligation on the part of the tenant to manage a farm fairly, and in a husband-like manner, according to the course of proper management in that part of the country where the premises are situated (*e*); and upon such obligation the law raises an implied promise, upon the breach of which an action of assumpsit may be maintained. Such implied obligation, however, does not extend to the performance of particular modes of husbandry which are not customarily followed in the usual course of agriculture; thus a declaration which stated, that in consideration that the defendant *had* become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of

(*b*) *Herne* v. *Benbow*, 4 Taunt. 764.
(*c*) *Winn* v. *White*, 2 W. Black. 840.
(*d*) *Tempest* v. *Rawling*, 13 East, 18.
(*e*) *Powley* v. *Walker*, 5 Term Rep. 373. See also *Beale* v. *Saunders*, 3 Bing. N. C. 850; 3 Hodges, 147. In an action on the case the declaration alleged that the defendant was tenant to the plaintiff, and by reason thereof it was his duty to manage and use the lands in a husband-like manner, according to the custom of the country, but that he did not do so, to which there was a plea of non tenuit modo et formâ; it was held, that the plaintiff on this issue was only bound to prove the tenancy, and not the terms of the tenancy; *Halifax* v. *Chambers*, 4 Mees. & Wels. 662; 7 Dowl. 342; 1 Horn. & Hurl. 417.

fallow, and to spend 60*l.* worth of manure every year thereon, and to keep the buildings in repair, was held bad on general demurrer, because those obligations do not necessarily arise out of the bare relation of landlord and tenant (*f*). It appears that this implied obligation results from the relative situation of the parties as landlord and tenant, by whatever means that situation is created; and, therefore, that the right is given, and the remedy afforded in all cases, where there is a tenancy of whatsoever description. Although a farm is held under a written agreement, the custom of the country may be insisted upon, unless it can be collected from the instrument, either expressly or impliedly, that the parties do not mean to be governed by it (*g*): but special covenants as to cultivation cannot be implied, from the mere act of holding over after a lease (*h*).

What constitutes a Custom of the Country.

In order to constitute such a custom, or more properly speaking, usage, as is binding on the tenant, it is not necessary that it should have been immemorially adopted; it is sufficient if there be a general usage applicable to farms of a similar description (*i*). In a late case, the question was tried to be raised, whether the customs between landlord and tenant should not be proved to have existed from time immemorial, and whether they should not be averred to be reasonable, when an action is brought upon them; but the objections were overruled, and it seems that if the custom appear to be reasonable, it is sufficient: the custom or usage proceeded on in that case, by the tenant against his landlord, was, that the outgoing tenant should receive a reasonable compensation from his landlord, for the expenses of tillage and cultivation, in respect of which the tenant had not, according to the due course of husbandry, received the benefit, provided that the tenant upon entry had not received a similar benefit without paying; this usage, Dallas, C. J., described as affording the strongest encouragement to good husbandry, and as being beneficial to both landlords and tenants, the land of the former receiving a lasting benefit, from the labour and expense bestowed by the tenant on payment of a reasonable compensation to the latter, and the tenant being thereby encouraged to pursue a good course of husbandry (*k*). In an action against a tenant upon promises to cultivate a farm according to the course of good husbandry and the custom of the country, if the declaration sets out the custom, and the defendant traverses it, the plaintiff

(*f*) *Brown* v. *Crump*, 6 Taunt. 300; 1 Marsh. 567.

(*g*) *Hutton* v. *Warren*, 1 Mees. & Wels. 466; Tyr. & Gr. 646; 2 Gale, 71; *Wigglesworth* v. *Dallison*, 1 Dougl. 201; *Senior* v. *Armytage*, Holt, 197; *Clarke* v. *Roystone*, 13 Mees. & Wels. 752; *Wilkins* v. *Wood*, 12 Jur. 583.

(*h*) *Kimpton* v. *Eve*, 3 Ves. & Beam. 349. And see *Roberts* v. *Barker*, 1 Cromp. & Mees. 808; 3 Tyr. 945.

(*i*) In the "Practice of Tenancy," by Messrs. Kennedy and Grainger, will be found much useful information respecting the different customs which prevail in the different counties as to cultivation, repairs, outgoing tenants, &c.

(*k*) *Dalby* v. *Hirst*, 1 Brod. & Bing. 224; 3 Moore, 536.

must prove it as alleged (*l*). A custom of the country, that where a tenant has laid out money in tile draining, the landlord is to repay him five-sevenths of the expense, whether he has consented or not to such drainage, is not an unreasonable custom (*m*). In an action against a tenant on a promise that he would occupy a farm in a good and husband-like manner, according to the custom of the country; an allegation that he had treated the estate contrary to good husbandry and the custom of the country, is proved by showing that he had treated it contrary to the *prevalent* course of good husbandry in that neighbourhood; as by tilling half his farm at once, when no other farmer tilled more than a third; though many tilled only a fourth: and it is not necessary to show any precise definite custom or usage in respect to the quantity tilled (*n*).

been be a ch of the Custom.

The implied obligation to manage a farm in a husband-like manner was held to be broken, when evidence was given of dung and compost having been carried off the premises, without any stipulation or agreement to that effect having been entered into (*o*): and in the case of *Brown* v. *Crump* (*p*), Gibbs, C. J., declared, "that the implied engagement which arises out of the letting of land is, that every tenant (where there is no particular agreement dispensing with that engagement) is bound to cultivate his farm in a husband-like manner, and to consume the produce on it:" but it is presumed that, in the former case, the carrying away was contrary to the custom of the country where the farm was situated; for it is submitted, that the implied obligation to cultivate, upon the part of the tenant, is always to be regulated by the custom of the country; and therefore, where there is no custom to the contrary, that a tenant may remove hay or straw from the premises. In counties in which much hay is grown for the market, it would be an extreme hardship upon the tenant, if he were necessarily bound to consume all the produce of the farm upon his premises: indeed, in a case some time since decided, it had been held by Lawrence, J., that there is nothing to prevent a yearly tenant, by the general rules of husbandry, from carrying away straw or hay from the premises: and the learned judge mentioned a case before Mr. Justice Buller (*q*), where the latter judge took a distinction between dung and straw: and said that the former, by the common course of husbandry in all places, ought to be used upon the premises; but the latter was part of the produce of the land, and if not permitted to be sold, none could be brought to market (*r*). It is conceived, that a tenant from year to year is not entitled to plough on the swarth or

(*l*) *Angerstein* v. *Handson*, 1 Cromp. M. & Ros. 789; 5 Tyr. 383; 1 Gale, 8.

(*m*) *Ludlam* v. *Mouseley*, 21 Law J., Q. B., 64.

(*n*) *Legh* v. *Hewitt*, 4 East, 154.

(*o*) *Powley* v. *Walker*, 5 Term Rep. 373.

(*p*) 1 Marsh. 567.

(*q*) *Furbre* v. *Andrews*, Winch. Sum. Assizes, 1788.

(*r*) *Gough* v. *Howard*, Peake, Ad. Ca. 197. And see *Ex parte Nixon*, 1 Rose, Bank. Ca. 446.

grass land which has been for some years in that state, though originally laid down by himself; as such a proceeding must be against the rules of good husbandry.

(b) *Express Contracts to Cultivate.*

Usual Covenants to Cultivate in a particular manner.

It has not been uncommon, in lieu of special covenants pointing out the required course of cultivation and stipulated restrictions, to insert a covenant in farming leases, either to cultivate according to the custom of the country, or according to the course of good husbandry. Both these methods appear to be attended with many disadvantages: they not only tend to perpetuate what frequently are very absurd and injurious practices, but occasion much difficulty as to proving what the custom or usage really is, if any question should arise between the parties: the obvious remedy for this is, that the particular restrictions and specifications as to the mode of culture should be inserted in the lease: and where it is intended to compel the tenant to conform to any particular mode of husbandry, such a course is absolutely necessary; for without such covenants the tenant would be entirely left to his own choice as to the treatment of the land, if he contrived to keep himself within the ambiguous terms of the general covenants to cultivate according to the custom, or according to good husbandry. Where there is a covenant to manage a farm in the same manner as it had been farmed by other tenants, the tenant is bound by the terms of such previous lease, if he have notice of its existence and purport; but if he have no such notice, he is only bound by the mode in which the landlord shall have permitted the former tenants to manage the farms, although they may have been legally bound by stricter agreements (*s*). A very full collection of farming covenants, applicable to almost every possible species of husbandry, will be found in another part of this work (*t*).

Effect of such Contracts in cases of Execution against Tenant.

By statute 56 Geo. III. c. 50, s. 1, it is enacted, "that no sheriff shall, by virtue of process, carry off, or sell or dispose of, for the purpose of being carried off from any lands let to farm, any straw thrashed or unthrashed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes or sea-weed, in any case whatsoever; nor any hay, grass or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement entered into and made for the benefit of the owner or landlord of any farm, such hay, &c. ought not to be taken off or withholden from such lands, or which by the tenor or effect of such covenants or agreements ought to be used or expended thereon, and of which

(*s*) *Liebenrood* v. *Vines*, 1 Meriv. 15.

(*t*) See post, Book IV., Chaps. I. and II.

covenants or agreements such sheriff shall have received a written notice before he shall have proceeded to sale." Section 2 provides, that the tenant shall give notice to the sheriff of the existence of such covenants, and of the name and residence of the landlord; that the sheriff shall give notice to the landlord of the seizure of the crops; and that if he hears nothing from him he shall put off the sale as long as he legally can. Subsequent sections provide, however, that such produce may be sold, subject to an agreement to expend it on the land, according to the custom of the country, where there is no covenant or agreement, and according to such contracts where there is: in case of such qualified sale, the purchasers may use all such necessary barns, buildings, yards and fields, for the purpose of consuming such produce as the sheriff shall assign for the purpose, and which the tenant would have been entitled to, and ought to have used for the like purpose. By the 11th section of this statute, the assignees of bankrupt or insolvent tenants, together with all purchasers whatsoever, are prevented from disposing of the crops in any other manner than the bankrupt, &c., himself might do (*x*). The Bankruptcy Law Consolidation Act, 12 & 13 Vict. c. 106, which repeals the 6 Geo. IV. c. 16, and other statutes relating to bankruptcy, contains a similar enactment in sect. 144. But the case is different with respect to the landlord; for where a farm tenant is under a covenant to expend upon the premises the hay, &c. made thereon, a landlord who seizes hay under a distress, and sells it subject to a condition that it shall be expended upon the premises, whereby the hay fetches a smaller price than it would have done if the sale had been absolute, is liable in an action by the tenant for not selling at the best price (*y*).

Contracts respecting Mode of Tillage.

Covenants respecting the mode of tillage to be adopted by the tenant must necessarily vary so much in their terms, that little can be said to elucidate the subject. Those cases, however, which have been decided upon the construction of such covenants, and which have settled the extent of the tenant's liability in the particular instances determined upon, may be given: thus it has been held, that upon a covenant not to plough any ancient meadow, and if done, to pay an additional yearly rent per acre; the increased rent is not a penalty, but a liquidated satisfaction fixed and agreed upon by the parties, and therefore that a court of equity ought not to interfere in an action brought for the recovery of it (*z*). Where there was a covenant to pay an additional rent for pasture land if the lessee should ear, plough, break

(*x*) *Wilmot* v. *Rose*, 3 El. & Bl. 563.

(*y*) *Ridgway* v. *Stafford* (*Lord*), 6 Ex. Rep. 401, overruling *Abbey* v. *Petch*, 8 M. & W. 419, where it was decided, that where a farm tenant is under covenant not to carry off hay and straw made on the farm, a landlord distraining the same may sell them, subject to a condition that the purchaser shall consume them on the premises. See also *Frusher* v. *Lee*, 10 Mees. & Wels. 709; *Roden* v. *Eyton*, 6 C. B. R. 427; and see also on this statute *Hutt* v. *Morrell*, 11 Queen's B. Rep. 425.

(*z*) *Rolfe* v. *Peterson*, 2 Bro. Parl. Ca. 436.

up, dig, use or convert it to tillage, or for brick earth, or for any other purpose whatsoever, it is uncertain whether he would be liable if he used it for the purpose of a race-course, but it seems rather a question of fact than of law (*a*). Sowing clover with the spring corn does not *restore* the land to a state of permanent pasture, although the clover remains after the corn is cut: it is still merely in tillage (*b*). Where an action was brought on a covenant "to permit the plaintiff, in the last year of the term, to sow clover among the defendant's barley," and the breach assigned was, that the defendant sowed so many acres with barley and so many with oats, without giving "notice" to the plaintiff, by which he was prevented from sowing the clover and grass seeds; and there was a plea that the defendant did "not prevent," it was upon demurrer held good: for the covenant made no mention at all about any notice to be given, and the plaintiff being the party for whose benefit the covenant was made, ought to have used due diligence; and the breach assigned being the not permitting the plaintiff to sow grass seed, the single question was, whether the defendant did or did not prevent him. If he had refused to give notice, or had given a wrong notice, it might have been a breach (*c*).

Contracts respecting Manure.

It has been held by Buller, J., that under a covenant to use the land in a husband-like manner, and deliver it up in the like condition, the tenant ought to use on the land all the manure made, that when his time was out he might carry away such corn and straw as had not been used there, and was not obliged to bring back the manure arising from it (*d*): but it is conceived that the proper mode of construing such a covenant would be with reference to what is the usage upon the subject, in the same manner as in the case of an implied liability. Where the outgoing tenant had covenanted with his landlord to leave the manure made by him on the farm, and sell it to the incoming tenant at a valuation, to be made by certain persons; the effect of such covenant is to give the outgoing tenant the right of on-stand for his manure upon the farm, and the possession of and property in it remains in him in the meantime: and therefore if the incoming tenant remove and use it before such valuation, he is answerable to the outgoing tenant in trespass (*e*). Where a lessee covenanted to leave fodder, &c. on the determination of his lease, and he became bankrupt, and his assignees refused to take the lease, they are not entitled to take the fodder (*f*). A covenant by the lessee that he would sufficiently muck and manure the land demised with two sufficient sets of muck within the last six years of the term, the last set to be laid on the premises within three

(*a*) *Aldridge* v. *Howard*, 4 Man. & Gran. 921; 5 Scott, N. R. 623.
(*b*) *Birch* v. *Stevenson*, 3 Taunt. 469.
(*c*) *Hughes* v. *Richmond*, Cowp. 125.
(*d*) 1 Esp. N. P. 279.
(*e*) *Beaty* v. *Gibbons*, 16 East, 116. Manure passes to the assignee of an insolvent tenant of a farm, although he may thereby subject himself to an action for bad husbandry; *Burbage* v. *King*, 2 Chit. 246
(*f*) *Ex parte Nixon*, 1 Rose, 445; *Ex parte Whittington*, Buck, 87.

years of the expiration of the term, is satisfied with the tenant's laying on two sets of muck within the last three years of the term, if he should think proper so to do (*g*). A condition not to sell, cart or convey away any dung, compost or manure from a farm, is broken by the removal of the dung of two cows which had been sold by the tenant, but were permitted by him to remain on the premises, they being entirely provided by the buyer with provender from elsewhere (*h*). A count in assumpsit stated that the defendant *had* become tenant to the plaintiff on certain terms and stipulations, and, amongst others, that the rent should be payable half-yearly, that the defendant "should not sell any straw, &c. or manure grown or produced upon the said farm without the written license" of the plaintiff, under certain penalties, and "that the penalties should be considered as additional rent, and should be recoverable by distress or otherwise as rent:" it was then averred, that "in consideration thereof" the defendant promised the plaintiff to pay all such penalties as he might be liable to pay plaintiff according to the said stipulations," and that the defendant, without license, sold straw grown on the premises during the tenancy: breach, non-payment of penalties in respect thereof: plea, that the straw was sold after the determination of the tenancy: it was held, on demurrer, by Lord Campbell, C. J., and Patteson, J., that the promise to observe the terms, one of which was payment of penalties, was supported by the bygone consideration of having become tenant on those terms, and that the stipulation must be construed to be, not *at any time* to sell straw grown during the tenancy: Erle, J., however, was of a different opinion, considering that the stipulation should be construed to be, not *during the tenancy* to sell straw, &c. grown during the tenancy (*i*).

(c) *Remedies for Breach of Contract.*

To what Remedies the Parties may resort.

The remedies given by the law for the breach of contracts relative to the course of husbandry, are precisely similar to those already mentioned, when speaking of the remedies for breach of contract to repair, viz., an action of covenant, where the contract is under seal; an action of assumpsit, where it is in writing not under seal, or verbal; and an action of ejectment, where the breach of contract works a forfeiture of the estate. The mode of proceeding in these several actions will be hereafter pointed out (*k*).

Sect 5.—*Fences and Party-walls.*

Ownership of Agricultural Fences.

Where there are two adjacent fields, separated by a hedge and ditch, the hedge, primâ facie, belongs to the owner of the field in which the

(*g*) *Pownall* v. *Moores*, 5 Barn. & Ald. 416.

(*h*) *Hindle* v. *Pollitt*, 6 Mees. & Wels. 529.

(*i*) *Massey* v. *Goodall*, 17 Queen's B. Rep. 310.

(*k*) See post, Book III., Chaps. II., IV. and VII.

ditch is not; and if there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership (*l*). An attempt was once made to establish a common law right in the owner of a bank and ditch, to have a width of eight feet from the interior line of the foot of the bank, as the reasonable width, viz., four feet for the ditch, and four feet for the base of the bank, if there were no ditch; but it was decided that no such rule about an eight feet width exists; and Lawrence, J., stated the rule about ditching to be this—"no man making a ditch can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land; he is of course bound to throw the soil which he digs out upon his own land, and often, if he likes it, he plants a hedge upon the top of it; therefore, if he cuts afterwards beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser (*m*):" proof, therefore, of the ancient width of the ditch, is evidence that the owner's land did not extend beyond the outer edge thereof. One tenant in common of a hedge may maintain trespass against his co-tenant if the latter grub it up; but a mere clipping of the hedge may be justified under the general issue (*n*).

Ownership of Party-walls.

The common use of a wall separating adjoining lands belonging to different owners, is primâ facie evidence that the wall and the land on which it stands belong to the owners of those adjoining lands, in equal moieties as tenants in common: where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built of greater height than the old one; it was held not to be such a total destruction of the wall as to entitle one of the two tenants in common to maintain an action of trespass against the other; for it must be remembered that such an action does not lie by one part-owner or tenant in common of a party-wall against the other: and where in such an action the judge left it to the jury whether the wall was the common property of the plaintiff and defendant, and they found that it was a party-wall, and the judge thereupon directed them to find for the defendant; it was held, that such direction was right (*o*). But where a party-wall was built at the joint expense of the two adjoining proprietors, and half its thickness stood on the land of each, the property in the wall follows the land on which it stands, and the two proprietors are not tenants in common of the wall (*p*). If a house or office be separated from other premises by a wall, and that wall belongs to the owner of the house or office, he is of common right bound to repair it; and an action will lie against him for not doing so.

(*l*) *Gay* v. *West*, 2 Selw. N. P. 1287.
(*m*) *Vowles* v. *Miller*, 3 Taunt. 137.
(*n*) *Voyce* v. *Voyce*, Gow, 201.
(*o*) *Cubitt* v. *Porter*, 8 Barn. & Cres. 257; 2 Man. & Ryl. 267; *S. P. Wiltshire* v. *Sidford*, 8 Barn. & Cres. 259, n.; 1 Man. & Ryl. 404; see also *Murley* v. *M'Dermott*, 8 Ad. & El. 138; 3 Nev. & Per. 356; 1 Will. Wol. & Hod. 226.
(*p*) *Matts* v. *Hawkins*, 5 Taunt. 20.

Obligation to repair Fences.

It is so notoriously the duty of the actual occupier of lands to repair the fences, and so little the duty of the landlord, that without any agreement to that effect, the landlord may maintain an action against his tenant for not so doing, upon the ground of the injury done to his inheritance (*q*); and where to a declaration against a tenant for not using premises in a husband-like manner, in repairing fences, &c. on his implied promise so to do, the tenant pleaded that the fence became out of repair by natural decay, and that there was not proper wood which he had a right to cut for repairing the fences, and that the plaintiff ought to have set out proper wood for the purpose of repairs, which he had neglected to do; the plea was considered bad, because it did not aver any request to the plaintiff so to do, or a custom of the country in that respect (*r*). If two persons are possessed of adjoining closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other: but it may be doubted, if two persons have the concurrent possession of land, for the purpose that each may take profits of a special nature, and distinct from, but not inconsistent with, the right of the other, whether either one is bound to guard against casual damage, which during, and by fair enjoyment of his right, may happen to the other (*s*). Where the owner of two adjoining closes (*A.* and *B.*) separated by a fence and gate, which had always been repaired by the occupier of *B.*, sold *A.* to the plaintiff, and two years afterwards sold *B.* to the defendant; it was held, that the latter was not bound to repair the gate, unless he or his vendor had made some specific bargain with the plaintiff to that effect; and that the doing of occasional repairs was not evidence of such bargain (*t*).

Rights respecting Fences, Boundaries and Party-walls.

All owners of lands adjoining and exposed to the inroads of the sea, or commissioners of sewers acting for a number of landowners, have a right to erect such works and defences as are necessary for the protection and preservation of their own land, even although they may be prejudicial to others by rendering it necessary for them to do the same (*u*). A tenant is obliged to preserve the boundaries of the land demised to him, and if he permit them to be destroyed, so that his landlord's land cannot be distinguished from his own, he shall either restore the land specifically, or give other land of equal value in lieu; such value to be ascertained and fixed by a commissioner appointed by the Court of Chancery (*x*); and the same obligation extends to cases where there are several co-lessees (*y*). A person has no right to undermine, either partially or wholly, a party-wall between his own

(*q*) *Cheetham* v. *Hampson*, 4 Term R. 319. As to the duty of railway companies to fence, see *Ricketts* v. *East and West India Docks Company*, 12 C. B. 160; *Manchester Railway Company* v. *Wallis*, 14 C. B. 213.

(*r*) *Whitfield* v. *Weedon*, 2 Chit. 685.

(*s*) *Churchill* v. *Evans*, 1 Taunt. 529.

(*t*) *Boyle* v. *Tamlyn*, 6 Barn. & Cres. 329; 9 Dowl. & Ryl. 430.

(*u*) *Rex* v. *Pagham* (*Commissioners*), 8 Barn. & Cres. 355; 2 Man. & Ryl. 468.

(*x*) *Att.-Gen.* v. *Fullerton*, 2 Ves. & Beam. 263.

(*y*) *Willis* v. *Parkinson*, 1 Swanst. 49.

house, which he has pulled down, and his neighbour's, unless it can be done without injury to his neighbour's house; even although it is doubtful whether the interests of the parties in the wall are several or whether they are tenants in common of it (z).

Waste and Destruction of Fences.

Although a tenant from year to year is not bound to put the premises into repair, he is not, on the other hand, at liberty to do any thing which amounts to waste, or to a breach of the rules of good husbandry; he is not, therefore, entitled to cut and sell hedgerows, or at least, not without making up the hedges and fences according to the course of good husbandry. If there be a quickset fence of white thorn, and the tenant stub it up or suffer it to be destroyed, this is destruction; but cutting up quicksets is not waste, if it preserves the spring (a).

SECT. 6.—*Trees and Timber.*

(a) *What is deemed Timber.*

What Description of Trees are Timber, under all Circumstances.

By the term *timber* is meant, it is said, such trees only as are fit to be used in building and repairing houses; thus oak, ash and elm trees are considered timber in all places, and under whatsoever circumstances they are grown.

What Trees are Timber by the Custom of the County.

Many descriptions of trees, which are not to be considered as timber in their nature, become so by the custom of the county where they grow, and are generally used for the purpose of building; thus it has been laid down that horse-chesnuts, limes, birch, beech, asp, walnut trees, and the like, may under such circumstances be deemed timber, and are therefore protected by the law as such. It has been determined that in the county of York birch trees are timber, because they are used in that county for building sheep-houses, cottages, and such mean buildings (b): and it would seem that in Hampshire, willows have been considered as timber by the custom of the county (c). Where beech is admitted to be timber by the custom of the county, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at twenty years' growth; and therefore upon an issue whether certain beech trees in the county of Bucks were or were not timber according to the custom of the county, the inquiry is confined to the nature of the wood and the period of its growth, whether of twenty years; and no evidence can be received to qualify its character of timber, by showing that it was not deemed to be such in the county, unless the tree contained ten feet of solid wood (d).

(z) *Bradbee* v. *The Governors of Christ's Hospital*, 4 Man. & Gran. 714; 2 Dowl. N. S. 164; 5 Scott, N. R. 79; see also post, Book III., Chap. V., Sect. 4, b.

(a) *Gage* v. *Smith*, Godb. 209.

(b) *Lady Cumberland's case*, Moor, 813.

(c) *Layfield* v. *Cooper*, 1 Wood, 330; *Gruffly* v. *Pindar*, Hob. 219.

(d) *Aubrey* v. *Fisher*, 10 East, 446; and see *Chandos (Duke)* v. *Talbot*, 2 P. Wms. 606.

When Pollards are Timber.

Although pollards have been said not to be timber (*e*), yet Lord King inclined to think them timber, provided their bodies were sound and good; and in an action to recover the value of pollards under the description of timber and timber-like trees, the plaintiff recovered a verdict (*f*).

(b) *Implied Rights as to Trees.*

In whom the Right to Trees is vested.

The property in trees is vested in the owner of the inheritance of the land upon which they grow; for the property in trees, or of that which is likely to become timber, is in the landlord, and the property in bushes in the tenant, even when they are cut down by a stranger (*g*); and it was laid down by Littledale, J., that if a tree grow near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown or planted (*h*). This decision overrules many ancient judgments, by which the parties in such a case were held to be tenants in common (*i*). A farmer who raises young fruit trees on the demised land, for filling up the lessor's orchards, is not entitled to sell them; but it is otherwise of a nurseryman by trade (*k*). Therefore a nurseryman, who has planted fruit trees in the way of his trade, may remove them, if not of larger growth than could be dealt with in his trade, even though they are producing fruit (*l*). A tenant, not a gardener, cannot remove a border of box planted on the demised premises by himself, unless by special agreement with his landlord (*m*).

In whom the Property of Windfalls vests.

Windfalls are the property of the lord; for the timber while standing is part of the inheritance: but whenever it is severed, either by the act of God, as by a tempest, or by a trespasser and by wrong, it belongs to him who has the first vested estate of inheritance, whether in fee or in tail, and he may bring trover for it. So where there are intermediate contingent estates of inheritance, and the timber is cut down by combination between the tenant for life and the person who has the next vested estate of inheritance; or if the tenant for life himself has such an estate and fells timber; in these cases the Court of Chancery will order it to be preserved for him who has the first contingent estate of inheritance under the settlement (*n*).

(c) *Express Contracts as to Trees.*

Construction of Covenants respecting Trees.

With respect to the construction which has been put upon express

(*e*) Plowd. 470.

(*f*) *Rabbett* v. *Raikes*, Suffolk Sum. Ass. 1803, cor. Macdonald, C. B.; and see *Channon* v. *Patch*, 5 Barn. & Cres. 893.

(*g*) *Berriman* v. *Peacock*, 9 Bing. 384; 2 Moore & Scott, 524.

(*h*) *Holder* v. *Coates*, Mood. & Malk. 112.

(*i*) *Waterman* v. *Soper*, 1 Ld. Raym. 737; *Masters* v. *Pollie*, 2 Roll. Rep. 141; *Anon.*, 2 Roll. Rep. 255.

(*k*) *Wyndham* v. *Way*, 4 Taunt. 316.

(*l*) *Wardell* v. *Usher*, 3 Scott, N. R. 508.

(*m*) *Empson* v. *Soden*, 4 Barn. & Adol. 655; 1 Nev. & Man. 720.

(*n*) *Bewick* v. *Wintfield*, 3 P. Wms. 268.

contracts relating to trees, the following decisions may be mentioned (*o*). A covenant to keep all the trees standing in an orchard, whole and undefaced, "reasonable use and wear only excepted," is not broken by cutting down trees past bearing, provided the landlord is likely to get back the premises at the end of the term in an improved condition (*p*); but a covenant to leave all the timber which is growing on the land when the lessee took it, is broken, if at the end of the term he cut it down, but leave it there, for that would be defeating the intent of the covenant, although a literal performance of it (*q*). A lease was granted of a farm, and quarries of stone thereon, with liberty to work the quarries; out of this demise were reserved timber saplings and underwood growing on the premises: there was a covenant not to commit waste by cutting down saplings or underwood: it was held, that the cutting down saplings and underwood for the necessary purpose of working a quarry on the premises, was no breach of the covenant, there being no excess of the right that it was intended the tenant should exercise (*r*). A covenant not to remove or grub up trees is broken by removing trees from one part of the premises to another: and so it is by taking away trees, even if the lessee plant a greater quantity than he takes away, unless those taken away were dead (*s*). Where there was a liberty in a lease, for the lessee to cut down and dispose of all timber and coppice, and also a proviso to give notice in writing to the lessor of his intention, that the latter might have the option of purchasing; and the lessee gave a bonâ fide notice, and the lessor disclaimed any intention of purchasing; it was held, that the lessee might afterwards proceed to cut down the whole, without giving a fresh notice, at such seasons as suited his convenience, even though the lessor had in the meantime parted with his interest to another (*t*). Where by agreement, dated 1656, between the lord and certain tenants of customary tenements within a manor, the tenants covenanted that they, their heirs or assigns, would not cut down, sell or dispose of any wood, standing or growing, or thereafter to stand or grow, without the license of the lord; and the lord covenanted to set out yearly, upon request of the tenants, sufficient for the repairing of their houses, &c., and other necessary uses in and about the said tenements, and that in case any of the tenants, their heirs or assigns, should plant any wood upon the said tenements, it should be lawful for them to cut down, use and dispose of all or any such wood for repairing their houses, &c., or for any other their necessary uses, without disturbance of the lord; it was held, that a defendant, who was a tenant of one of the customary tenements comprised in the agreement, was not enti-

(*o*) As to exceptions of trees, see ante, Book I., Chap. IV., Sect. 7, p. 101.
(*p*) *Doe* d. *Jones* v. *Crouch*, 2 Camp. 449.
(*q*) 1 Esp. N. P. 271.
(*r*) *Doe* d. *Rogers* v. *Price*, 8 C. B. R. 894.
(*s*) *Doe* d. *Wetherell* v. *Bird*, 6 Car. & Pay. 195.
(*t*) *Goodtitle* d. *Luxmore* v. *Saville*, 16 East, 87.

tled, without license of the lord, to cut down and sell wood, which had been planted on the tenement by a tenant since the agreement, and that having done so, the lord might maintain trover against her for the wood (*u*). Where the bailiff of a manor assigned to a tenant in April, pursuant to the terms of a lease, a tree for housebote, and was discharged in July, and the tenant cut down the tree in October; it was held to be a sufficient delivery; and that the tenant was entitled to fell the tree in October (*x*). Woods, which were excepted out of the lease, but subsequently granted by the lessor to the lessee, have been held not to pass by an assignment of the lease (*y*).

(d) *Waste as to Trees.*

For what Purpose Trees may be cut without Waste.

A tenant who is answerable for waste only, may cut down trees for the purposes of reparation without committing waste, either where the damage has accrued during the time of his being in possession, in the ordinary course of decay, or where the premises were ruinous at the time he entered; but if the decay happened by his default, to cut down trees to do the repair would be waste. And if a tenant, having cut down trees for reparations, sell them, and afterwards buy them again and employ them about necessary reparations, it is waste by the sale (*z*): so, although he cut for repairs, if upon turning out unfit they are exchanged for others which are so applied (*a*). But the tenant may not cut timber for repairs, which his lessor has covenanted to do (*b*). It is not waste for a tenant to cut timber for necessary botes (*c*). It is an inseparable incident to an estate-tail, that the tenant shall not be punishable for committing waste by felling timber: but this power must be exercised during the life of the tenant in tail, for at the instant of his death it ceases: if, therefore, a tenant in tail sell trees, growing on the land, the vendee must cut them down during the life of the tenant in tail; for otherwise they will descend to the heir, as parcel of the inheritance (*d*).

What Acts amount to Waste.

Cutting down, destroying or topping all trees which are timber, either by the general law, or by the particular custom of the country, is waste; so is the doing of any act which has the effect of causing a decay of the wood: and cutting down willows, beech, birch, asp, maple, or any trees of that description, which, though not timber, afford a defence or shelter for the house, has been considered destruction. Upon the same principle, cutting down or destroying fruit-trees, growing in the garden or orchard is waste; but if such trees grow upon any of the ground which the tenant holds out of the garden or orchard, it is

(*u*) *Blackett* (*Bart.*) v. *Lowes*, 2 Maule & Selw. 494.
(*x*) *Courtney* v. *Fisher*, 4 Bing. 3; 12 Moore, 39.
(*y*) Godb. 188.
(*z*) Co. Litt. 220.
(*a*) *Simmons* v. *Norton*, 7 Bing. 640; 5 Moore & Pay. 645.
(*b*) Com. Dig. Pleader, (3 O), 14.
(*c*) Com. Dig. Pleader, (3 O), 12. See post, Chap. VII., Sect. 1, (b).
(*d*) Cruise's Dig. tit. 2, C. I. s. 33.

not waste: and it has been laid down, that suffering the germins, or young shoots springing from trees which have been felled, to be destroyed, is waste: and that if it be done after previous waste in felling the trees, it is double waste (*e*). Cutting down willows and leaving the stools to shoot afresh, has been held not to be waste, unless they are a shelter to the house or a support to the bank of a stream (*f*). In most places tenants may cut all trees, whether timber or underwood, which have, under the denomination of seasonable wood or sylva cædua, been cut within twenty years, without being guilty of waste (*g*): and in some counties, especially in Kent, they are in the habit of cutting down wood as underwood, at six-and-twenty, eight-and-twenty or thirty years; and which, if allowed to grow, would become most valuable timber. If trees be excepted out of a demise, waste cannot be committed by cutting them down; and therefore ejectment cannot be brought as for waste committed in or upon the demised premises (*h*).

SECT. 7.—*Waste generally.*

(a) *What is Waste.*

Nature and Definition of Waste.

Cases that now come before the Courts in the shape of actions for non-repairs, used formerly to appear in the form of proceedings in an action of waste, which was a remedy given by the common law, and extended by the Statutes of Marlbridge, and of Gloucester. The action of waste was, however, taken away by the statute 3 & 4 Will. IV. c. 27, s. 36, an action on the case being now substituted. Waste, called in Latin vastum, is defined to be a spoil or destruction to houses, gardens, trees, or other corporeal hereditaments, to the disherison of him who has the remainder or reversion in fee-simple or fee-tail. Waste is either voluntary, which is a crime of commission,—as by pulling down a house; or it is permissive, which is a matter of omission only,—as by suffering it to fall for want of necessary reparations: both of which are equally injurious to him who has the inheritance (*i*).

What Acts constitute Waste.

Voluntary waste chiefly consists in felling timber trees (*k*); pulling down houses; opening mines or pits; changing the course of husbandry; and, lastly, destroying heirlooms (*l*). Whatever does a lasting damage, however, to the freehold or inheritance is waste; therefore, removing wainscots, floors, or other things once fixed to the freehold of a house, is waste; and if the windows be broken or carried away, it is waste, although they were glazed by the tenant himself, for the glass is part of the house. If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is not waste;

(*e*) F. N. B. 59.
(*f*) *Phillipps* v. *Smith*, 14 Mees. & Wels. 589.
(*g*) Godb. 4.
(*h*) *Goodright* d. *Peters* v. *Vivian*, 8 East, 190; *Doe* d. *Rogers* v. *Price*, 8 C. B. 894. See also the next section as to waste.
(*i*) Co. Lit. 53; Wood's Inst. 521.
(*k*) See the previous section.
(*l*) 1 Cruise's Dig. tit. 3, s. 14.

but if the house be uncovered by tempest, it is said that he must not repair it, even though there be no timber growing upon the ground, for the tenant must at his peril keep the house from waste. It has before been stated, that by the enactments of the statute 14 Geo. III. c. 78, s. 86, no action shall be prosecuted against any person in whose house, chamber, stable, barn or other building, or in whose estate any fire shall accidentally begun, and that there is a proviso in the act that nothing therein contained shall defeat any contract or agreement made between landlord and tenant: but that the enactment probably will not protect tenants from the consequence of fires caused by negligence (m). Waste may be done in houses by pulling them down, or suffering them to be uncovered, whereby the rafters or other timber of the house become rotten: but barely suffering them to be uncovered, without rotting the timber, is not waste: or if the house be uncovered when the tenant comes in, it is no waste to suffer it to fall down; although it would be otherwise if the tenant were to pull it down. If the tenant suffer the houses to be waste, and then fell down timber to repair the same, it is double waste (n).

What is Waste to Warrens, Parks, &c.

If the tenant of a dove house, warren, park, fish-pond or the like, take so many, that such sufficient store be not left as he found when he came in, it is waste: and to suffer the pale to decay, whereby the deer are dispersed, is waste. If the lessee of a warren by charter or prescription plough the land, it is waste; but it is otherwise if it be only land stored with conies, and not a legal warren; and stopping and digging coney-burrows is not waste in a warren (o).

Waste by digging Mines, &c.

Digging for gravel, lime, clay, brick-earth, stone or the like, or for mines of metal, coal or the like, hidden in the earth, and not open when the tenant came in, is waste; but the tenant may dig for gravel or clay for the reparation of the house, (though no pit were open at the time of the lease,) as well as he may take convenient timber trees. If the pit or mines were open before, it is no waste if the tenant continue to dig them for his own use; for it has become the mere annual profit of the land (p). The making and continuing a gravel-pit by a rector by order of magistrates under the highway acts, and omitting to stop the pit pursuant to the provisions of the act, does not amount to waste. But the digging and sale of the gravel under the above circumstances to private persons is an act of waste (q).

By not repairing Sea-walls, &c.

It is waste to suffer a wall of the sea to be in decay, so as by the flowing and re-flowing of the sea the meadow or marsh be surrounded, whereby it becomes unprofitable; but if it be surrounded suddenly by the rage or violence of the sea, as by tempest, without any default

(m) Ante, p. 436; 2 Black. Com. 281.
(n) Co. Litt. 53, n.
(o) Co. Litt. 53.
(p) 1 Wood's Inst. b. 2, c. 5, s. 41; 2 Black. Com. 282; Co. Litt. 53.
(q) *Huntley* v. *Russell*, 13 Queen's B. Rep. 572.

of the tenant, it is not waste: so if the tenant do not repair the banks or walls against rivers, or other waters, whereby the meadows or marshes be surrounded, and become rushy and unprofitable, it is waste.

By Changing the Nature of the Property.

Although it is a general principle, that the law will not allow that to be waste which is not in any way prejudicial to the inheritance; it has been held, that a tenant or lessee cannot change the nature of the thing demised: therefore, if the tenant convert arable land into wood, or è converso, or meadow into arable, it is waste; for it changes not only the course of husbandry, but creates a difficulty in the proof of the title (*r*); and this would appear to be the case even where the act is done according to the custom of the country, for the purpose of amelioration (*s*). The same rule is to be observed with regard to converting one species of edifice into another, even though it be thereby improved in its value: thus if a lessee convert a corn-mill into a fulling-mill, it is waste, though the conversion be to the lessor's advantage: so the conversion of a brewhouse of 120*l.* per annum, into other houses let for 200*l.* per annum, is waste; because of the alteration of the nature of the thing, and of the evidence: so if the tenant pull down a malt-mill and build a corn-mill, it is waste (*t*). But where a power of leasing was given, so that no clause should be contained in the lease, giving power to the lessee to commit waste, or exempting him from punishment for committing it; it was held, that a lease was good, though it contained a stipulation that the lessee should erect a new dwelling-house, with liberty to pull down some outbuildings, and to use the materials in erecting the house (*u*).

Construction of the Term "without Impeachment of Waste."

To prevent parties subject to waste from suffering by the ordinary common law liability, it is not unusual to insert a clause by which they are not to be subject to impeachment for waste. The intention of this clause is to enable the tenant to do many things—such as cutting down trees or opening new mines—which would by the construction of the common law amount to waste; but it does not extend to allow destructive or malicious waste—such as cutting down timber which serves for the shelter or ornament of the estate (*x*). The privilege thus given by the words "without impeachment of waste," is annexed to the privity of estate; so that if the person to whom that privilege is given changes his estate, he loses the privilege (*y*). A tenant for life "without impeachment of waste" has as full power to cut down trees and open new mines, for his own use, as if he had an estate of inheritance; and is in the same manner entitled to the timber, if severed by others (*z*): but the words "without impeachment of waste" will

(*r*) *London* (*City*) v. *Graeme*, Cro. Jac. 182.
(*s*) *Simmons* v. *Norton*, 7 Bing. 640; 5 Moore & Pay. 645.
(*t*) *Cole* v. *Green*, 1 Lev. 309; *S. C.* nom. *Cole* v. *Forth*, 1 Mod. 95.
(*u*) *Doe* d. *Egremont* (*Lord*) v. *Stephens*, 6 Queen's B. Rep. 208.
(*x*) *Packington's case*, 3 Atk. 215.
(*y*) Co. Litt. 220, n. 1; 3 Wood, 399.
(*z*) *Pyne* v. *Dor*, 1 Term Rep. 54.

not permit a tenant for life to unlead a house and pull down the tiles (*a*).

(b) *Persons committing Waste.*

What Tenants are liable to Proceedings for Waste.

All tenants merely for life, or for any less estate, are punishable, or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste. A tenant in tail, after possibility of issue extinct, is not impeachable for waste, because his estate was, at its creation, an estate of inheritance, and so is not within the statutes (*b*). A tenant at will has no power to commit any kind of *voluntary* waste; and, although not being within the Statute of Gloucester, no action of waste would formerly lie against him if he committed waste, the lessor might have had an action of trespass against him: with respect to permissive waste, no remedy whatever lies against him, for he is not bound to repair or sustain houses like a tenant for years (*c*). Some recent decisions have made it doubtful, whether an action in the nature of waste, for permissive waste, can be maintained against tenants for years (*d*); but the better opinion seems to be, that the action is maintainable against all, except tenants from year to year, and strict tenants at will (*e*). It seems to be somewhat doubtful whether a tenant by curtesy or in dower is within the Statute of Gloucester (*f*).

(c) *License to commit Waste.*

License to commit Waste.

A tenant for life, dispunishable for waste, had power to lease for twenty-one years certain ancient pasture land, which she afterwards, and before any lease, had converted into garden allotments in a manner amounting to waste: the leasing power provided against "any fine, premium or profit being taken for the making thereof," and that "none of the lessees should be by any clause or words therein contained authorized to commit waste, or excepted from punishment for waste:" in a lease reciting this power, the tenant for life demised on the 13th December, 1845, the premises for twenty-one years, from the 1st July last, reserving a rent payable half-yearly on the 1st January, the first payment to be made on the 1st January, 1846: the lease contained a covenant by the lessee not to break up any of the pasture land demised, "except for the purpose of carrying out the allotment system" introduced by the tenant for life; it was held, that

(*a*) *Vane* v. *Barnard* (*Lord*), 1 Term Rep. 56, n.; 2 Vern. 738.

(*b*) *Williams* v. *Williams*, 12 East, 209.

(*c*) Cruise's Dig. tit. 9, s. 13; 1 Inst. 57 a; 3 Co. Rep. 13 b; *Harnett* v. *Maitland*, 16 Mees. & Wels. 257; 4 Dow. & Low. 545. See also ante, p. 434.

(*d*) *Gibson* v. *Wells*, 1 New Rep. 290; *Herne* v. *Benbow*, 4 Taunt. 764; *Jones* v. *Hill*, 7 Taunt. 392; 1 Moore, 100; *Martin* v. *Gilham*, 7 Ad. & El. 540; 2 Nev. & Per. 568.

(*e*) See Amos and Ferard on Fixtures, 279, n. 2nd ed., and authorities there cited; and *Harnett* v. *Maitland*, 16 Mees. & Wels. 257; 4 Dow. & Low. 545. See also post, Book III., Chap. V., Sect. 5.

(*f*) 1 Inst. 57 a, note; 1 Cruise's Dig. VI. c. 3, s. 39.

the exception in the consent did not amount to a license or authority to the lessee to commit waste by carrying out the allotment system; and that if any implication could be made so as to construe that exception as implying a permission to the lessee to do anything, it could not be inferred that it permitted him to do more than to carry out the allotment system during the life of the tenant for life, so far as she had power to permit it, and not otherwise: and, it would seem, such an exception introduced into a covenant not to commit waste, even if it amounted to an implied authority to commit waste, is not a "special license had by writing of covenant" within the meaning of the Statute of Marlbridge, 52 Hen. III. c. 23 (*g*).

(d) *Remedies for Waste.*

Actions at Common Law.

An action on the case, in the nature of waste, is now a common remedy for waste, the old action of waste being, by the statute 3 & 4 Will. IV. c. 27, s. 36, abolished. Where the tenant holds under a deed, an action on the case is sometimes a concurrent remedy with an action of covenant; and the lessor has his election to bring either action (*h*). So where a tenant does not hold by deed, assumpsit will often lie on the express or implied promise to use and keep the premises in a tenantlike manner (*i*). If an assignee of a lease commit waste, the landlord may sue him in covenant or in a special action on the case, but not in assumpsit (*k*).

Injunction from Chancery to restrain Waste.

Besides the action on the case in the nature of waste, the party to whom the reversion belongs may apply to the Court of Chancery for an injunction against any act of *commissive* waste which is contemplated. This remedy is ordinarily the most efficient which can be adopted, as it prevents that injury, which, by the other remedies, can only be compensated for after it is done. The particular cases, to which the remedy by injunction may be applied, will be stated hereafter (*l*).

SECT. 8.—*Fixtures.*

(a) *Generally.*

General Rule of Law upon the subject of Fixtures.

The general rule of law respecting fixtures, so far as the relation of landlord and tenant is concerned, is that whatever is fixed to the freehold becomes a part of it, and is subjected to the same rights of property as the land itself; and most of the difficulty which has arisen upon the subject will be found to have proceeded from the general

(*g*) *Doe* d. *Hopkinson* v. *Ferrand*, 20 L. J., C. P., 202.

(*h*) *Kinlyside* v. *Thornton*, 2 W. Black. 1111; *Marker* v. *Kenrick*, 13 C. B. 188; Amos and Ferard on Fixtures, 277, &c.

(*i*) See post, Book III., Chap. IV., Sect. 1, (c).

(*k*) *Torriano* v. *Young*, 6 Car. & Pay. 8. See further on this subject, post, Book III., Chap. V., Sect. 5; and 1 Chit. Plead. 157, 7th ed.

(*l*) Post, Book III., Chap. X., Sect. 4, (a).

rule having been preserved, though its acknowledged injurious effects have induced the courts to avoid it, whenever possible, by subtle and numerous distinctions. Thus the courts have affirmed that the exceptions from the rule have a different extent, in the different cases of landlord and tenant, executor of tenant for life or in tail, and remainder-man or reversioner, and executor of tenant in fee and the heir; and yet, as has been remarked (*m*), the limits within which the privilege of these parties are respectively confined are nowhere pointed out; neither have any satisfactory reasons been assigned by the courts for the distinctions thus laid down, from a consideration of which the rights of these several classes of individuals might be inferred. The intricacy indeed of the doctrine, and the uncertainty as to the law upon almost every point that arises concerning fixtures, which necessarily must exist where each case is professedly decided according to its own particular circumstances, and where a general principle is held up only to be departed from, will justify the animadversion of the same writers—that it is a reflection upon the jurisprudence of the country, that a rule of law, which is productive of so much inconvenience to the public, should have no better foundation than the motives of feudal policy.

Rule as applicable to Cases of Landlord and Tenant.

The term fixtures, in its more general signification, means those personal chattels which are let into and annexed to the soil, or affixed to the freehold; and this definition appears sufficiently accurate for the questions that arise between landlord and tenant as to the power of moving them when once annexed. If the chattels be not let into the soil, they are not fixtures at all, and may be removed at will like any other species of personal property, and a branch of numerous decisions points out what is considered a sufficient annexation to the soil (*n*). When the chattel is perfectly connected with the freehold, either by being let into the earth itself, or by being cemented, or otherwise united to some erection previously attached to the ground, the question then arises, in what cases the tenant may remove such fixtures, and in what not. The general rule as to annexations made by a tenant during the continuance of his term is the following:—whenever he has affixed any thing to the demised premises during his term, he can never again sever it without the consent of his landlord; the property; by being annexed to the land, immediately belongs to the freeholder; and the tenant, by making it a part of the freehold, is considered to abandon all future right to it, so that it would be waste in him to remove it afterwards: it therefore falls in with his term, and comes to the reversioner as part of the land (*o*). It should, however,

(*m*) In Amos and Ferard on Fixtures, Introd. xxix. 2nd edit. As the questions which arise between parties in the two latter cases do not fall within the limits of this treatise, the reader is referred, for a fuller examination of the principles on which such cases are decided, to the work on Fixtures, by Messrs. Amos and Ferard, where the subject is very fully and ably treated. See 14 & 15 Vict. c. 25.

(*n*) *Elwes* v. *Maw*, 3 East, 38; *Wansborough* v. *Maton*, 4 Ad. & El. 884; 2 Har. & Wol. 37; 6 Nev. & Man. 367.

(*o*) Co. Litt. 53 a; *Herlakenden's case*, 4

on the outset be remarked, that a tenant may in all cases so construct any erections he may make, that they shall not become affixed to the freehold: thus, if he erect even buildings—as barns, granaries, sheds and mills—upon blocks, rollers, pattens, pillars or plates, resting on brickwork, they may be removed, although they have sunk into the ground by their own weight (*p*); for unless they be affixed to the freehold, by being let into it, or are by means of nails, mortar, or the like, united to it, they remain merely moveable chattels. *B.*, a lessor, sent by his agent the following letter to his tenant:—"Mr. *B.* has no objection to your leaving the fixtures on the premises, and making the best terms with the incoming tenant;" it was held, that this document, if it gave a license at all, gave one coupled with an interest in land; and that, therefore, not being under seal, it could not be enforced against the incoming tenant (*q*).

The Exceptions to the Rule in favour of Tenants.

The exceptions which have been made to this rule may be considered—as in favour of trade—as applicable to fixtures for agricultural purposes—and as applicable to fixtures for ornament or convenience. Each of these exceptions will be treated separately, after first premising, that, with respect to the description of fixtures a tenant may remove, there is no distinction whether he be a lessee for life, for years, or merely a tenant from year to year; or whether he hold by a lease under seal, by written contract not under seal, or by parol demise. Where, at the time of making a demise, nothing is said respecting the fixed articles belonging to the premises, the tenant will be entitled to the use of them during his tenancy as part of the demise; and the landlord cannot afterwards remove them, or insist upon their being valued and paid for.

(b) *Fixtures for Purposes of Trade.*

General Nature of the Exception in favour of Trade.

It is difficult to state with anything like proper accuracy and certainty, the precise extent of the exception in favour of the removal of fixtures put up for the purposes of trade, so as to afford a guide, in all cases, as to the removal of such trade erections as between landlord and tenant. Whenever the following circumstances concur, however, it may be confidently pronounced, that there the tenant may safely

Co. Rep. 64; *Elwes* v. *Maw*, 3 East, 51; Amos and Ferard on Fixtures, 19. As several of the decisions, from which are deduced the rights of landlord and tenant, with regard to fixtures, will be observed to have taken place on claims between other parties—as between the executors of tenant for life and the remainder-man—it is necessary to premise, that the privilege of removing fixtures is construed more liberally in the case of a tenant against his landlord, than in the case of a tenant for life or in tail; *Haycraft* v. *Creasy*, 2 East, 91; *Elwes* v. *Maw*, 3 East, 38; and hence the decision in the latter cases may, in general, be applied to cases between landlord and tenant, and are to be considered as governing authorities in support of the tenant's rights; Amos and Ferard, 28; *Dudley* (*Lord*) v. *Warde*, Bull. N. P. 34; Ambl. 114. The case of *Lawton* v. *Salmon*, 1 H. Black. 259, n., shows how much stricter the rule of law is with regard to questions between heirs and executors as to fixtures, than between landlord and tenant.

(*p*) *Huntley* v. *Russell*, 13 Queen's B. Rep. 572.

(*q*) *Ruffey* v. *Henderson*, 21 Law J., Q. B., 49.

remove the article: thus things which a tenant has fixed to the freehold for the purposes of trade or manufacture may be taken away by him whenever the removal is not contrary to any prevailing practice; where the articles can be removed without causing material injury to the estate; and where in themselves they were of a perfect chattel nature before they were put up, or at least have in substance that character independently of their union with the soil—or, in other words, where they may be removed without being entirely demolished or losing their essential character or value (*r*). A more comprehensive description is to be found in the judgment of the Court of Exchequer, in *Hellawell* v. *Eastwood* (*s*), where it is laid down that the question whether a machine for the purpose of manufacture, when fixed, is parcel of the freehold, "is a question of fact depending on the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed integrè salvè et commodè or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, perpetui usus causâ; or in that of the Year Book, 'pour un profit del inheritance' (20 Hen. VII. 13); or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel." The following leading cases on the subject will be found useful.

Decisions upon the Subject of Trade Fixtures, *Penton* v. *Robart*.

One of the best authorities, perhaps, is the case of *Penton* v. *Robart* (*t*), in which it was held, that though a building may be raised on a brick foundation, and have a brick chimney, yet that where the erection on such foundation is of wood, and the building used for the purpose of trade or manufacture, the tenant may remove it at the end of his term. The circumstances of that case were these; an action of trespass having been brought by the landlord against his tenant for breaking and entering, &c. and pulling down and taking away certain buildings, the defendant, as to breaking and entering, suffered judgment by default, and pleaded not guilty as to the rest; and under that plea showed that the building taken away, which was of wood, was erected by him as tenant of the premises, on a foundation of brick, for the purpose of carrying on his trade; and that he still continued in possession of the premises at the time when, &c., though the term had then expired. At the trial Lord Kenyon observed, "that the mere erection of a chimney would not prevent the right of taking away the rest of the building which surrounded it, where the trade was carried on; for in *Dudley* v. *Ward* (*u*) a steam-engine, to which a chimney

(*r*) Amos and Ferard on Fixtures, 48, 2nd ed.

(*s*) 6 Exch. Rep. 312.

(*t*) 2 East, 88; 4 Esp. 33.

(*u*) Bull. N. P. 34; Ambl. 114.

necessarily belonged, was held to be removable; and modern determinations have, for the benefit of trade, allowed many things to be removed, which the rigour of former decisions, considering them as fixed to the freehold, prohibited; the case of the cider-mill is familiar to us all; the construction ought to be favourable to the tenant, and my opinion is, that he was warranted in removing the building in question; but I will reserve the point." Upon the case being argued afterwards, his Lordship, in giving the judgment of the Court of King's Bench, said, "the old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier; but in modern times the leaning has always been the other way, in favour of the tenant, in support of the interests of trade, which is become the pillar of the state. What tenant will lay out his money in costly improvement of the land, if he must leave every thing behind him which can be said to be annexed to it? Shall it be said, that the great gardeners and nurserymen in the neighbourhood of the metropolis, who expend thousands of pounds in the erection of greenhouses, hothouses, &c., are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade? If it were otherwise, the very object of their holding would be defeated. This is a description of property divided from the realty; and some of the cases have even gone further in favour of the executor of tenant for life against the remainderman, between whom the rule has been holden stricter; for it has been determined that the executor of tenant for life was entitled to take away the fire-engine of a colliery. The case of *Fitzherbert* v. *Shaw* (*x*) turned upon the construction of an agreement that such things should be left on the premises, and decided nothing against the general principle. Here the defendant did no more than he had a right to do; he was, in fact, still in possession of the premises at the time the things were taken away, and therefore there is no pretence to say that he had abandoned them." Lawrence, J., also said, "It is admitted that the defendant has a right to take these things away during the term; and all that he admits upon this record against himself by suffering judgment to go by default as to the breaking and entering is, that he was a trespasser in coming upon the land, but not a trespasser de bonis asportatis; as to so much therefore he is entitled to judgment." The following case illustrates the want of certainty that exists on the subject of fixtures:—A lessor, by indenture, demised to the plaintiff an

(*x*) 1 H. Black. 258. In that case the purchaser of lands, &c. having brought an ejectment against the tenant from year to year, the parties entered into an agreement that judgment should be signed for the plaintiff, with a stay of execution till a given period; it was held, that the tenant could not in the interval remove buildings, &c. from the premises which he had himself erected during his term, and before the action was brought.

unfurnished messuage for the term of ninety-seven years. The indenture contained a covenant by the plaintiff, that, at the expiration of the term, he would deliver up the demised premises unto the lessor, "together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot-paces, slabs and other fixtures and articles *in the nature of fixtures*, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging." The plaintiff took possession of and completed the messuage, and fitted it up with things necessary for carrying on the business of a tavern keeper and licensed victualler, and for that purpose put in the premises certain fixtures of the description called and known as trade and tenant's fixtures. The defendant afterwards contracted with the plaintiff to purchase from him an under-lease of the premises and the good-will, and also the furniture, fixtures, stock in trade, &c. at a valuation. In pursuance of this contract the plaintiff executed to the defendant an under-lease, which contained a covenant on the part of the defendant in the same words as the above covenant by the plaintiff in his lease; it was held, by Parke, B., that under the above covenants the plaintiff had no right to sell, and consequently the defendant could not remove either the tenant's or the trade fixtures; by Platt, B., that the covenants did not apply to either description of fixtures; and by Martin, B., that the covenants applied to the tenant's fixtures only, and not to the trade fixtures (*y*). Where trustees seised under a devise in fee of a farm, leased to defendant, one of themselves, for a term, and afterwards, in the character of trustees only, conveyed the land to plaintiff in fee, with all fixtures; it was held, that defendant, being a party to the conveyance, could not, after the conveyance, under the general law or custom of the country, remove at the expiration of his term farm machinery annexed to the land, and that he was therefore liable to plaintiff, who had demised to *M.*, in case for injury to the reversion, for removing staddles built into the land for the purpose of supporting ricks, and a threshing machine attached by bolts and screws to pillars fixed in the land, assuming that he might have removed them if they had been placed there by himself, and he had not joined in the conveyance; that a granary resting by its mere weight on staddles built into the land was a chattel, and would not be a fixture in the ordinary sense of the word, though it might pass by that word if, from the rest of the conveyance, an intention appeared of comprehending farm machinery in general: but that, even then, plaintiff could not recover against defendant for carrying it away, either as for an injury to the reversion in the land, the chattel not being part of such reversion, or in trover, *M.* being entitled to the exclusive possession of the chattel (*z*).

(*y*) *Elliott* v. *Bishop*, 10 Exch. Rep. 496. (*z*) *Wiltshear* v. *Cottrell*, 1 El. & Bl. 674.

Other Decisions.

The principle of favour being shown to buildings erected for the purposes of trade, has been extended to many buildings which come by no means strictly under the term; thus in the famous case of the cider-mill, although the mill was put up in part for the enjoyment of the real estate, yet as the making of cider was a species of trade, the mill was considered to fall within the general exception in favour of trade fixtures (*a*). So in the case of fire-engines and steam-engines in collieries (*b*), it was held that the getting and vending the coals so far partook of the nature of a trade, that the engines employed in the collieries might be deemed trading erections. It has, however, been held, that the machinery of a mill is part of the freehold, and cannot be legally removed by the tenant; and, accordingly, where mill-machinery and a mill were demised to a tenant for a term, and he severed the machinery from the mill without the consent of his landlord, and it was afterwards seized by the sheriff under a fi. fa. and sold by him; it was held, that no property passed to the buyer under such sale (*c*). So the screwing of a stocking-frame to the floor to keep it steady will not make it a fixture (*d*). Whether machines, when fixed, are parcel of the freehold, is a question of fact depending on the circumstances of each case (*e*). In *Duck* v. *Braddyll* (*f*), it was doubted whether machinery fixed by bolts to the floor of a factory was distrainable for rent. But it has been since held, that cotton-spinning machines, called "mules," some of which were fixed by screws to the wooden floor, and some by screws which had been sunk into holes in the stone flooring and secured by molten lead, were distrainable (*g*). And it would seem that lime-kilns erected for the purposes of trade, during the continuance of a lease by indenture, containing a general covenant to repair, cannot be removed by the tenant (*h*). And where *A.*, being seised in fee of a close on which a windmill was erected, mortgaged the close to *B.* for 1000 years, and in the same deed there was a conveyance by bargain and sale of the mill to him in fee; the mill was built of wood, removable at pleasure, and fixed to brick-work which was let into the ground; it was held, that the mill could not be taken in execution under a fi. fa. sued out against *A.* by one of his creditors, although he continued in possession, and carried on his trade therein (*i*). So where a windmill was of wood and had a foundation of brick, but the wood-work was not inserted into the brick foundation, but rested upon it by its own weight alone, and no part

(*a*) *Lawton* v. *Lawton*, 3 Atk. 14.

(*b*) *Lawton* v. *Lawton*, 3 Atk. 14; *Dudley (Lord)* v. *Warde*, Ambl. 114; Bull. N. P. 34; *Minshall* v. *Lloyd*, 2 Mees. & Wels. 450; Mur. & Hurl. 125.

(*c*) *Farrant* v. *Thompson*, 5 Barn. & Ald. 826; 2 Dowl. & Ryl. 1; 3 Stark. 130; see also *Rufford* v. *Bishop*, 5 Russ. 346.

(*d*) *Trappes* v. *Harter*, 2 Cr. & Mee. 177.

(*e*) See the rule as laid down in *Hellawell* v. *Eastwood*, 6 Exch. 312; ante, p. 468.

(*f*) M'Clel. 217; 13 Price, 455; see also *Hubbard* v. *Bagshaw*, 4 Sim. 326.

(*g*) *Hellawell* v. *Eastwood*, supra, and p. 468.

(*h*) *Thresher* v. *East London Waterworks (Proprietors)*, 2 Barn. & Cres. 608; 4 Dowl. & Ryl. 62.

(*i*) *Steward* v. *Lombe*, 1 Brod. & Bing. 506; 3 Moore, 281.

of the machinery of the mill touched the ground, or any part of the foundation, it was held that the mill was not affixed to the freehold (*j*): but stills set in brick-work were considered as being fixed to the freehold, though vats supported by and resting upon brick-work and timber, but not fixed in the ground, were not (*k*). Iron salt-pans, fixed with mortar to a brick floor, with furnaces under them, may be removed by the lessees of salt springs (*l*): but where a lessee of salt springs was to pay rent according to the number of pans, and he covenanted to deliver up all *works* erected or to be erected at the end of the term, it was held, that he could not remove iron salt-pans, though merely resting on brick-work, and having iron rings in their sides, by which they were occasionally lifted up to be repaired (*m*). Fixtures demised with a paper-mill, and used by the tenant in the manufacture of paper, are not liable to be seized under an extent for duties, under the statute 34 Geo. III. c. 20, s. 27, as utensils for the making of paper in his custody (*n*). Where certain parts of a machine had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant; it was held, that these were the goods and chattels of the outgoing tenant, for which he might maintain trover (*o*). A chattel, as a fender in a mill-stream, placed by its owner on another's soil, but not fixed to it, does not necessarily become the property of that person; but it depends on all the circumstances of the case whether the original owner has a right to take it away again (*p*).

Summary of Trade Fixtures which may be removed.

It appears from the foregoing statement, that a tenant may remove things which he has himself affixed to the premises for the purpose of trade and manufacture. This has been expressly decided to extend to furnaces, coppers, brewing vessels, fixed vats, salt-pans, and the like; to machinery in breweries, collieries, and mills—such as steam-engines, cider-mills, and the like; to buildings for trade—as a varnish house built on plates laid on brick-work, and a shed, called a Dutch barn, formed of uprights rising from a foundation of brick. It has not, however, been expressly laid down, that a tenant may remove

(*j*) *Rex* v. *Otley*, 1 Barn. & Adol. 161; and see *Rex* v. *Londonthorpe*, 6 Term Rep. 377.

(*k*) *Horn* v. *Baker*, 9 East, 215; but see *Trappes* v. *Harter*, 2 Cromp. & Mees. 153; 3 Tyr. 603.

(*l*) *Lawton* v. *Salmon*, 1 H. Black. 259, n.

(*m*) *Mansfield* (*Earl*) v. *Blackburn*, 6 Bing. N. C. 426; 8 Scott, 720.

(*n*) *Att.-Gen.* v. *Gibbs*, 3 You. & Jerv. 333.

(*o*) *Davis* v. *Jones*, 2 Barn. & Ald. 165; see also *Sunderland* v. *Newton*, 3 Sim. 450. By a mortgage of a mill, the stones, tackling and implements pass to the mortgagee; *Place* v. *Fagg*, 4 Man. & Ryl. 277; see also *Ex parte Wilson*, 4 Dea. & Chit. 143; 2 Mont. & Ayr. 61; *Ex parte Lloyd*, 3 Dea. & Chit. 765; 1 Mont. & Ayr. 494; *Ex parte Quincey*, 1 Atk. 477; *Ex parte Belcher*, 4 Dea. & Chit. 703; 2 Mont. & Ayr. 160; *Ex parte Broadwood*, 1 Mont. Deac. & De G. 631; *Ex parte Scarth*, ibid. 240; *Ex parte King*, ibid. 119; *Ex parte Reynal*, 2 Mont. Deac & De G. 443; *Fletcher* v. *Manning*, 1 Car. & Kir. 350; *Ex parte Price*, 2 Mont. Deac. & De G. 518; *Ex parte Bentley*, ibid. 591; *Ex parte Heathcote*, ibid. 711; *Ex parte Cotton*, ibid. 725.

(*p*) *Wood* v. *Hewett*, 8 Queen's B. Rep. 913.

substantial and extensive additions to the premises, although he has built them exclusively for the convenience of trade—such as lime, pottery, or brick-kilns, wind or water-mills, work-shops, store-houses, furnaces, and flues of smelting and glass-houses, stoves and floors of smelting-houses, and other erections of the like description (*q*). A reversionary interest in trade fixtures will pass to a purchaser under a parol agreement (*r*).

(c) *Fixtures for Agricultural Purposes.*

Extent of the Tenant's Right to remove Agricultural Fixtures.

With regard to the removal by the tenant of things set up for agricultural purposes, it has been decided that the privilege established in favour of tenants in trade does not extend to agricultural tenants, so as to entitle them to remove things which they have erected for the purposes of husbandry; even though the premises be left in exactly the same state as upon the tenant's entry. The immediate point decided in the celebrated case of *Elwes* v. *Maw* (*s*) was, that a tenant

(*q*) See further, Amos and Ferard on Fixtures, 339, 2nd ed.

(*r*) *Petrie* v. *Dawson*, 2 Car. & Kir. 138.

(*s*) 3 East, 38. The importance of the decision requires the whole of the judgment delivered to be stated; which judgment, as it is intrinsically opposed to the liberal construction usually put upon cases of this nature, it is singular enough has received more praise perhaps than any other individual case. The following is the celebrated judgment of Lord Ellenborough:—"Questions respecting the right to what are ordinarily called fixtures principally arise between three classes of persons. 1st. Between different descriptions of representatives of the same owner of the inheritance, viz. between his heir and executor: in this first case, i. e. as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto. 2ndly. Between the executors of tenant for life or in tail, and the remainderman or reversioner; in which case the right of fixtures is considered more favourably for executors than in the preceding case between heir and executor. The 3rd case, and that in which the greatest latitude and indulgence have always been allowed in favour of the claim to having any particular articles considered as personal chattels, as against the claim in respect of freehold or inheritance, is the case between landlord and tenant. The general rule on this subject is that which obtains between heir and executor; and that rule (as found in the Year Book, 17 Edw. II. p. 518, and laid down at the close of *Herlakenden's case*, 4 Co. Rep. 64, and Co. Litt. 53, in *Cooke* v. *Humphrey*, Moor, 177, and in *Lord Darby* v. *Asquith*, Hob. 234, and in other cases), is that where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, it is waste; but this rule at a very early period had several exceptions attempted to be engrafted upon it, and which were at last effectually engrafted upon it, in favour of trade, and of those vessels and utensils which are immediately subservient to the purposes of trade. In the Year Book, 42 Edw. III. 6, the right of the tenant to remove a furnace, erected by him during his term, is doubted and adjourned; in the Year Book of the 20 Hen. VII. 13, a and b, which was a case of trespass against executors for removing a furnace fixed with mortar by their testator, and annexed to the freehold, and which was holden to be wrongfully done, it is laid down, that 'if a lessee for years make a furnace for his advantage, or a dyer make his vats or vessels to occupy his occupation during his term, he may remove them; but if he suffer them to be fixed to the earth after the term, then they belong to the lessor; and so of a baker; and it is not waste to remove such things within the term by some, and this shall be against the opinions aforesaid:' but the rule in this extent in favour of tenants is doubted afterwards in 21 Hen. VII. 27, and narrowed there, by allowing that the lessee for years could only remove within the term things fixed to the ground, and not to the walls of the principal building. However, in process of time, the rule in favour of the right in the tenant to remove utensils set up in relation to trade became fully established; and accordingly we find Lord Holt, in *Poole's case*, Salk. 368, laying down (in the instance of a soap-boiler, an under-tenant, whose vats, coppers, &c. fixed had been taken in execution, and on which account the first lessee had brought an action against the sheriff), that during the term the soap-boiler might well remove the vats he set up in relation to trade; and that he might do it by common law, and not by virtue of any

in agriculture, who erected at his own expense, and for the more necessary and convenient occupation of his farm, a beast-house, car-

special custom in favour of trade, and to encourage industry; but that after the term they became a gift in law to him in reversion, and were not removable: he adds, that there was a difference between what the soap-boiler did to carry on his trade and what he did to complete his house, as hearths and chimney-pieces, which he held not removable. The indulgence in favour of the tenant for years during the term has been since carried further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like; *Beck* v. *Rebow*, 1 P. Wms. 94; *Ex parte Quincey*, 1 Atk. 477; and *Lawton* v. *Lawton*, 3 Atk. 13; but no adjudged case has yet gone the length of establishing that buildings subservient to purposes of agriculture, as distinguished from those of trade, have been removable by an executor of tenant for life, nor by the tenant himself who built them during his term.

"In deciding whether a particular fixed instrument, machine, or even building, should be considered as removable by the executor, as between him and the heir, the court in the three principal cases on this subject (viz. 3 Atk. 13; Ambler, 113; and 1 H. Black. 259, n.) may be considered as having decided mainly on this ground, that where the fixed instrument, engine or utensil (and the building covering the same falls within the same principle) was an accessory to a matter of a personal nature, that it should be itself considered as personalty. The fire engine in 3 Atk. and Ambler was an accessory to the carrying on the trade of getting and vending coals; a matter of a personal nature. Lord Hardwicke says, in the case in Ambler, 'A colliery is not only an enjoyment of the estate, but in part carrying on a trade.' And in the case in 3 Atk. he says, 'One reason that weighs with me is its being a mixed case, between enjoying the profits of the lands and carrying on a species of trade; and considering it in this light, it comes very near the instances in brewhouses, &c. of furnaces and coppers.' Upon the same principle, Lord C. B. Comyns may be considered as having decided the case of the cider-mill; i. e. as a mixed case between enjoying the profits of the land, and carrying on a species of trade; and as considering the cider-mill as properly an accessory to the trade of making cider.

"In the case of the salt-pans, Lord Mansfield does not seem to have considered them as accessory to the carrying on a trade, but as merely the means of enjoying the benefit of the inheritance. He says, 'the salt-spring is a valuable inheritance, but no profit arises from it unless there be a salt-work; which consists of a building, &c. for the purpose of containing the pans, &c. which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance.' Upon this principle he considered them as belonging to the heir, as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor as the means or instrument of carrying on a trade. If, however, he had even considered them as belonging to the executor, as utensils of trade, or as being removable by the tenant, on the ground of their being such utensils of trade, still it would not have affected the question now before the court, which is the right of a tenant for mere agricultural purposes to remove buildings fixed to the freehold, which were constructed by him for the ordinary purposes of husbandry, and connected with no description of trade whatsoever; and to which description of buildings no case (except the Nisi Prius case of *Dean* and *Allaly*, 3 Esp. 11, before Lord Kenyon, and which did not undergo the subsequent review of himself and the rest of the court) has yet extended the indulgence allowed to tenants in respect to buildings for the purposes of trade. In the case in Bull. N. P. 34, of *Culling* v. *Tuffnell*, before Lord C. J. Treby, at Nisi Prius, he is stated to have held that the tenant who had erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground, might by the custom of the country take them away at the end of his term. To be sure he might, and that without any custom; for the terms of the statement exclude them from being considered as fixtures; 'they were not fixed in or to the ground.' In the case of *Fitzherbert* v. *Shaw*, 1 H. Black. 258, we have only the opinion of a very learned judge indeed, Mr. J. Gould, of what would have been the right of the tenant, as to the taking away a shed built on brick-work, and some posts and rails which he had erected, if the tenant had done so during the term; but as the term was put an end to by the new contract, the question, what the tenant could have done in virtue of his right under the old term, if it had continued, could never have come judicially before him at Nisi Prius; and when that question was offered to be argued in the court above, the counsel were stopped, as the question was excluded by the new agreement. As to the case of *Penton* v. *Robart*, 2 East, 88, it was the case of a varnish-house, with a brick foundation let into the ground, of which the wood-work had been removed from another place, where the defendant had carried on his trade with it. It was a building for the purpose of trade; and the tenant was entitled to the same indulgence in that case, which, in the cases already considered, had

penter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, could not remove the same, even during his term, and although he thereby left the premises in the same state as when he

been allowed to other buildings for the purposes of trade, as furnaces, vats, coppers, engines, and the like. And though Lord Kenyon, after putting the case upon the ground of the leaning, which obtains in modern times, in favour of the interests of trade, upon which ground it might be properly supported, goes further, and extends the indulgence of the law to the erection of greenhouses and hothouses by nurserymen, and indeed by implication to buildings by all other tenants of lands; there certainly exists no decided case, and, I believe, no recognized opinion or practice on either side of Westminster Hall, to warrant such an extension. The Nisi Prius case of *Dean* v. *Allaly*, 3 Esp. 11, is a case of the erection and removal by the tenant of two sheds, called Dutch barns, which were, I will assume, unquestionably fixtures. Lord Kenyon says, 'The law will make the most favourable construction for the tenant, where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been so holden in the case of cider-mills and other cases; and I shall not narrow the law, but hold erections of this sort made for the benefit of trade, or constructed as the present, to be removable at the end of the term.' Lord Kenyon here uniformly mentions the benefit of trade, as if it were a building subservient to some purposes of trade; and never mentions agriculture, for the purposes of which it was erected. He certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming were, or rather ought to be, governed by the same rules which had been so long judicially holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always put and recognized as a known allowed exception from the general rule, which obtains as to other buildings; and the circumstances of its being so treated and considered establishes the existence of the general rule to which it is considered as an exception. To hold otherwise, and to extend the rule in favour of tenants in the latitude contended for by the defendants, would be, as appears to me, to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants. But its danger or probable mischief is not so properly a consideration for a court of law, as whether the adoption of such a doctrine would be an innovation at all; and being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case."

The Nisi Prius case of *Dean* v. *Allaly*, noticed by Lord Ellenborough in the above judgment, is the following:—In an action of covenant brought by the plaintiff against the defendant, who had been his lessee, under a lease containing a covenant that the lessee should leave all the buildings which then were, or should be erected on the premises during the term, in repair, &c., the breach assigned was, that the defendant took down and carried away two sheds, which had been erected during the term. The defendant pleaded performance of the covenants, and issue was taken on the breach as above assigned. The buildings in question were two sheds, called Dutch barns, which had been erected by the defendant during his term; and which his counsel contended he had a right to remove. Lord Kenyon—"If a tenant will build upon premises demised to him a substantial addition to the house, or add to its magnificence, he must leave his additions at the expiration of his term, for the benefit of his landlord; but the law will make the most favourable construction for the tenant, where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been held so in the case of cider-mills, and in other cases; and I shall not narrow the law, but hold erections of this sort, made for the benefit of trade, or constructed as the present, to be removable at the end of the term." It was then contended, that by the express words of the covenant the tenant was to leave all erections on the premises at the end of the term. Lord Kenyon—"I am aware of the full extent of that, and not quite sure that it concludes the question. It means that the tenant should leave all those buildings which are annexed to and become part of the reversionary estate."

It will be observed, therefore, that the rule delivered by Lord Ellenborough, is an unqualified exclusion of any participation by *agricultural* tenants in the advantages possessed in similar circumstances by tenants in trade. In an able treatise, where the above judgment is examined at length, the principles of law which led to the decision appear to be as justly questioned, as the narrow grounds upon which it rests render it liable to objection; Amos and Ferard on Fixtures, 60—63, 2nd edit.; although its validity as an authority of law cannot be doubted.

entered. The Court clearly considered that there was a distinction between annexations to the freehold for the purposes of trade, and those made for the purposes of agriculture, and better enjoying the immediate profits of the land, in favour of the tenant's right to remove the former (*t*). Lord Kenyon's opinion, however, in the case of *Penton* v. *Robart*, before noticed, creates a supposition that there may be a right to remove at least some sort of agricultural erections; and Lord Ellenborough evidently takes the same view of the question in one part of his judgment in the case of *Elwes* v. *Maw*, given at full length above.

Summary of what may be removed.

Although an agricultural tenant cannot remove articles which are strictly of an agricultural nature, yet, if the object and purpose of the erections have relation to trade of any description, the tenant may remove them; thus cider-mills, machinery for working mines and collieries, and salt-pans, have been considered removable: nurserymen have been allowed to remove trees and shrubs which they have planted for the purposes of sale, but not to plough up strawberry beds out of the ordinary course of management of the nursery-ground; and it would seem that they cannot remove hothouses, greenhouses, forcing-pits, and erections of that description. In no case can private persons sell or remove fruit-trees, although planted by themselves (*u*).

Tenant's Right to remove under 14 & 15 Vict. c. 25, s. 3.

But now by 14 & 15 Vict. c. 25, s. 3, "If any tenant of a farm or land shall, after the passing of this act, with the consent in writing of the landlord for the time being, at his own cost and expense, erect any farm-buildings, either detached or otherwise, or put up any other building, engine or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines and machinery shall be the property of the tenant, and shall be removable by him notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition as the same were in before the erection of anything so removed: provided, nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the

(*t*) *Elwes* v. *Maw*, 3 East, 38; and see *Williams* v. *Williams*, 12 East, 209.

(*u*) Amos and Ferard on Fixtures, 343, 2nd edit.

landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in amount by the landlord who shall have so elected to purchase the same."

(d) *Fixtures for Ornament and Convenience.*

What Erections for Ornament or Convenience may be removed.

Articles put up for ornament and convenience during the term have been long allowed to be taken away by the tenant at the expiration of his lease. Instances are to be found as far back as the Year Books (*x*); but the relaxation of the general rule in these instances is held to be a privilege of a more limited nature than that in respect of trade fixtures (*y*), although such distinction does not appear to have been taken in many of the early cases (*z*). Fixtures for ornament or convenience cannot be removed where the erections may be deemed a permanent improvement: thus, a conservatory erected on a brick foundation, affixed to, and communicating with rooms in, a dwelling-house, by windows and doors, cannot be removed by a tenant for years, who had erected it during his tenancy; although he had a reversion in fee after the death of his lessor (*a*): and upon the same principle it has been held, that ranges, ovens, and set pots, affixed to a house built by the person against whom an execution has issued, cannot be taken by the sheriff under a writ of fi. fa. (*b*): but window-sashes, which are neither hung nor beaded into the frames, but merely fastened by laths, nailed across the frames to prevent their falling out, are not fixed to the freehold (*c*): so a pump erected by a tenant during his term, and very slightly affixed to the freehold, is removable as a tenant's fixture (*d*). *A.* bequeathed his leasehold messuage, with the grates, stoves, coppers, locks, bolts, keys, bells, and other fixtures and fixed furniture, to *V.* for life; and the household goods, furniture, plate, linen, china, books, wines and liquors, and other properties in the messuage, not being comprehended under the preceding terms fixtures and fixed furniture, to *V.* absolutely; there were in the messuage looking-glasses, standing on chimney-pieces and nailed to the wall; and a book-case, standing on (but not fastened to) brackets and screwed to the wall; it was held, that *V.* took only a life interest in these (*e*). Erections of the description above mentioned also cannot be removed, if the removal would be of such a nature as to constitute waste, or if the premises could not be left in the same state as before

(*x*) 8 Hen. VII. 12; 21 Hen. VII. 26; *Day* v. *Austin*, Owen, 70; Cro. Eliz. 374.

(*y*) *Buckland* v. *Butterfield*, 2 Brod. & Bing. 54; 4 Moore, 440; see also *Leach* v. *Thomas*, 7 Car. & Pay. 327.

(*z*) *Beck* v. *Rebow*, 1 P. Wms. 94; *Squier* v. *Mayer*, 2 Freem. 249.

(*a*) *Buckland* v. *Butterfield*, 2 Brod. & Bing. 54; 4 Moore, 440; see also *West* v. *Blakeway*, 2 Man. & Gr. 729; 3 Scott, N. R. 218; 9 Dowl. 846.

(*b*) *Wynne* v. *Ingleby*, 5 Barn. & Ald. 625; 1 Dowl. & Ryl. 247.

(*c*) *Rex* v. *Hedges*, 1 Leach, C. C. 201; 2 East, P. C. 590, n.

(*d*) *Grymes* v. *Boweren*, 6 Bing. 437; 4 Moore & Pay. 143.

(*e*) *Birch* v. *Dawson*, 2 Ad. & El. 37; 4 Nev. & Man. 22; 6 Car. & Pay. 658.

the removal; at least the contrary of this was assigned by Lord Mansfield as a ground for removal, although the principle has not been adverted to in more modern decisions (*f*).

Summary of what may be removed.

The articles for ornament and convenience, which have been held to be removable, are:—hangings, tapestry, and pier glasses, whether nailed to the walls or panels, or put up in lieu of panels; marble or other ornamental chimney-pieces; marble slabs; window blinds; wainscot fixed to the walls by screws; grates, ranges and stoves, although fixed in brick-work; iron backs to chimneys; beds fastened to the walls or ceiling; fixed tables, furnaces and coppers, mash-tubs, and fixed water-tubs; coffee and malt-mills; cupboards fixed with hold-fasts; clock-cases; iron ovens and the like. It must, however, be remarked, that things can be removed only when the separation will occasion but little or no damage (*g*).

(e) *Contracts respecting Fixtures.*

Construction of express Contracts respecting Fixtures, as to Removal.

It is a principle applicable to the law of fixtures, as well as every other branch of law, that individuals, on entering into a contract, may agree to vary the strict position in which they would otherwise legally stand towards each other, that is, where no absurdity or general inconvenience would result from the transaction (*h*). This is according to the often-quoted maxim, modus et conventio vincunt legem. Thus it has been settled (*i*), that buildings erected for the purposes of trade, under leases containing covenants to yield up in repair, at the expiration of the term, all buildings which should be erected upon the demised premises, cannot be removed by the lessees, when the words of the covenant are general, and contain no exception of any particular sort of buildings; "and this is highly reasonable, because the expectation of buildings to be erected during a term and left at its expiration, is often one of the inducements to the granting of a lease, and forms a considerable ingredient in the estimate of the rent to be reserved (*k*). And as buildings for trade erected during a lease cannot

(*f*) *Lawton* v. *Salmon*, 1 H. Black. 259, n.; 3 Atk. 16, n.

(*g*) See further, Amos and Ferard on Fixtures, 341, 342, 2nd edit. The question whether a fixture can be removed by a tenant without substantial injury to the premises is a question for the jury, upon an issue whether the fixture is removable or not by law. A plea to an action by a landlord against his tenant for removing a cornice, stated that it was the property of the defendant; that it was fixed up by him with screws only, for the purpose of ornament; that he carefully removed it during the term, doing no unnecessary damage; and that he repaired all the damage done. The replication stated that it was affixed to the freehold of the house, and was not removable by law. Issue on that question:—Held, that it was not a misdirection to leave it to the jury to say whether they were of opinion that the cornice was ornamental, and was so affixed to the freehold that it could be removed without substantial injury; and that if they thought so, and that it had been so removed, the tenant had a right to remove it. The question whether removable by law or not is a mixed question of law and fact; *Avery* v. *Cheslyn*, 3 Ad. & El. 75; 5 Nev. & Man. 372; 1 Har. & Wol. 283.

(*h*) Amos and Ferard on Fixtures, 108.

(*i*) *Naylor* v. *Collinge*, 1 Taunt. 19.

(*k*) Per Abbot, C. J., *Thresher* v. *East London Waterworks Company*, 2 Barn. & Cres. 608; 4 Dowl. & Ryl. 62.

be removed without the breach of such a covenant, so neither can buildings erected before, and existing at the date of a lease, be removed without a breach of a similar covenant, unless there appear some very strong circumstances to take them out of the operation of the covenant; and therefore where a lease contained a general covenant to repair, and lime-kilns were erected by the lessee during the term, it was held, that he could not remove them at the end of his term without a breach of such covenant (*l*): and where there was a covenant to keep in repair the premises, and all erections, buildings and improvements erected on the same during the term, and to yield up the same at the end of the term, it was held to be broken by the removal of a verandah erected during the term, the lower part of which was affixed to the ground by means of posts (*m*). Where there was a covenant to yield up at the expiration of the term all erections and improvements made during the term, a greenhouse, the frame-work of which was laid on walls imbedded in mortar, cannot be removed, although no damage is done to the walls by removing it (*n*). Where a colliery, with all the machinery and implements necessary for working it, was leased for years, with a proviso for re-entry for the landlord on non-payment of rent, and a covenant on the part of the lessee, at the expiration or other sooner determination of the demise, to deliver up the machinery and implements, conformably to an inventory annexed to the lease, of which a re-valuation was to be made three months before the expiration of the demise; and the landlord recovered judgment in ejectment in Trinity Term for a forfeiture for non-payment of the rent, but did not execute the writ of possession until the 8th November, and the tenant committed an act of bankruptcy the next day; it was held, that the landlord was entitled to take possession of all the machinery and implements (some of which had been brought on the premises by the tenant during the term), although no previous valuation had been made (*o*). A lease of mines contained a covenant for the lessee to erect furnaces, iron works, &c., and to repair and yield up the furnaces, fire-engines, iron-works, dwelling-houses and all other erections, &c., to be erected, built or set up, except the iron-work castings, railways, wimseys, gins, machines, and the moveable implements and materials used in or about the said furnaces, fire-engines, iron-works, stone-pits and premises; and there was a power given to the lessor to purchase the excepted articles; it was held, that the lessee had a right to remove whatever was in the nature of a machine, or part of a machine, though fixed in brick-work, but

(*l*) *Thresher* v. *East London Waterworks Company*, 2 Barn. & Cres. 608; 4 Dowl. & Ryl. 62.

(*m*) *Penry* v. *Brown*, 2 Stark. 403.

(*n*) *West* v. *Blakeway*, 2 Man. & Gr. 729; 3 Scott, N. R. 218; 9 Dowl. 846.

(*o*) *Storer* v. *Hunter*, 3 Barn. & Cres. 368; 5 Dowl. & Ryl. 240; and see *Clark* v. *Crownshaw*, 3 Barn. & Adol. 804; *Horn* v. *Baker*, 9 East, 215; *Fairburn* v. *Eastwood*, 6 Mees. & Wels. 679.

not what was in the nature of a building or support of a building, although made of iron (*p*). Where various engines, and other fixtures used in mining and smelting, were standing on the premises at the date of the demise, of which the engines were purchased by the incoming from the outgoing tenant, and were not mentioned in the general words of the demise, nor in the clause of re-entry; but the lessee covenanted to keep the "said engines" (the word "engines" never having occurred before) in good and tenantable repair, and the same in such state to yield up at the end or other sooner determination of the term; and the lessor covenanted that the lessee might remove (at the end of the term or sooner, except, as in the cases and events before mentioned, in any of which, a taking in execution being one, it was made lawful for the lessor to re-enter) all such engines, &c., as had theretofore been erected, and all such as should by himself be erected for carrying on the smelting business; it was held, that upon a forfeiture of the demise by a taking in execution, the lessee had lost his right to recover any of the fixtures, and that they all belonged to the lessor, such being the intention of the parties as collected from the covenants (*q*). A covenant to leave a water-mill with all fixtures, fastenings and *improvements*, was held to include a pair of new mill stones, set up by the lessee during the term, although by custom they might have been removed (*r*). A lease was made of a cotton-factory and machinery in consideration of 1,250*l.* paid on execution of the lease, and yielding for the first year 1,600*l.*, on the next day, and 350*l.* yearly afterwards; there was a proviso that the lessor might distrain the machinery for rent; and also a proviso that when the rents by the lease reserved to be payable for the first year should have been paid, and all other covenants, &c., therein contained on the lessee's part have been fulfilled, the lessee should become absolutely entitled to the machinery as his own goods and chattels absolutely for ever; there was also a covenant to use the machinery on the premises and not elsewhere; it was held, that the property in the machinery passed to the lessee on the payment of the 1,600*l.*, and that it did not continue in the lessor until the end of the term (*s*). In conclusion upon this part of the subject,—before a tenant removes an article which he considers as a removable fixture, he must examine his right not only with reference to the general law of fixtures, but also as it may be affected by any express or implied contract by which he may be bound; where a tenant renews or extends his term, he must be careful to preserve his right to fixtures, for without some express stipulation on the subject, he may lose his right at the expiration of his first term.

(*p*) *Foley* v. *Addenbrooke*, 13 Mees. & Wels. 174.

(*q*) *Rex* v. *Topping*, M'Clel. & You. 544.

(*r*) *Martyr* v. *Bradley*, 9 Bing. 24; 2 Moore & Scott, 25.

(*s*) *Duck* v. *Braddyll*, M'Clel. 217; 13 Price, 455.

Contracts respecting Fixtures on other points.

Accepting the demise of a house containing fixtures, does not raise an implied contract to pay for the fixtures (*t*). It was held formerly, that if a man sold a house where there was a copper, or a brewhouse where there were utensils, unless there was some consideration given for them, and a valuation set upon them, they would not pass; but this position has been overruled by a decision, in which it was held, that where a freehold mansion-house was sold at public auction, without any stipulation on the part of the owner that the fixtures were to be taken and paid for separately; and the vendee, who had paid the purchase-money, entered into possession under a conveyance; that the fixtures still remaining in the house passed to the vendee by the conveyance of the freehold, and were not the subject of trover; and that a demand of and refusal to deliver the fixtures, would not entitle the vendor to such articles, left in possession of the vendee, as appeared to be moveable goods and chattels (*u*); and the principle was laid down, per Best, J., that without a stipulation for a valuation in the conditions of sale, fixtures would pass to the vendee in a conveyance, like timber upon land (*x*): wherever, therefore, it is intended in contracts which concern the realty as well as the fixtures, that the latter should be paid for separately, a stipulation to that effect ought to be introduced. Contracts for the sale of fixtures are not within the Statute of Frauds, as they are not goods and chattels within the meaning of the statute, nor do they, although annexed to the freehold, constitute an interest in land (*y*). But a memorandum of the actual sale of fixtures requires a conveyance stamp, and it makes no difference that it is in the past tense (*z*). A reversionary interest in trade fixtures will pass by an agreement in writing, though not a deed (*a*). Where a lessee, who had power to remove a greenhouse fixed to the freehold, agreed to sell the lease, together with the greenhouse and furniture, plants and crops, for a certain sum, but was afterwards unable to obtain the lessor's consent to the assignment of the lease, which was necessary; it was held, that the contract was an entire one, and that the lessee could not sue for the price of the greenhouse (*b*). A steam-engine erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not come within the description of "goods and chattels" in the 12 & 13 Vict. c. 106, s. 125, nor had the bankrupt the actual or apparent ownership (*c*). In a later

(*t*) *Goff* v. *Harris*, 5 Man. & Gran. 573.

(*u*) *Colegrave* v. *Dias Santos*, 2 Barn. & Cres. 76; 3 Dowl. & Ryl. 255.

(*x*) See *Crockford* v. *Alexander*, 15 Ves. jun. 138; and see *Boydell* v. *M'Michael*, 1 Cromp. M. & Ros. 177.

(*y*) *Hallen* v. *Runder*, 1 Cromp. M. & Ros. 275; *Lee* v. *Risdon*, 7 Taunt. 191; *Pinner* v. *Arnold*, 1 Tyr. & Gr. 4.

(*z*) *Horsfall* v. *Key*, 17 Law J., N. S., Exch., 266.

(*a*) *Petrie* v. *Dawson*, 2 Car. & Kir. 138.

(*b*) *Sleddon* v. *Cruikshank*, 16 Mees. & Wels. 71.

(*c*) *Coombs* v. *Beaumont*, 5 Barn. & Adol. 72; see also *Ex parte Scarth*, 1 Mont. Deac. & De G. 240; and *Ex parte Broadwood*, ibid. 631.

case it was held, that fixtures which were by law removable as between landlord and tenant, as well as on the principle of the benefit of trade, part of which were erected before a mortgage, and part afterwards, passed to the mortgagee, and not to the assignees of the bankrupt mortgagor under the same section (*d*). By a grant of a house all the fixtures pass. It is otherwise when, by an enumeration of particular fixtures in the conveyance, an intention is shown to exclude other fixtures of certain value and importance. *A.*, by deed of mortgage, granted, bargained, sold, released and confirmed to *B.* (in his possession then being by a previous bargain and sale) an iron-foundry and two dwelling-houses, &c., and the appurtenances, "together with all grates, boilers, bells and other fixtures in and about the said two dwelling-houses;" and all trees, houses, cottages, commons, &c., easements, profits, &c., to the said foundry, messuages and lands appertaining: there were cranes, presses, a steam-engine and other fixtures in the foundry used for the purposes of the business carried on there, and valued at 600*l.*: it was held, that the specification of the grates and other fixtures in and about the dwelling-houses, showed that those in the foundry were not intended to pass, though they would have passed if the others had not been mentioned (*e*).

(f) *Removal of Fixtures.*

When the Tenant may remove Fixtures which he has a Right to take away.

The right of a tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant: where therefore a term was forfeited by the bankruptcy of the lessee, and the lessor entered for the forfeiture, and three weeks afterwards the assignees sold and removed a fixture; it seems that the assignees would have been liable in trover, even if the jury had not found that the three weeks was not a reasonable time (*f*). In the case of a strict tenancy at will the tenant would probably be allowed a reasonable time after the determination of the will, if his interest were not terminated by his own act, as by an act of forfeiture or breach of conditions. In *Poole's case* (*g*), where a tenant for years made an under-lease of a house to *J. S.* who was by trade a soap-boiler, and who, for the convenience of his trade, put up vats, coppers, tables and partitions, and paved the back-side, &c., and which the sheriff took under a fieri facias against him, and left the house stripped and in a ruinous condition, so that the first lessee was liable to make it good, and therefore brought a special action on the case against the sheriff

(*d*) *Ex parte Reynal*, 2 Mont. Deac. & De G. 443, where all the cases are collected. In *Ex parte King*, 1 Mont. Deac. & De G. 119, the court was divided in opinion on the point. See also *Fletcher* v. *Manning*, 1 Car. & Kir. 350; and *Ex parte Cowell*, 17 Law J., N. S., Bankr. 16; 12 Jurist, 411.

(*e*) *Hare* v. *Horton*, 5 Barn. & Adol. 715; 2 Nev. & Man. 428.

(*f*) *Weeton* v. *Woodcock*, 7 Mees. & Wels. 14.

(*g*) 1 Salk. 368.

and those that bought the goods, for the damage done to the house; Holt, C. J., held, first, that during the term, the soap-boiler might well remove the vats he had set up in relation to trade; and that he might do it by the common law, and not by virtue of any special custom in favour of trade and to encourage industry; but that after the term they became a gift in law to him in reversion, and were not removable. So Lord Hardwicke held, that the removal must be made during the term, otherwise the tenant will be deemed a trespasser (*h*). And in another case, where the purchaser of lands, having brought an ejectment against the tenant from year to year, the parties entered into an agreement that judgment should be signed for the plaintiff, with a stay of execution till a given period; it was held, that the tenant could not in the interval remove buildings, &c., from the premises which he had himself erected during his term, and before the action was brought (*i*). Where the tenant has by law the right to carry away any erections or other things on the premises which he has quitted, the inclination of Lord Kenyon's mind was, that he had a right to come on the premises, for the purpose of taking them away; but that point was not expressly determined, because the defendant had let judgment go by default (*k*). In later cases, however, the rule as to the time of removal is laid down exactly as in the previous decisions (*l*); thus it has been held, when the yearly tenant of a house has at his own expense, during his term, hung bells, but quitted the premises without removing them, that by remaining fixed to the freehold after the expiration of the term, they became the property of the landlord, and that the tenant could not maintain trover for them after the landlord had severed them from the freehold (*m*). So where steam-engines were removable by the lessee, but had not been removed previously to the lessor entering for a forfeiture, it was held, that trover could not be maintained for them (*n*).

How the Removal must be effected.

It appears to be generally understood in practice, that where trading as well as ornamental fixtures may be removed, and are accordingly taken down, the tenant is liable to repair any injury the premises may sustain by the act of removal; and in like manner, it would seem, that where a fixture has been put up in substitution for an article which was attached to the premises at the time of the demise, the tenant, on taking down his own fixture, is bound to restore the former article, or to replace it by another erection of a similar description (*o*). It has been held, that in removing engines, &c., partly fixed in brickwork,

(*h*) *Ex parte Quincey*, 1 Atk. 477.

(*i*) *Fitzherbert* v. *Shaw*, 1 H. Black. 258; *Heap* v. *Barton*, 12 C. B. 274.

(*k*) *Penton* v. *Robart*, 2 East, 88; 4 Esp. 35.

(*l*) *Lee* v. *Risdon*, 7 Taunt. 191; 2 Marsh. 493; per Dallas, C. J., *Colegrave* v. *Dias Santos*, 7 Barn. & Cres. 76; 3 Dowl. & Ryl. 255.

(*m*) *Lyde* & *Russell*, 1 Barn. & Adol. 394.

(*n*) *Minshall* v. *Lloyd*, 2 Mees. & Wels. 450; Mur. & Hurl. 125; see also *Mackintosh* v. *Trotter*, 3 Mees. & Wels. 184; 1 Horn. & Hurl. 20.

(*o*) Amos and Ferard on Fixtures, 89, 2nd edit.

which a tenant has by the terms of his lease a right to remove, he may disturb such brickwork as is necessary, and is not bound to restore it to a perfect state, but that he is liable for unnecessary disturbance of brickwork (*p*).

(g) *Remedies respecting Fixtures.*

Landlord's Remedies for the Wrongful Removal of Fixtures.

When fixtures, which he considers have become part of the realty, have been removed, the landlord may resort to the before-mentioned remedy by an action on the case in the nature of waste; for if he is right, such removal amounts to an injury to the reversion, which the law considers waste. He may also, before the removal, apply to equity for an injunction to prevent the removal. Although a landlord cannot maintain an action of trespass for entering the premises during the occupation of the tenant, because occupation is necessary to maintain that form of action; yet immediately upon the severance of the fixtures from the realty, they become mere chattels, and he can maintain an action of trespass for taking them away, for the property is vested in him from the time of severance; again, where the fixtures have been unlawfully severed from the freehold and carried away, or otherwise converted or disposed of, the landlord may maintain an action of trover for their value (*q*). The mode of the reversioner proceeding in these several remedies, for wrongful removal of fixtures, will be fully pointed out hereafter (*r*).

Remedies to recover the Value of Fixtures.

Fixtures being often the subject of contracts, actions may be brought for any breach of such contracts by either of the parties. These actions generally arise either from the breach of contracts respecting the care and disposition of fixtures during the existence of a tenancy; or upon contracts for the sale of fixtures. With respect to the latter description of actions, it has been held,—upon the often repeated principle that fixtures are not chattels until severance,—that the price of fixtures to a house cannot be recovered in an action for goods sold and delivered merely (*s*); but where the defendant agreed verbally with the plaintiff to take a house, and purchase the fixtures at a valuation to be made by two brokers; and an inventory of the furniture and fixtures was accordingly made, generally described as "an inventory of the fixtures, &c." with the gross amount placed at the foot thereof; in an action for goods sold and delivered, with a count on an account stated, it was held, that the defendant, having taken possession of and enjoyed the furniture and fixtures, and paid part of the sum determined by the brokers to be due for the same, was liable on the account stated for the remainder, and could not afterwards object to the plaintiff's defec-

(*p*) *Foley* v. *Addenbrooke*, 13 Mees. & Wels. 174.

(*q*) *Hitchman* v. *Walton*, 4 Mees. & Wels. 409; 1 Horn. & Hurl. 374; and see *Sheen* v. *Rickie*, 5 Mees. & Wels. 175; 7 Dowl. 335.

(*r*) See post, Book III.

(*s*) *Lee* v. *Risdon*, 7 Taunt. 188; 2 Marsh. 495; *S. P. Nutt* v. *Butler*, 5 Esp. 176.

tive title to the house (*t*). A tenant who had occupied a house in which there were certain fixtures, which he had purchased on entering the house, and which he had a right to remove during his tenancy, agreed at his landlord's request, a few days before the expiration of his tenancy, to forbear to remove the fixtures, the landlord agreeing to take them at a valuation to be made by two brokers; the tenant, at the expiration of his tenancy, delivered up possession of the house, leaving the fixtures on the premises; on the following day the fixtures were valued by two brokers, and the valuation was signed; it was held, that an action of indebitatus assumpsit was maintainable for the price and value of the fixtures (*u*). The plaintiff, tenant of a house for term of years, being possessed of shelves, stoves, ranges, ovens, boilers and other articles of household use, his own property, but annexed to the freehold, requested the landlord to purchase them at the expiration of the term, or let them remain for purchase by the incoming tenant, but to be taken away by the plaintiff if the tenant should refuse them: the landlord wrote an answer, declining to purchase, but adding, "I have no objection to your leaving them on the premises, and making the best terms you can with the incoming tenant:" the articles remained unsevered from the freehold till the entry of the new tenant, who came in under demise from the same landlord, but who declined to take them: the plaintiff then (after the tenant had been two months in possession) demanded liberty to enter and remove the fixtures; but the tenant refused permission: the plaintiff thereupon brought case for the hindrance and trover against the tenant; it was held, that if the landlord's letter to plaintiff amounted to a license to take away the articles, yet, not being under seal, it was no valid grant of such privilege, as against a new lessee in possession of the premises and not party to the license, and that trover would not lie for the articles (*x*). A lessee cannot even during his term maintain trover for fixtures attached to the freehold (*y*). If a landlord severs fixtures from the freehold and distrains them, the tenant may maintain trover for them (*z*). Where a tenant assigned his lease by way of mortgage, but continued in possession and became bankrupt, whereupon the assignees removed fixtures, which by the lease were to be yielded up at the end of the term to the lessor, it was held, that the mortgagee

(*t*) *Salmon* v. *Watson*, 4 Moore, 73; and see *Neal* v. *Viney*, 1 Camp. 471.

(*u*) *Hallen* v. *Runder*, 1 Cromp. M. & Ros. 266; 3 Tyr. 447. It was also held, that this was not a sale of an interest in land, within the 4th section of the Statute of Frauds. And it was considered that a note or memorandum in writing was not necessary within the 17th section.

(*x*) *Roffey* v. *Henderson*, 17 Queen's B. Rep. 574.

(*y*) *Mackintosh* v. *Trotter*, 3 Mees. & Wels. 184; 1 Horn. & Hurl. 20; *Roffey* v. *Henderson*, 17 Queen's B. Rep. 574.

(*z*) *Dalton* v. *Whittem*, 3 Queen's B. Rep. 961; 3 Gale & Dav. 260; *Clarke* v. *Holford*, 2 Car. & Kir. 540. The value of them as chattels merely can be recovered as damages. But in an action by a mortgagee against assignees of a bankrupt tenant, who had severed the fixtures and sold them separately from the lease, it was held, that their value while fixed might be recovered; *Thompson* v. *Pettit*, 16 Law J., N. S., Q. B., 162; 11 Jurist, 748.

might maintain trover against the assignees (*a*). If a tenant who is possessed of the fixtures, mortgage his term with the fixtures and afterwards becomes bankrupt, the mortgagee may recover in trover the value of the fixtures from the assignees, who have removed and converted them (*b*). And where the assignees of a bankrupt mortgagor who had vested in his mortgagee an immediate interest in fixtures, severed and sold them, it was held, that the mortgagee was entitled to recover from the assignees the value of the fixtures estimated as between outgoing and incoming tenant (*c*). A lessee of a house containing fixtures, executed an assignment of the premises by way of mortgage, not mentioning the fixtures; he afterwards assigned the premises and all his estate and effects to trustees; the trustees being in treaty for a sale of the fixtures, the mortgagee, whose principal and interest were due, took forcible possession of the house, and refused, on demand, to deliver the fixtures up; the trustees brought trover; and it was held, that they could not recover for them (*d*). In another case, of a declaration in trespass for taking the plaintiff's "goods, chattels and effects," it was held, that the value of fixtures might be recovered under these words (*e*).

Remedies to recover Damages for an improper Sale of Fixtures.

If an incoming tenant purchase as fixtures from the outgoing tenant property which in fact belongs to the landlord, he may recover back the money he paid for it, in an action against the outgoing tenant for money had and received; and in such action it will be no defence that the outgoing tenant was not aware that the articles belonged to the landlord, having bought them himself from a preceding tenant; he, however, has his remedy against such preceding tenant (*f*). Where the owner of the goodwill and fixtures of a public-house allowed another person to represent himself as such to the landlord, whereupon they let the house to him and he sold the house and fixtures to a bonâ fide purchaser; it was held, that the real owner of the fixtures had estopped himself from recovering the fixtures of the purchaser (*g*).

SECT. 9.—*Survey and Valuation of Dilapidations and Fixtures.*

(a) *When made.*

When made during the former part of the Term.

All observations upon the mode of making a survey of demised premises, to ascertain the state of dilapidations, and the necessity of repairs, have been reserved to the end of the chapter, as more strictly

(*a*) *Hitchman* v. *Walton*, 4 Mees. & Wels. 409; 1 Horn. & Hurl. 374.

(*b*) *Boydell* v. *M'Michael*, 1 Cromp. M. & Ros. 177; 3 Tyr. 974; and see *Ex parte Reynall*, 2 Mont. Deac. & De G. 443; *Ex parte King*, 1 Mont. Deac. & De G. 119; *Fletcher* v. *Manning*, 1 Car. & Kir. 350; and *Ex parte Heathcote*, 2 Mont. Deac. & De G. 711.

(*c*) *Thompson* v. *Pettit*, 10 Queen's B. Rep. 101.

(*d*) *Longstaff* v. *Meagoe*, 2 Ad. & El. 167; 4 Nev. & Man. 211.

(*e*) *Pitt* v. *Shew*, 4 Barn. & Ald. 206; see also *Twigg* v. *Potts*, 1 Cromp. M. & Ros. 89; 3 Tyr. 969.

(*f*) *Robinson* v. *Anderton*, Peake, 94.

(*g*) *Gregg* v. *Wells*, 10 Ad. & El. 90; 2 Per. & Dav. 296.

following the several subjects—repairs, cultivation, waste and fixtures, already treated of. There are three periods at which surveys of dilapidations are usually made: the first in the former part of the term, the second when near its expiration, and the third after the conclusion of it. With respect to the first, when the lease contains covenants to repair on the part of the tenant, and to repair after a certain notice, with a right of entry to the landlord to ascertain what repairs are needful, the most efficient and beneficial method, both for landlord and tenant, is, that an architect should be employed to take a survey, and draw up a schedule or specification of repairs, and of the reinstatements (by tenant) of decayed and dilapidated parts. And on this report, and on due notice being given according to the covenants of the lease, and to the customs of leaseholders, an action will lie for non-performance (*h*).

When made just before the Expiration of the Term.

When the survey is made during the last twelve months of the term, a schedule or specification of repairs and reinstatements is drawn up as in the former instance; and also an estimate, or assessment of a sum of money to be paid on the expiration of the lease by the tenant, in default of his doing the repairs, as a compensation for the condition that the tenement is in, worse than it ought to be, reasonable wear and tear excepted. The tenant has then his election, whether he will so repair, or pay the amount assessed for dilapidations (*i*).

When made after the Expiration of the Term.

An assessment of dilapidations, and a notice to the tenant to repair, are unnecessary when the term has expired (although the notice is frequently given), as the covenant to give three months' notice to repair refers to operations only which are to be done within the term (*k*).

(b) *Mode of making.*

Right of Landlord to enter the Premises to survey.

When there is a covenant that the landlord may enter so many times during the year to survey the premises, and to require the necessary repairs to be done, he may select any days in the year that he thinks fit, whether they be the worst or best time for doing repairs (*l*). It was once held, that an action would lie against a tenant for refusing to permit his landlord to enter to see if any waste had been committed, although it was not shown that any waste had, in fact, been committed (*m*); but this, it is conceived, is not now law; for the landlord, having parted with the possession, has no right to enter the premises, unless there is a power reserved to him for that purpose.

What Dilapidations are to be included.

The surveyor must be careful in considering what buildings are become fixed to the freehold, and, therefore, as before stated, subject to dilapidations, and what are merely accessorial, and may be removed

(*h*) Elmes on Dilapidations, 84.
(*i*) Ibid.
(*k*) *Luxmore* v. *Robson*, 1 Barn. & Ald. 584.
(*l*) Per Lord Eldon, *Hill* v. *Barclay*, 16 Ves. jun. 403.
(*m*) *Hunt* v. *Downman*, Cro. Jac. 478.

by the tenant. In taking his survey, he should include the want of repairs which exists in the former, but must not notice the dilapidations of the latter, as they are the property of the tenant, and may be removed by him. The dilapidations of farm buildings must, in all cases, be included, as the tenant can in no case remove the erections made by himself during the term.

What Fixtures are to be valued.

The valuation of fixtures is very seldom made between the landlord and tenant; and when it is, few cases of nicety occur, as there can be but little doubt as to the articles to be taken: it is usually made between the outgoing and incoming tenant, and in that case it is material to consider what articles should be included. Only those things which are removable by the outgoing tenant should be valued, whether the restriction be in consequence of the general law as to the removal of fixtures or of express stipulation of the parties. The rights of the parties, however, regarding particular articles, are much regulated by custom; and it has accordingly been lately held, that a custom to value a particular article, as between outgoing and incoming tenant, is a proper criterion for determining the nature of the property, and whether it be a fixture or not (*n*).

Stamp upon Appraisement.

By statute 55 Geo. III. c. 184, schedule, tit. *Appraisement*, any "appraisement or valuation of any estate or effects, real or personal, heritable or moveable, or of any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials and labour used or to be used in any buildings, or of any artificer's work whatsoever:"

	£	s.	d.
Where the amount of such appraisement or valuation shall not exceed 50*l.* requires a stamp duty of	0	2	6
And where it shall exceed 50*l.* and not exceed 100*l.* . .	0	5	0
And where it shall exceed 100*l.* and not exceed 200*l.* . .	0	10	0
And where it shall exceed 200*l.* and not exceed 500*l.* . .	0	15	0
And where it shall exceed 500*l.*	1	0	0

Nothing being referred to appraisers, except the mere value of goods, and of the repairs of a farm, an appraisement stamp upon the written valuation is sufficient without an award stamp (*o*); although, in fact, the appraisement is in the nature of an award (*p*). It has been held, that if a broker be called to prove the value of goods, he need not produce an inventory written on an appraisement stamp (*q*): and when the appraisement is made merely for the private information of the party procuring it to be made, without any intention of its being obligatory as a contract, it need not be stamped at all (*r*).

(*n*) *Davis* v. *Jones*, 2 Barn. & Ald. 165; and see *Watherell* v. *Howells*, 1 Camp. 227.
(*o*) *Leeds* v. *Burrows*, 12 East, 1.
(*p*) *Perkins* v. *Potts*, 2 Chit. 399.
(*q*) *Stafford* v. *Clarke*, 1 Car. & Pay. 25.
(*r*) *Atkinson* v. *Fell*, 5 Maule & Selw. 240.

(c) *Expenses of Survey.*

By whom the Expenses are to be defrayed.

The expenses of survey are usually borne by the landlord, unless there be some special agreement to the contrary. It is not, therefore, common in an action for breach of contract by the dilapidation of premises, to allow to the landlord the expenses he has been put to in ascertaining what has been the extent of injury sustained. Incidentally, however, the jury consider this matter, in estimating the amount of damages they give by their verdict.

At what Rate Surveyors are to be remunerated.

The surveyor is to be paid according to his labour, and not according to the amount of bills he looks over, or the amount of money expended, or to be expended (*s*); although a commission of 5 per cent. on the sum laid out, when such was proved to be the usage, has been allowed (*t*). If a surveyor make an estimate, which turns out to be incorrect to a considerable amount, through his omitting to take reasonable precaution in forming his judgment, he is not entitled to recover anything for his plans, specifications or estimates, made for the work (*u*). As questions occasionally rise, whether surveyors are entitled to be paid, when their surveys appear to have been incorrectly or negligently taken, the following remarks of Lord Tenterden and Best, C. J., in the case of *Moneypenny* v. *Hartland*, will convey a clear idea of the mode in which their claims are considered in a court of law. Lord Tenterden, in the first-mentioned report, is stated to have said, that "If a surveyor, who makes an estimate, sues those who employ him for the value of his services, and it appear that he was so negligent, that he did not inform himself, by boring or otherwise, of the nature of the soil of his foundation and it turned out to be bad, this goes to his right of action; and if he went upon the information of others, which now turns out to be false or insufficient, he must take the consequences, for every person employed as a surveyor must use due diligence. Whether the plaintiff has used due diligence or not is a question for the jury, and if the plaintiff went on the statements of others, that is no excuse, as it was his duty to ascertain how the fact was, or to report to his employers that he only went on the information of others, or that the fact was uncertain;" and in the latter report, Best, C. J., summed up thus, "Supposing negligence or want of skill to be sufficiently made out, unless that negligence or want of skill has been to an extent that has rendered the work useless to the defendants, they must pay him and seek their remedy in a cross action; for if it were not so, a man by a small error might deprive himself of his whole remuneration." "I grant that it is not a trifling deviation from an estimate that is to prevent a party's recovering; but if a surveyor delivers in an estimate greatly below the sum at which a work

(*s*) *Upsdell* v. *Stewart*, Peake, 193.
(*t*) *Chapman* v. *De Tastet*, 2 Stark. 291.
(*u*) *Moneypenny* v. *Hartland*, 1 Car. & Pay. 352; 2 Car. & Pay. 378.

can be done, and thereby induces a private person to undertake what he would not otherwise do, then I think he is not entitled to recover; and this doctrine is precisely applicable to public works. There are many in this metropolis, which would never have been undertaken at all, had it not been for the absurd estimates of surveyors. I think if it was so in the present case, the plaintiff is not entitled to recover: and it appears that Lord Chief Justice Abbott was of the same opinion. His Lordship says, 'I think it of great importance to the public, that gentlemen in the situation of the plaintiff should know, that if they make estimates, and do not use all reasonable care to make themselves informed, they are not entitled to recover any thing.' And to this I am disposed to add a qualification, which is found in my brother Bayley's opinion; his words are, 'the plaintiff claims as much as his services are worth, and if he led his employers into a great expense by his want of care, his services would be worth nothing.' If you think the lowness of the estimate in this case induced the parties to undertake the work, then you should find your verdict for the defendants. It is said to-day, that there is a difference between an estimate and a contract; I do not agree in that observation; between honest men there is no difference at all. A man should not estimate a work at a price at which he would not contract for it; for if he does, he deceives his employer. It appears that 1400*l.* in addition to the estimate was required for the planking and piling, and 3300*l.*, in addition to the 1700*l.*, for the completion of the road. Is a man to tell me, that a thing can be done for 1700*l.* which cannot be completed for less than 5000*l.*? But it is said, that there has been no negligence here, because the plaintiff had been informed by another of the state of the soil. In my opinion he should not have trusted to such information."

(d) *Proof of.*

Usual Mode of proving the Extent of Dilapidations.

The fact of the survey and valuation of dilapidations or fixtures, is usually proved in actions brought for breach of contract, by calling the architect or surveyor who made the survey and valuation: he will speak, not only to the existence of the want of repairs—where that forms the ground of action—but also the reasonableness of his estimate of the damage sustained. As in these cases the surveyor is a most essential witness, on account of the impracticability of any one else being able to give more than a general idea of the state of the premises, it is obviously desirable to employ a man of credit and intelligence in his profession for the purpose. General corroborative evidence may be given by unprofessional persons, who are acquainted with the state of the premises; but such evidence should never be entirely relied upon; a surveyor should in all cases be employed, where the matter is likely to become the subject of consideration in a court of justice.

CHAPTER V.

OTHER USUAL OBLIGATIONS OF THE PARTIES.

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SECT. 1.—*Insurance against Fire.*

(a) *Implied Liability in case of Fire.*

State of the Law where there is no Contract applicable to Fires.

AT common law lessees were not answerable to their landlords for accidental or negligent burning; then came the Statute of Gloucester (6 Edw. I. c. 5), which, by making tenants for life and years liable to waste, without any exception, consequently rendered them answerable for destruction by fire; and since by the statute 14 Geo. III. c. 78, s. 86 (*a*), it is enacted, "that no action, suit or process whatsoever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby;" provided "that no contract or agreement made between landlord and tenant shall be hereby defeated or made void." It has been considered that this enactment would prevent tenants from being liable to their landlords where a fire happened either by pure accident or by negligence (*b*); but in a late case (*c*), it has been held, that this enactment does not extend to fires occasioned by the *negligence* of a person or of his servants, and therefore some tenants (*d*) may perhaps be held to be liable to their landlords, even though there is no special contract or agreement between them (*e*).

(*a*) This enactment is more extensive than the previous one of 6 Anne, c. 31, s. 6, which was made perpetual by 10 Anne, c. 14, s. 1, but repealed by 12 Geo. III. c. 73, as appears by 14 Geo. III. c. 78, s. 101. This enactment of 14 Geo. III. c. 78, s. 86, is not repealed by the new building act, 7 & 8 Vict. c. 84.

(*b*) 2 Black. Com. 281; 1 Black. Com. 431.

(*c*) *Filliter* v. *Phippard*, 11 Queen's B. Rep. 347.

(*d*) See ante, 464.

(*e*) See ante, 435, 439, 461.

Usual Form of Contracts to Insure.

(b) *Contracts to Insure.*

The contract to insure from loss or damage by fire usually specifies the amount or value intended to be insured—the particular office in which the party must insure—and the name, whether that of the lessor or lessee, in which the insurance must be effected. In many cases, however, particularity to this extent is not considered essential: thus it has been held, that a covenant in a lease "that the lessee shall insure and keep insured the sum of 800*l.* at the least, in some sufficient insurance office within the cities of London or Westminster," is sufficiently certain (*f*); Lord Ellenborough observing, that by a reasonable intendment the insurance was to be understood as against fire, and the lessee bound to insure and keep insured in the specified sum in an office where policies against fire were usually effected. In addition to the contract to insure, the covenant almost universally contains a clause to produce the policy, and the receipt for the current year's premium, at the request of the lessor, in order that he may have assurance of the fact of the contract having been complied with (*g*).

On whom the Contract to Insure is binding.

It is undecided whether a covenant merely to insure premises against fire is a covenant which runs with the land, and consequently binds assignees; but where the premises were situate within the weekly bills of mortality, such a covenant has been held to run with the land (*h*); because, by the old Building Act, 14 Geo. III. c. 78 (*i*), the landlord may insist upon the sum received from the insurance office being laid out in rebuilding and reinstating the premises. Of course a covenant expressly in those terms would do the same if the premises were in any other place: and in that case Best, J., intimated an opinion that the mere covenant to insure would in any place run with the land (*j*). Under a covenant to insure in such office as the lessor or his assigns should direct, an assignee cannot take advantage of a direction given by the lessor before assignment, which had not been obeyed, so as to work a forfeiture after the assignment, the lessee not having had notice of the assignment or any direction from the assignee (*k*). A court of equity will not relieve against a forfeiture for the breach of a covenant to insure (*l*).

(c) *Extent of Liability.*

What amounts to a Breach of a Covenant to insure.

Where a lessee has covenanted to insure and keep insured, it will be a breach of the covenant if he permit the premises to remain uninsured, although it be only for a short period of time, and no fire or damage happen: thus, where a lessee covenanted to keep premises

(*f*) *Doe* d. *Pitt* v. *Shewin*, 3 Camp. 134.

(*g*) See *Doe* d. *Bridger* v. *Whitehead*, 8 Ad. & El. 571; 3 Nev. & Per. 557; 1 Will. Wol. & Hod. 521; see also *Doe* d. *Ive* v. *Scott*, Arn. & Hod. 76.

(*h*) *Vernon* v. *Smith*, 5 Barn. & Ald. 1.

(*i*) This provision is not repealed by the new building act, 7 & 8 Vict. c. 84.

(*j*) See ante, Book I., Chap. IV., Sect. 5, (b), pp. 88, 89.

(*k*) *Crane* v. *Batten*, 2 Com. L. Rep. 1696.

(*l*) *White* v. *Warner*, 2 Meriv. 459.

insured, and omitted to pay the premium till after the expiration of fifteen days beyond the year, but at the end of the month he paid the premium, which was accepted by the company, as reviving the insurance from the former year; it was held, that the covenant was broken, the premises having in fact remained uninsured from the expiration of the fifteen days to the time the premium was paid (*m*): but where a lessee, having covenanted to keep 800*l.* insured on the premises, effected an assurance containing a memorandum, that in case of the death of the insured the policy might be continued to his personal representative, provided an indorsement to that effect was made upon it within three months after his death, and died; and an indorsement continuing the policy to his personal representative was made after the expiration of the three months, it was held to be no breach of the covenant to insure (*n*). Where a lessee covenants to insure and keep insured, and deposit the policy with the lessor, the covenant does not mean that he is to effect one policy and keep that policy on foot, but that the premises should always be kept insured by one policy or another; and it is a breach if they are uninsured at any one time, and a continuing breach for any portion of the time they are uninsured (*o*). Where there was a covenant to insure and continue insured the premises in the joint names of the lessor and the lessee, but the lessee effected an insurance in his own name alone, and showed the policy to the lessor, who approved of it, and afterwards accepted rent; it was held, that there was a continuing breach of the covenant, and that the acceptance of rent waived the previous breaches only (*p*). A breach of covenant is committed if the lessee covenants to insure the buildings from time to time and at all times, and leaves a part uninsured for two months after execution of the lease; although the greater part of the premises were already insured at the requisite amount by a policy expiring at the end of the two months, and that on its expiration a new policy was effected covering all the premises, which were then insured at the stipulated amount. So, where there was a covenant by the tenant to insure in the names of three lessors, and the insurance was made in their names jointly with the tenant, it was held a breach of the covenant; and that the premises being within the operation of the Building Act (14 Geo. III. c. 78, s. 83) made no difference (*q*). In another case, where an action of ejectment was brought on a forfeiture, for breach of the covenant in a lease, wherein the lessee covenanted to insure in the joint names of himself and the lessor in two-thirds of the value of the premises demised; and the lessee had insured in his own name only, and, as contended, to a

(*m*) *Doe* d. *Pitt* v. *Shewin*, 3 Camp. 134; *Wilson* v. *Wilson*, 23 Law J., C. P., 137.

(*n*) *Doe* d. *Pitt* v. *Laming*, 4 Camp. 73.

(*o*) *Doe* d. *Flower* v. *Peck*, 1 Barn. & Adol. 428.

(*p*) *Doe* d. *Muston* v. *Gladwin*, 6 Queen's B. Rep. 953; ante, pp. 278, 279.

(*q*) *Penniall* v. *Harborne*, 11 Queen's B. Rep. 368.

less amount than two-thirds of the value of the premises; but both parts of the lease had remained in the possession of the lessor, and an abstract only had been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that the insurance was to be in two-thirds of the value of the premises; and the lessor had previously insured the premises at the same sum as the defendant: it was held, that the conduct of the lessor being such as to induce a reasonable and cautious man to conclude that he was doing all that was necessary or required of him by insuring in his own name, and to the amount insured, he could not recover for a forfeiture, though there was no dispensation or release from the covenant (*r*). So where the lessee was to insure, with a proviso that if he did not the lessor might: it was held, that the lessor could not recover in ejectment for a forfeiture, if by his conduct he had led the lessee to believe the premises were insured by himself (*s*). It may be remarked, that where there is a covenant to repair, and another to insure in a specific sum, the liability of the lessee on the former covenant is not limited to the amount of the sum to be insured under the latter (*t*). Where the performance of a covenant to insure in an under-lease, did not necessarily include a performance of the corresponding covenant in the original lease, and the premises were uninsured, and the original lessor entered for breach of the covenant to insure, and there was no general covenant in the under-lease to indemnify against the covenants in the original lease, the lessee cannot recover against the under-lessee damages for the term which he has lost by his own default (*u*).

Sect. 2.—*Respecting Assignments and Under-Leases.*

(a) *Contracts relating to Assignments and Under-Leases.*

Propriety and Legality of such Contracts.

A covenant either absolutely not to assign the premises, or not to assign them without the consent of the lessor, and a proviso for re-entry in case the lessee do assign, are very often contained in leases (*x*). The landlord relies perhaps on the tenant's honesty, or he approves of his skill in farming, and thinks that he will take more care of the farm than another; and therefore he has a right to guard against the event of the estate falling into the hands of any other person who may not manage it so well as the original tenant; indeed it is but reasonable that a landlord should exercise his judgment with respect to the

(*r*) *Doe* d. *Knight* v. *Rowe*, Ryan & Mood. 343.

(*s*) *Doe* d. *Pitman* v. *Sutton*, 9 Car. & Pay. 706.

(*t*) *Digby* v. *Atkinson*, 4 Camp. 275.

(*u*) *Logan* v. *Hall*, 4 C. B. 598. As to where the onus lies on the tenant of proving that a delay to insure is reasonable, see *Doe* d. *Darlington* v. *Ulph*, 13 Queen's B. Rep. 204.

(*x*) Entry and eviction by the lessor on part of the land is no defence to an action on such a covenant; *Newton* v. *Allin*, 1 Queen's B. Rep. 518; 1 Gale & Dav. 44; or to any covenant except that for the payment of rent; *Morrison* v. *Chadwick*, 7 C. B. Rep. 266; 6 D. & Low. 567.

person to whom he trusts the management of his estate, a covenant, therefore, to that effect is perfectly legal and proper. A covenant not to assign or under-let without leave of the lessor first had and obtained, is a fair and usual covenant (*y*); but although that is the case, a contract to grant a lease with common and usual covenants does not comprise by implication a covenant not to assign without license (*z*). A proviso in a lease that the landlord shall re-enter on the tenant's committing an act of bankruptcy whereon a commission shall issue, is good, for it is a proviso not contrary to any express law, or to reason, or public policy; and the landlord, in such a case, parts with his term on account of his personal confidence in his tenant, which is manifestly the case in all leases where clauses against alienation are inserted (*a*). Although conditions in restraint of alienation are legal and usual, courts of law have always held a strict hand over such methods of defeating leases, and have countenanced very easy modes of putting an end to them: therefore where the words of the condition were, "that the lessee, his executors and administrators shall not at any time or times during the demise assign, transfer, or set over, or otherwise do or put away the indenture of demise, or the premises hereby demised, or any part thereof," it was held, that this condition was not broken by an under-lease, for that "assign, transfer, and set over," being mere words of assignment, did not extend to an under-lease (*b*). A court of equity will not relieve against a forfeiture for alienation without license (*c*).

Decisions on the subject of Licenses.

If a lease contain a proviso that the lessee shall not set, let, or assign over the whole or part of the premises without leave in *writing*, on pain of forfeiting the lease (*d*); a *parol* license to let part of the premises does not discharge the lessee from the restriction of such a proviso. It was long since laid down, however, that if the lessor license his lessee to alien part, he may alien the residue without license, for the lessor cannot enter, because if he should enter for the condition, he should enter upon the entire, as it was limited; and if he should enter upon the entire, he would destroy that which he had licensed to be aliened, which he cannot do (*e*); and therefore that on a proviso that a lessee and his assigns shall not alien without license, if the lessor give license, the condition is entirely destroyed, and the assignee may afterwards assign or demise the whole or any part of the term without license, for the condition is considered as gone (*f*). The license need

(*y*) *Morgan* v. *Slaughter*, 1 Esp. 8; *S. P. Folkingham* v. *Croft*, 3 Anst. 700.

(*z*) *Henderson* v. *Hay*, 3 Bro. Cha. Ca. 632; *S. P. Church* v. *Brown*, 15 Ves. jun. 258; *Blaker* v. *Mathews*, 3 Bro. Cha. Ca. 632; *Browne* v. *Raban*, 15 Ves. jun. 528.

(*a*) *Roe* d. *Hunter* v. *Galliers*, 2 Term Rep. 131; *Church* v. *Brown*, 13 Ves. jun. 258.

(*b*) *Crusoe* d. *Blencowe* v. *Bugby*, 3 Wils. 235; 2 W. Black. 767.

(*c*) *Hill* v. *Berkeley*, 18 Ves. jun. 56; *Wafer* v. *Moccato*, 10 Mod. 112.

(*d*) *Roe* d. *Gregson* v. *Harrison*, 2 Term Rep. 425.

(*e*) *Dumpor's case*, 4 Co. Rep. 120; *S. C.* nom. *Dumpor* v. *Syms*, Cro. Eliz. 816.

(*f*) Per Eldon, *Brummell* v. *Macpherson*, 14 Ves. jun. 173.

not be in writing, unless the terms of the contract required it to be so; and if, when the lease requires a written license, the lessor gives a parol license to ensnare the lessee, a court of equity will relieve on the ground of fraud (*g*). If the vendor of a lease, in which there is a covenant not to assign, contract to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's license for the assignment (*h*). Where *A.* assigned his effects to *B.* for the benefit of his creditors, and, among other things, a lease of a farm from *C.*, which contained a covenant not to assign without *C.*'s consent in writing, and *B.* agreed to assign the lease to *D.*'s nominee, *D.* to pay the expenses of the assignment, and 180*l.* on a day certain for the improvements and manure; to take the crops at a valuation, and to have immediate possession: it was held, that to support an action on this agreement *B.* must show that he had obtained *C.*'s consent in writing to the assignment, though *D.* had taken possession of the premises, had cut down the crops, and had paid part of the 180*l.* to *B.* (*i*).

(b) *Upon whom Contracts against Assignment and Under-letting are binding.*

Absolute Contracts cannot bind Assignees.

An absolute covenant not to assign must necessarily be personal and collateral only, for there never can be any assignee (*k*); therefore a covenant that the lessee, his executors or administrators, will not assign, does not bind his assignees (*l*); accordingly it has been laid down, that if a lessee covenant not to assign, and become bankrupt, and his assignees take to the lease, his covenant is discharged by the bankruptcy, although a breach of it had become impossible by reason that he no longer had the subject-matter respecting which the covenant was made; and, therefore, that if he come in again as assignee of his assignees, he shall not be charged with the covenant, and it is no breach if he assign.

Contracts against Assignment and Under-letting without License.

It would seem that a covenant by a lessee that he, his executors and administrators shall not assign *without license*, is not binding upon an assignee of the lessee (*m*): thus where an action of covenant was brought against the assignee of the lessee for rent, and there was a plea that before the rent became due the defendants assigned all their estate and interest in the demised premises to *A. B.*; and a replication that in and by the indenture the lessee for himself, his executors, administrators and assigns, covenanted that he and they should not assign the premises thereby demised without the consent of the

(*g*) *Richardson* v. *Evans*, 3 Madd. Cha. Cas. 218.

(*h*) *Lloyd* v. *Crispe*, 5 Taunt. 249.

(*i*) *Mason* v. *Corder*, 7 Taunt. 9; 2 Marsh. 332.

(*k*) If a lease be made to a man and his assigns for twenty-one years, provided that he shall not assign, the proviso being repugnant to the premises is void; but it would have been good if the word "assigns" had been omitted; Shep. Touch. 123, n.

(*l*) *Doe* d. *Cheere* v. *Smith*, 5 Taunt. 795; 1 Marsh. 359; 2 Rose's Bank. Ca. 280; *Bally* v. *Wells*, 3 Wils. 33.

(*m*) *Paul* v. *Nurse*, 8 Barn. & Cres. 486; 2 Man. & Ryl. 525.

lessor, and that no consent was given; it was held upon demurrer, first, that the replication was bad, inasmuch as the covenant of the lessee not to assign did not restrain the assignee from setting up the assignment; and secondly, that the action being founded on privity of estate, the defendant's liability ceased as soon as the privity of estate was destroyed: but where a lease contained a proviso that the lessee, his executors or administrators, should not set, let or assign over the whole or any part of the demised premises without license in writing, on pain of forfeiting the lease; it was held, that the administratrix of the lessee could not under-let without incurring a forfeiture (*n*).

Other conditional Contracts against Assignment.

If a covenant not to assign contain an exception in favour of assignment by will, it seems that executors claiming under the will are not within the exception, so as to be at liberty to sell for payment of debts without license of the lessor (*o*). If a lease be upon condition that the lessee or his assigns shall not alien unless to his brother, if the lessee assign his term to his brother, it seems that the latter shall not be restrained by the condition (*p*).

(c) *What is a Breach of a Contract against Assignment or Under-letting.*

There must be a valid and effectual Assignment.

In order that an assignment, which is made contrary to a contract in restraint of alienation, shall have the fact of inducing a forfeiture, the instrument must be valid and effectual in point of law; accordingly, where there was a proviso in a lease for re-entry in case of assignment without license, and the lessee by deed assigned all his property real and personal to trustees for the benefit of his creditors, and was afterwards declared a bankrupt; it was held, that the deed of assignment being an act of bankruptcy, and void, did not operate as a valid conveyance of the lessee's interest under the lease, and that therefore it did not work a forfeiture (*q*). An advertisement to under-let or assign is not a breach of contract, if no actual under-lease or assignment be made (*r*).

When a Breach is committed by the Grant of an Under-Lease.

It has been a considerable time settled, that under-leases are not within the general words, "assign, transfer or set over," usually contained in covenants or provisoes against assignment; and, therefore, that a covenant not to assign, transfer, set over, or otherwise do or put away the lease or premises, is not broken so as to work a forfeiture, by an under-lease for part of the term (*s*): but a covenant not to assign or otherwise part with the premises, or any part thereof, for the whole or any part of the term, has been held by Lord Ellenborough to be

(*n*) *Roe* d. *Gregson* v. *Harrison*, 2 Term Rep. 425.

(*o*) Per Mansfield, C. J., *Lloyd* v. *Crispe*, 5 Taunt. 249.

(*p*) Com. Dig. tit. *Condition*, (F).

(*q*) *Doe* d. *Lloyd* v. *Powell*, 5 Barn. & Cres. 308; 8 Dowl. & Ryl. 35; 2 You. & Jerv. 372.

(*r*) *Gourley* v. *Somerset* (*Duke*), 1 Ves. & Beam. 68.

(*s*) *Crusoe* d. *Blencowe* v. *Bugby*, 2 W. Black. 766; 3 Wils. 234; *S. P. Kinnersley* v. *Orpe*, 1 Dougl. 55; *Church* v. *Brown*, 15 Ves. jun. 258.

broken by an under-lease (*t*). A covenant against under-letting will restrain an alienation by assignment (*u*). Letting lodgings is not a breach of a covenant in a lease not to under-let any part of the premises without the license of the lessor; for, as Lord Ellenborough observed, the covenant can only extend to such under-letting as a license might be expected to be applied for; and who ever heard of a license from a landlord to take in a lodger (*x*)?

When by a deposit of the lease as a security.

A covenant "not to let, set, assign, transfer, set over or otherwise part with the premises demised, or the lease," is not broken by a deposit of the lease as a security for a loan; because, although it creates an equitable mortgage, it gives no legal title (*y*). Accordingly, it has very recently been decided, that such a covenant, in a lease of a chop and coffee-house, was not broken by a deposit of the lease with the brewers of the lessee, as a security for money advanced and beer supplied to the house; as it could not be deemed to be a parting with the premises within the meaning of the covenant (*z*).

When by the Lease being taken in Execution.

It may be laid down as a general principle, that any assignment which is effected by operation of law, and not immediately by the voluntary act of the party, is not within the meaning of a contract in restraint of alienation. Upon this principle it was held, that a lease taken in execution, on a warrant of attorney to confess a judgment given by the lessee, is not a forfeiture of the lease under a covenant by such lessee, "not to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture, &c.," for a distinction is to be taken between those acts which a party does voluntarily, and those which pass in invitum, of which latter class is the one in question (*a*): but it being found by verdict, that the tenant gave such a warrant of attorney to a creditor, for the express purpose of enabling such creditor to take the lease in execution under the judgment; it was held to be in fraud of the covenant; and the landlord, under the clause of re-entry, recovered the premises in ejectment from a purchaser under the sheriff's sale (*b*). Where a lease contained a clause of re-entry, in case the term should be extended or taken in execution, and the sheriff entered the premises during the term, under a writ of extent against the lessee at the suit of the Crown, held an inquisition, and seized the lessee's interest into the King's hands; it was held by the Court of Exchequer, that this proceeding was a taking in execution within the latter clause of the proviso; and therefore that the term was forfeited (*c*). Since an assignment by operation of law is not a breach of a general covenant against alienation, the landlord should

(*t*) *Doe* d. *Holland* v. *Worsley*, 1 Camp. 20.
(*u*) *Greenaway* v. *Adams*, 12 Ves. jun. 395.
(*x*) *Doe* d. *Pitt* v. *Laming*, 4 Camp. 77.
(*y*) *Doe* d. *Goodbehere* v. *Bevan*, 3 Maule & Selw. 353.
(*z*) *Doe* d. *Pitt* v. *Hogg*, 4 Dowl. & Ryl. 226; 1 Car. & Pay. 160; *S. C.* nom. *Doe* d. *Pitt* v. *Laming*, Ryan & Moody, 36.
(*a*) *Doe* d. *Mitchinson* v. *Carter*, 8 Term Rep. 57; and see Dyer, 6 a.
(*b*) *Doe* d. *Mitchinson* v. *Carter*, 8 Term Rep. 300.
(*c*) *Rex* v. *Topping*, M'Clel. & Yo. 544.

protect himself, as far as he can, by the particularity of the words contained in his covenant.

When by the Bankruptcy of the Lessee.

Where the lessee becomes a bankrupt, the operation of the bankrupt acts, by which the property becomes vested in the assignees, does not create a breach of the contract against alienation: so the assignment, which was formerly necessary, being a change effected by operation of law, was no breach, because the assent of the lessor was presumed to have been given (*d*). Where a lessee covenanted, that neither he nor his executors nor administrators would assign the term without the lessor's consent, with a power of re-entry to the lessor in such case, and that the lease should be void; and the lessee having died, his executor entered, and afterwards became a bankrupt, and the lease was assigned over by the assignees under his commission for a valuable consideration to the plaintiff, who brought his bill in equity to be relieved against the proviso, and to stay proceedings in an ejectment brought against him upon it; Lord Macclesfield held clearly, that the assignment being done by the authority of a statute, would supersede any private agreement between the parties; and that the assignment by the assignees was therefore no breach of the condition (*e*). Even where the proviso was, that the lessee, his executors or administrators, shall not assign without the lessor's consent *in writing*; it was held not to prevent the commissioners from assigning the lease to the assignees without such consent (*f*): thus where there was a demise for years to *S.*, who covenanted that he, his executors, administrators or assigns, would not assign the indenture, or his or their interests therein, or assign the premises to any person whatsoever, without the consent in writing of the lessor; and a proviso, that in case *S.*, his executors, administrators or assigns, should part with his or their interest, contrary to the covenant, the lessor might re-enter; and *S.* having deposited the lease as security for money borrowed, became bankrupt, and the lease was sold by direction of the Chancellor to pay that debt; it was held, that the assignees under the commission might assign the lease to the vendee, without the consent of the lessor. Where *A.* granted a lease to *B.*, which contained a covenant that *B.*, his executors or administrators, without mentioning "assigns," should not under-let without the consent of the lessor; and *B.* having become bankrupt, his assignees assigned the premises to *C.*, from whom *B.*, after he obtained his certificate, took them again by re-assignment, and under-let them to another person; it was held, that *B.*, having been discharged at the time of his bankruptcy from all covenants in

(*d*) *Wadham* v. *Marlow*, 2 Chit. 600; 1 H. Black. 438, n.; 8 East, 314, n.; 4 Dougl. 54.

(*e*) *Roe* d. *Hunter* v. *Galliers*, 2 Term Rep. 133; *Weatherell* v. *Geering*, 12 Ves. jun. 512; *Doe* d. *Lockwood* v. *Clarke*, 8 East, 185.

(*f*) *Doe* d. *Goodbehere* v. *Bevan*, 3 Maule & Selw. 353.

the lease, the under-letting by him, which was in the character of assignee, was no forfeiture of the lease (*g*).

When by the Insolvency of the Lessee.

Taking the benefit of an insolvent act is considered as a *voluntary* assignment; and therefore creates a forfeiture of a lease which contains a covenant against alienation (*h*).

When by the Marriage of the Lessee.

Where the lessee of a term for years is a single woman, and there is a contract against alienation, her taking a husband is no breach of the condition (*i*).

When by the Term being devised.

Where the lessee, having covenanted "not to assign over the term without the lessor's consent first had in writing," devised the term without any such consent obtained; it was held not to be such an assignment as was a breach of the covenant (*k*): but whether it would be so held at this day, may well be doubted (*l*). In a late case (*m*), Bayley, J., observed, that it had been the general impression on the minds of the profession, for a long series of years, that a devise of a term by the lessee is not a breach of a covenant against alienation.

What Acts amount to a Breach of Contract against Alienation.

If a man lease a house and land, upon condition that the lessee shall not parcel out the land, nor any part thereof, from the house; and afterwards the lessee lease the house and part of the land to one, and the residue of the land to another, it is a breach of the condition; for by the word "parcelling" is intended a division or separation of the land from the house; and every division and severance of the house and land is within the meaning of the condition (*n*). Where a lease contained a proviso for re-entry, in case the tenant should demise, lease, grant, or let, the demised premises, or any part or parcel thereof, or convey, &c., to any person whomsoever, for all or any part of the term, without the license of the lessor in writing; and the lessee, without such license, agreed with a person to enter into partnership with him, and gave him the use of a back chamber, and some other parts of the premises exclusively, and of the rest jointly with himself; it was held to be a breach of the contract against alienation, for which the lessor was entitled to re-enter (*o*). Suffering, without consent, persons to use portions of the land for the purpose of raising a potato crop, is a breach of a stipulation not to suffer any part of the land to be occupied by any other person, without the consent of the landlord, although it be proved to be the custom of the country for farmers to pursue that course (*p*). Where the covenant was, not to assign the whole or any part of the lands demised without the lessor's consent,

(*g*) *Doe* d. *Cheere* v. *Smith*, 5 Taunt. 795; 1 Marsh. 359; 2 Rose, Bank. Ca. 280.

(*h*) *Shee* v. *Hale*, 13 Ves. jun. 404.

(*i*) Com. Dig. tit. *Condition*, (Q).

(*k*) *Fox* v. *Swann*, Style, 483.

(*l*) *Barry* v. *Taunton*, Cro. Eliz. 330; *Roe* d. *Gregson* v. *Harrison*, 2 Term Rep. 425.

(*m*) *Doe* d. *Goodbehere* v. *Bevan*, 3 Maule & Selw. 353; see also *Doe* d. *Evans* v. *Evans*, 9 Ad. & El. 719; 1 Per. & Dav. 472.

(*n*) Bac. Abr. tit. *Condition*, (O).

(*o*) *Roe* d. *Dingley* v. *Sales*, 1 Maule & Selw. 297.

(*p*) *Greenslade* v. *Tapscott*, 1 Cromp. M. & Ros. 55; 4 Tyr. 566.

and the lessor entered into part himself, and then the lessee assigned; it was held to be a breach of the covenant, notwithstanding the lessor's entry (*q*). Where during the existence of a lease, containing a proviso for re-entry in case of assignment or under-letting without license in writing, the lessor, who had purchased the remainder of the interest in it, engaged to grant a new lease to the defendant, who was not the lessee, to take effect on the expiration of the old lease, it was held, that the lessor could not maintain ejectment against the defendant on the fact of his possession, though no license in writing had been granted, as there was a waiver of the forfeiture, if any had taken place, or else there was no forfeiture at all, for the defendant came in with the lessor's consent (*r*). It was at one time held, that where there is a right of re-entry upon assignment or under-letting, if a person be found on the premises appearing as tenant, it is primâ facie evidence of an under-letting; and the defendant must show, whether the person was a tenant or merely a servant (*s*): but it has since been laid down by Lord Ellenborough, that it is not sufficient to prove the defendant, a stranger, in possession of the demised premises, and his declaration that they were demised to him by another stranger, even if the tenant had covenanted not to part with the possession (*t*).

(d) *What is a Waiver of a Breach of Contract.*

Difference between a Lease being absolutely void, and a mere Power of Re-entry.

In a former part of this work (*u*) it was stated, that there was a distinction in the case of a lease for years between a clause, by which, on a breach of covenant, the lease is made absolutely void, and a clause, which in such case merely gives the lessor a power to re-enter; in the former case, the term is absolutely ended by a breach of contract, and cannot be set up again by any act of waiver of the forfeiture; in the latter case, however, as the lease is merely voidable, it may be affirmed by the acceptance of rent accrued afterwards, or other act, if the lessor had notice of the breach of contract at the time. It appears, therefore, that if a forfeiture had been incurred by a breach of the contract against alienation, that the receipt of rent accrued afterwards will affirm the lease, and amount to a waiver of the forfeiture, if the lessor had full knowledge of the fact at the time (*x*). Where in an action of ejectment, for the breach of a condition that the lessee should not under-let, in an agreement amounting to a lease, it appeared in evidence, that the lessor of the plaintiff asked the defendant what he would take for his land, and on the defendant naming a price, said, "then let it, and I shall know what it will produce next

(*q*) *Collins* v. *Sill*, Style, 265.
(*r*) *Doe* d. *Weatherhead* v. *Curwood*, 1 Har. & Wol. 140.
(*s*) *Doe* d. *Hindley* v. *Rickarby*, 5 Esp. 4.
(*t*) *Doe* d. *Payne*, 1 Stark. 86.
(*u*) Ante, Book I., Chap. VII., Sect. 5, (*f*), p. 276; and see *Marsh* v. *Curtis*, Cro. Eliz. 528; 1 Salk. 4.
(*x*) *Roe* d. *Gregson* v. *Harrison*, 2 Term Rep. 425; *Mulreary* v. *Eyre*, Cro. Car. 511; *Harvey* v. *Oswald*, Cro. Eliz. 572; *Goodright* d. *Walter* v. *Davids*, Cowp. 803.

year;" it was held, that this was a waiver of the forfeiture, on a breach of such condition (*y*). A lessor who has a right of re-entry on the breach of a covenant not to under-let, does not, by waiving his right on one under-letting, lose his right to re-enter on a subsequent under-letting (*z*).

SECT. 3.—*Residence on the Premises.*

Nature and Extent of Liability on Covenants to reside.

A covenant by the lessee to reside constantly upon the demised premises, is not unfrequently inserted in leases; and such a covenant has been recognized as a fair and proper covenant. In one case it was considered that the reasonableness of a covenant by a lessee, in a lease of lands renewable for ever, that he and his heirs shall always live upon the lands, or pay an additional rent, with the usual remedies by distress and entry, is properly triable at law; and that a court of equity ought not to interpose, or give relief against it (*a*). The covenant to reside upon the premises runs with the land into whosesoever hands it comes; and is therefore binding upon assignees, although they be not named (*b*). Where *A.* gave by will his tenant-right, which he held by lease, to *B.*, but not to dispose of nor sell it; and if he refused "to dwell there or keep it in his own possession," then that *C.* "should have his tenant-right of the farm;" and *B.* having borrowed money, left the title-deeds with his creditor as a security, and confessed a judgment to secure the money; and having also given a judgment to another creditor, who issued an execution against him, and the sheriff sold the lease to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff in the execution; and *B.* having left the premises, and ceased to dwell there on the day of the execution, before the sheriff entered; it was held, that *C.*, the remainderman, was entitled to enter; for that the acts of *B.* amounted to a voluntary parting with the estate (*c*).

SECT. 4.—*Respecting particular Trades.*

Nature and Propriety of Contracts respecting particular Trades.

In leases of houses in towns (*d*), a covenant is very freqeuntly inserted, to restrain the lessee from carrying on or assigning the premises to persons carrying on obnoxious trades, and also from having or permitting any sale of furniture in the house; a precaution which becomes very necessary, not merely from the injury which may otherwise be done to the premises, but likewise from their respectability being lessened, and the good-will of them being thereby diminished. Some-

(*y*) *Doe* d. *Henniker* v. *Watt*, 8 Barn. & Cres. 308; 1 Man. & Ryl. 694.

(*z*) *Doe* d. *Boscawen* v. *Bliss*, 4 Taunt. 735.

(*a*) *Ponsonby* v. *Adams*, 2 Bro. Parl. Cas. 431.

(*b*) *Tatem* v. *Chaplin*, 2 H. Black. 133.

(*c*) *Doe* d. *Norfolk* (*Duke*) v. *Hawke*, 2 East, 481.

(*d*) By the late Metropolitan Building Act, 7 & 8 Vict. c. 84. ss. 54 & 55, certain dangerous and noxious trades are prohibited from being carried on within a certain distance of any building.

times, also, as in the case of mines, there is a covenant to carry on effectually a certain trade or business. Sometimes, again, there is a restriction in the lease, that the premises shall only be used for the purposes of one specified trade—as is the case in leases of public-houses. It appears that such restrictions are not only legal, but usual and common in some trades: thus it was held, in a very recent case of an action brought on an agreement to accept an assignment of a public-house lease, subject to a net yearly rent, and to *common and usual* covenants, that it was no defence that the lease contained a proviso for re-entry, in the event of the premises being applied to the carrying on of any business except that of a licensed victualler, when it was found that the greater number of such leases contain such a proviso (*e*). But a restriction against particular trades has been held not to be a usual covenant (*f*). It has been held, that on a covenant, that (in consideration of a weekly payment to *A*. and his executors for a term certain) *A*. shall not exercise a particular trade, the executors of *A*. are not bound to abstain from exercising it (*g*). A lease made for the express purpose of using the premises to boil oil and tar, which is contrary to the provisions of the Building Act, 25 Geo. III. c. 77, would, it seems, be probably held to be void, though the intended use of the premises is not named in the lease (*h*). A promise cannot be implied, from the mere fact of a lessee having entered into an agreement for an under-tenancy, that he had power to let without restriction as to the purposes for which the premises should be used (*i*). A person agreed to take land for ninety years at a certain rent, and to build glass-houses, and not to use the premises for any other purpose than a glass manufactory; it was held, that this agreement did not warrant the insertion of a covenant in the lease, compelling the tenant to carry on the business of a glass manufactory during the term (*k*).

What amounts to a Breach of Contract not to carry on a particular Trade.

The following cases will show the view the courts have taken, in putting a construction upon covenants with respect to trades:—Where a lessee of a house covenanted not to lease a shop, yard, or other thing belonging to the house, to one who sold coals, nor that he himself would sell coals there, and afterwards he leased all the house to one who sold coals; it was held, that he had broken the covenant (*l*). A covenant in a lease, that the lessee shall not exercise the trade of a butcher upon the premises, is broken by there selling raw meat by retail, although no beasts were there slaughtered (*m*): but carrying on

(*e*) *Bennett* v. *Womack*, 7 Barn. & Cres. 627; 1 Man. & Ryl. 644; 3 Car. & Pay. 96.

(*f*) *Propert* v. *Parker*, 3 Myl. & Keen, 280.

(*g*) *Cook* v. *Calcraft*, 2 W. Black. 856; 3 Wils. 380.

(*h*) *Gas Light Company* v. *Turner*, 5 Bing. N. C. 666; 7 Scott, 799; 8 Scott, 609; 6 Bing. N. C. 324. This statute is not repealed by the new Building Act, 7 & 8 Vict. c. 84.

(*i*) *Jackson* v. *Cobbin*, 8 Mees. & Wels. 790; 1 Dowl., N. S., 96.

(*k*) *Doe* d. *Bute* (*Marquis*) v. *Guest*, 15 Mees. & Wels. 160.

(*l*) Bac. Abr. tit. *Condition*, (O).

(*m*) *Doe* d. *Gaskell* v. *Spry*, 1 Barn. & Ald. 617.

the business of a retail brewer has been held to be no breach of a covenant not to carry on the business of a common brewer or retailer of beer (*n*). Where a lessee of a house and garden for a term of years covenanted with the lessor not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, &c., without the license of the lessor, &c., and afterwards, without the license of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises; it was held, that the assignment was a breach of the covenant; and that the lessor was entitled to re-enter, under a proviso for re-entry for non-performance of covenants (*o*). In a lease of a house (made in 1802) there was a covenant, with a clause of forfeiture, not to use or exercise the trades or businesses of a butcher, baker, slaughter-man, melter of tallow, tallow-chandler, tobacco-pipe maker, tobacco-pipe burner, soap maker, sugar maker, fellmonger, dyer, distiller, victualler, vintner, tavern keeper or coffee-house keeper, tanner, common brewer, or any offensive trade, without license; it was held, that the lease was not forfeited by carrying on any occupation besides a trade; and that it was not a trade to use the house as a private lunatic asylum; the word "trade," in this covenant, being applicable only to a business conducted by buying and selling (*p*). In a lease for years of a messuage and premises in a public street, the lessee covenanted that he, his executors, &c., should not permit or suffer any person or persons to inhabit the same, who should carry on therein certain enumerated trades or businesses, "or any other trade or business that might be, or grow, or lead to be, offensive, or any annoyance or disturbance, to any of the other tenants of the lessor," &c.; and the lessee granted an under-lease of the premises (subject to the like covenant) to *A.*, who opened them as a public-house, in the business of a licensed victualler, which was not one of the businesses enumerated in the covenant; it was held, that such an act did not amount to a breach of covenant (*q*). If a lessee exercise a trade upon the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by and witnessing the act for six years, waive the forfeiture, as some positive act of waiver is necessary: but if he permit the tenant to expend money in improvements to adapt them to that trade, it would seem that it is evidence to be left to the

(*n*) *Simons* v. *Farren*, 1 Bing. N. C. 126; 4 Moore & Scott, 672; and see *S. C.* 1 Bing. N. C. 272; 1 Scott, 105.

(*o*) *Doe* d. *Bish* v. *Keeling*, 1 Maule & Selw. 95.

(*p*) *Doe* d. *Wetherell* v. *Bird*, 2 Ad. & El. 161; 4 Nev. & Man. 285; 6 Car. & Pay. 195.

(*q*) *Jones* v. *Thorne*, 1 Barn. & Cres. 715; 3 Dowl. & Ryl. 152. In construing a covenant not to carry on any offensive trade or business on premises demised, much will depend on the situation of the premises; and it is particularly worthy of consideration, whether such trade as that complained of was carried on there at the time of the demise. It would appear that a trade carried on there at the time of the demise would not be within the covenant; *Gutteridge* v. *Munyard*, 7 Car. & Pay. 129; 1 Mood. & Rob. 334.

jury of his consent to their being so occupied (*r*). Where there is a covenant against carrying on a particular trade without a written license, the mere fact of the lessor's suffering the tenant to carry on one trade on the premises will not afterwards authorize his carrying on another without a written license (*s*).

What amounts to a Breach of Contract to use Premises for a particular Trade or Purpose.

Where a lessee covenanted to use his utmost endeavours to continue the house open as a public-house, and the license was taken away by the magistrates on account of the disorderly conduct of an under-tenant, and was not renewed for six years, when the lease expired, it was held, that the covenant was broken, because the lessee had done no act to endeavour to get the license renewed (*t*). A lease of a mine contained a proviso, that it should be void to all intents and purposes if the tenant ceased working at any time for two years; held, that a fraudulent working for a short time would not avoid a forfeiture (*u*). An agreement to work a mine as long as it is "fairly workable," does not oblige the tenant to work it at a dead loss (*x*). A lessee of iron mines covenanted to work them, unless prevented by accident or want of materials, or unless the ironstone should be insufficient in quantity or quality, or would not by itself, or with a proper mixture or process, make good common pig-iron; held, that the mixture intended was not necessarily of ingredients procurable on the demised premises (*y*). Where there was a demise of all mines which then had been, or thereafter during the demise should be discovered or opened under certain lands, and there was a covenant by the lessee that he would work the said mines in a proper and workmanlike manner, no action lies on the covenant if the mines have never been worked either before or since the demise (*z*). Land was demised to trustees for a parish, they covenanting to build a workhouse, and to use, occupy, possess and enjoy the premises, for the sole use, maintenance and support of the poor of the parish, and not to convert the building or the land, or employ the profits thereof, to any other use, intent or purpose: there was a proviso for re-entry on breach of the covenant: the premises were used for the intended purposes, until the paupers were removed under the Poor Law Amendment Act to a union workhouse, after which the house was shut up, and the land was let at a rack-rent, which was applied in aid of the poor rates; it was held, there was no breach of the covenant, and that if there were, it was excusable, being caused by the compulsory operation of the poor-law act (*a*).

(*r*) *Doe* d. *Sheppard* v. *Allen*, 3 Taunt. 78.
(*s*) *Macher* v. *Foundling Hospital*, 1 Ves. & Beam. 188.
(*t*) *Linder* v. *Pryor*, 8 Car. & Pay. 518.
(*u*) *Doe* d. *Bryan* v. *Bancks*, 4 Barn. & Ald. 401; Gow. 220.
(*x*) *Jones* v. *Shears*, 7 Car. & Pay. 346.
(*y*) *Foley* v. *Addenbrooke*, 13 Mees. & Wels. 174.
(*z*) *Quarrington* v. *Arthur*, 10 Mees. & Wels. 335.
(*a*) *Doe* d. *Anglesea* (*Marquis*) v. *Rugeley* (*Churchwardens*), 6 Queen's B. Rep. 107.

SECT 5.—*Dealing with particular Persons.*

Nature and Propriety of Contracts to deal with particular Persons.

Contracts entered into by the lessee to deal with the lessor alone in the way of trade, or indeed any other mode of binding a party to purchase articles of particular individuals, should not be encouraged, for very obvious reasons. They are not favoured by the Courts, although it has never been directly decided that they are illegal and nugatory. The question upon the validity of such contracts has generally arisen with respect to leases granted by brewers to publicans: and in many cases the Courts have strongly censured that course of proceeding, not only as being extremely injurious to the public interest and welfare, but having an evident tendency to prejudice the health of the subject (*b*). Attempts were made to get over the difficulty by framing the contract in the alternative, either that the publican should take all his beer of the brewer, or pay an advanced rent; but it was held by Lord Ellenborough, that even this could not be enforced, unless it was proved that *good* beer was supplied (*c*): and the quality cannot be shown to be good by evidence that the brewer served good beer to his other customers at the same period of time. In another case, where a lease contained such a proviso, a plea in bar to an avowry for such advanced rent, stating the beer delivered by the plaintiff to be bad, nauseous and unwholesome, was considered to be a good defence on the merits (*d*). Where, in the conditions of sale of a public-house, it was described as a free public-house, and the lease contained a clause of this nature, it was held, that the purchaser was not bound to complete his purchase, and might recover back his deposit, even although the lease was read over by the auctioneer at the time of sale (*e*). Lord Kenyon, in a former case, doubted whether a covenant contained in the assignment of a lease, requiring the assignee and his assigns to buy the beer of the assignor, would bind a subsequent assignee (*f*): and in a late case, where the lessee of a public-house covenanted for himself, his executors and assigns, with his lessors (brewers) to take all his beer of them, *or their successors* in their said trade, and the lessors sold their trade, and the public-house, with other premises, to third persons, who removed their business to a short distance; it was held, that the trade of the lessors was determined, and that their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer (*g*). Where there was a lease of lime-works, with a stipulation that the lessor should furnish, and the lessee take, coals from particular collieries; it was held, that the lessee could not, on failure by the lessor to raise the

(*b*) *Thornton* v. *Sherratt*, 8 Taunt. 529.
(*c*) *Holcombe* v. *Hewson*, 3 Camp. 391.
(*d*) *Cooper* v. *Twibill*, 3 Camp. 286, n.
(*e*) *Jones* v. *Edney*, 3 Camp. 285.
(*f*) *Hartley* v. *Pehall*, Peake, 131.
(*g*) *Doe* d. *Calvert* v. *Reid*, 10 Barn. & Cres. 849.

full quantity of coals, resort to other collieries for the whole of his supply, but only for the deficiency (*h*).

SECT. 6.—*Trading within a certain Distance.*

Nature and Legality of Contracts in Restraint of Trade within a given Distance.

A covenant to restrain a person from exercising a trade is not illegal if it be not to the general prejudice of the public, and the consideration be reasonable (*i*): there is, therefore, no objection to a covenant, by which a party binds himself not to exercise a particular trade within a specified distance of premises which he has transferred to another, for the purpose of carrying on the same trade. But a covenant by the lessor of a brewery, that he will not during the continuance of the demise, carry on the business of a brewer, or agent for the sale of ale, &c. in *S.* or elsewhere, or in any other manner howsoever be concerned in the business, is void (*j*). Covenants in restraint of trade in a trading locality are not considered usual covenants (*k*).

How the Distance is to be computed.

Where the assignor of a lease of a public-house in London, covenanted that he would not keep a public-house within the distance of half a mile from the premises assigned, it was held, that the half-mile, as mentioned in the covenant, imported half a mile measured by the nearest way of access between the premises assigned and any public-house afterwards kept by the assignor (*l*).

SECT. 7.—*Re-delivery of Fixtures, Goods, Land, &c.*

Nature and Propriety of a Covenant to re-deliver Fixtures, &c.

Where fixtures which are not part of the freehold, furniture or other goods and chattels, are leased together with houses, it is usual to attach a schedule of them to the lease, and to insert a covenant by the lessee to re-deliver them in the same condition at the end of the term. The object in doing this is to give the lessor a remedy on the covenant, after the lease is ended, for any damage sustained by their being injured; for as he cannot complain of any injury during the existence of the term, because they may be replaced before the end of it, and as the ordinary remedy by an action of trover or detinue merely affects the recovery of the chattels, he would be without any remedy whatever, for damage done to them, without the insertion of such a covenant.

Covenants to give up Part of Land.

It is not unusual to reserve to the lessor the power of taking such portions of the land demised as he may want, upon giving a specified notice to the lessee, and making a proportionable abatement out of

(*h*) *Wight* v. *Dicksons*, 1 Dow. 141.

(*i*) *Homer* v. *Ashford*, 3 Bing. 322; 11 Moore, 91; and see *Crisdee* v. *Bolton*, 3 Car. & Pay. 240; *Hitchcock* v. *Coker*, 6 Ad. & El. 438; 2 Har. & Wol. 464; 1 Nev. & Per. 796; and *Archer* v. *Marsh*, 6 Ad. & El. 959; 2 Nev. & Per. 562; Will. Wol. & Dav. 641; *Mullen* v. *May*, 11 Mees. & Wels. 653.

(*j*) *Hinde* v. *Gray*, 1 Man. & Gr. 195; 1 Scott, N. R. 123; and see *Chesman* v. *Nainby* (*in error*), 1 Bro. Parl. Cas. 234; *Haward* v. *Young*, 2 Chit. 407; *Davis* v. *Mason*, 5 Term Rep. 118; *Pemberton* v. *Vaughan*, 10 Queen's B. Rep. 87.

(*k*) *Wilbraham* v. *Livesay*, 18 Beav. 206.

(*l*) *Leigh* v. *Hind*, 9 Barn. & Cres. 774; 4 Man. & Ryl. 579; *Woods* v. *Dennett*, 2 Stark. 89.

the rent. Such provisoes are perfectly reasonable and just, and have often been recognized by the courts both of law and equity. Such a power has been extended to the whole of the land demised (*l*): where the proviso was, that the lessor might from time to time have any part of the land leased, it was held he might require possession of the whole (*m*). In the same case it was held, as the proviso gave the lessor power to take possession, it did not operate by way of covenant merely. But in another case where there was no such power, it was held to operate as a covenant merely (*n*).

SECT. 8.—*Contracts for Quiet Enjoyment.*

(a) *Implied Obligation.*

Nature and Extent of the implied Obligations for Quiet Enjoyment.

Although an express covenant is almost invariably inserted in leases, for the quiet enjoyment of the lessee, upon his performing all the stipulations which are obligatory upon him; there is always an implied obligation on the part of the lessor, that the lessee shall hold and enjoy the premises quietly during the existence of the tenancy. This obligation necessarily arises from the nature of the relation of landlord and tenant. It exists in every case of a tenancy for any certain period, however short it may be; but is confined, however, to cases of disturbance by persons either deriving title from the lessor, or having a paramount right. Upon the old principle, that when a contract is expressed, no implied contract shall arise, no action can be maintained for a breach of the implied covenant for quiet enjoyment, where there is any express contract for the same purpose contained in the lease: thus, if a lease contain a covenant for quiet enjoyment against the lessor, and those who claim under him, the lessee cannot, upon an eviction by a paramount title, recover under the implied covenant for general title implied in the word demise (*o*). Where a person held under an agreement, which was an actual demise, subject to the same conditions as were mentioned in the memorandum under which the lessor held the premises, and it did not appear what these conditions were; it was held, that a contract for quiet enjoyment could not be implied (*p*). But, under ordinary circumstances, an agreement for quiet enjoyment during the term is implied by law from a demise by parol; but not an agreement for good title (*q*). Where the plaintiff took of the defendant a house at a *yearly* rent, under an agreement, by the terms of which the latter agreed that up to the date thereof he had paid all arrears of *rent;* and the former agreed that "from and

(*l*) *Doe* d. *Wilson* v. *Abel*, 2 Maule & Selw. 541.

(*m*) *Doe* d. *Gardner* v. *Kennard*, 12 Queen's B. Rep. 244.

(*n*) *Doe* d. *Willson* v. *Phillips*, 2 Bing. 13; 9 Moore, 46; ante, pp. 104, 105.

(*o*) *Merrill* v. *Frame*, 4 Taunt. 329; *Line* v. *Stevenson*, 4 Bing. N. C. 678; 5 Bing. N. C. 183; 6 Scott, 447; 7 Scott, 69; 1 Arn. 294.

(*p*) *Messent* v. *Reynolds*, 3 Com. B. Rep. 194.

(*q*) *Bandy* v. *Cartwright*, 8 Exch. Rep. 913; *Hancock* v. *Caffyn*, 8 Bing. 366.

after that day *the same* should be kept paid by him for the period he might occupy;" and at the expiration of the first quarter the superior landlord distrained; it was held, that there was no implied duty on the defendant to indemnify the plaintiff against this claim, although the agreement stipulated for a yearly rent, the defendant having by the subsequent clause expressly undertaken to keep the reserved rent paid (*r*). If the party ousting the covenantee have no title, the covenantee, it is said, cannot bring an action of covenant against the lessor, upon the implied covenant created by law (*s*). He must, therefore, always show upon the face of his pleadings, that he was molested or evicted by one who had an elder title (*t*). He must also show, with certainty, the person by whom he was evicted; thus in an action for breach of covenant on defendant's demise, whereby plaintiff's assignee of the lease was evicted, and plaintiff put to costs in an action against him by such assignee, for such eviction; it was held, that merely stating that a third person was seised in fee of the premises, and that the assignee was evicted generally, was not sufficient (*u*). A declaration stating the simple relation of landlord and tenant between the plaintiff, a lessee for years, and the defendant, and that in consideration of the premises the defendant promised the plaintiff that he should quietly hold the house during the term without *any* eviction from the parties entitled to the reversion, is bad, as no such duty as that stated as the defendant's promise arises from that relation (*x*). It would seem, that under the word "demise," the lessee may maintain an action of covenant against the lessor, for not having sufficient power to demise for the whole term, whereby plaintiff was put to expense in procuring a better title for the whole term: so upon the word "assign" in an assignment, for it is as general a word of covenant as "demise (*y*)." Where tenant for life, with remainder over, demised by indenture for years, without any express covenant for quiet enjoyment, and the lessee was evicted by the remainderman, after the death of the tenant for life, but before the expiration of the term; it was held, that he could not maintain an action of covenant against the executor of the tenant for life (*z*). If the incumbent of a living contract to let lands belonging to the benefice for a term of years, his resignation of the living during the term is a breach of the contract (*a*). Where an agreement for letting part of a house at a rent of 30*l.*, contained a clause that the tenant should be liable only to the said rent; such clause was held to be a clause of indemnity, and that an action would lie upon it where

(*r*) *Upton* v. *Fergusson*, 3 Moore & Scott, 58.

(*s*) *Andrew's case*, Cro. Eliz. 214; 2 Leon. 104.

(*t*) Shep. Touch. 167.

(*u*) *Fraser* v. *Skey*, 2 Chit. 646.

(*x*) *Granger* v. *Collins*, 6 Mees. & Wels. 458.

(*y*) Bac. Abr. tit. *Covenant*, (B 65), cited 15 East, 541.

(*z*) *Adams* v. *Gibney*, 6 Bing. 656; 4 Moore & Pay. 491; and see *Woodhouse* v. *Jenkins*, 9 Bing. 431; 2 Moore & Scott, 599.

(*a*) *Price* v. *Williams*, 1 Mees. & Wels. 6; 1 Gale, 362; Tyr. & Gr. 197.

the tenant's goods were seized under a distress for rent by the original landlord, though the party giving the indemnity was not the immediate tenant of such original landlord; it was also held, that if no notice be given to the party indemnifying, and he pay the rent, and protect his tenant's goods, such tenant cannot recover specially on a count framed on the indemnity, though he may recover the money on the common counts (*b*). In these cases of implied contract of indemnity against the consequences of distress, an action of tort is the proper form of remedy (*c*).

(b) *Express Contracts.*

Nature and Propriety of express Contracts for Quiet Enjoyment.

As before observed, it is almost invariably the case, that an express covenant is inserted in the lease for the lessee's quiet enjoyment of the premises, and to save him harmless from all persons claiming title, upon his performance of those stipulations which are obligatory upon himself. According to the ancient mode of conveyance, deeds were confined to a very narrow compass, and the words "grant and enfeoff" were considered to amount to a general warranty in law, and to have the same force and effect. The lengthy covenants which have been introduced in more modern times, are intended for the greater protection of the parties; and are introduced for the purpose of supplying the place of the general warranty, which the old law implied (*d*). A covenant for quiet enjoyment does not extend to oblige the lessor to rebuild in case of fire or otherwise, where the lessee is not bound to rebuild himself, and cannot therefore have any beneficial occupation (*e*).

Construction of Covenants for Quiet Enjoyment.

Where restrictive words are inserted in the first of several covenants having the same object, they are to be construed as extending to all the covenants, although they are distinct (*f*). The following cases have been determined upon the construction of covenants for quiet enjoyment. A tenant for life, with a power of leasing, made a lease for years, in which was a clause that "he, for himself, his heirs and assigns, the said demised premises unto the said lessee, his executors, administrators and assigns, under the rent, covenants, conditions, exceptions and agreements before expressed, against all persons whatsoever lawfully claiming the same, shall and will during the said term warrant and defend:" held, that this was an express covenant for

(*b*) *Evans* v. *Curtis*, 2 Car. & Pay. 296

(*c*) *Hancock* v. *Caffyn*, 8 Bing. 358; 1 Moore & Scott, 521.

(*d*) It may not be amiss to hint here again, that it is not always wise to endeavour to meet every possible case which may happen by express contract, rather than rely upon the more general extent of the implied covenant. By so doing, the object is often entirely frustrated, and those things which would unquestionably come within the general principle of a covenant in law, are passed over by a vain attempt at an enumeration of particulars which is intended to have the same effect. This is exemplified in the case of *Merrill* v. *Frame*, 4 Taunt. 329, above cited, p. 508. See also ante, Book I., Chap. IV., Sect. 6, p. 97.

(*e*) *Brown* v. *Quilter*, Ambl. 620.

(*f*) Sugden's Vend. and Purch. 756, 11th edit.; and see *Gainsford* v. *Griffith*, 1 Saund. 58; *Belcher* v. *Sikes*, 8 Barn. & Cres. 185.

quiet enjoyment (*g*). Premises were demised at a certain rent, and there was a proviso for re-entry if the rent should be in arrear twenty-one days, and the lessee covenanted to pay the rent, and the lessor covenanted that he paying the rent at the time appointed should quietly enjoy; it was held, that the lessee might maintain an action on the covenant for quiet enjoyment against the lessor, though at the time when the cause of action accrued, the rent had been in arrear more than twenty-one days; for that payment of rent was not a condition precedent to the performance of the covenant for quiet enjoyment (*h*). Where releasors covenanted that, for and notwithstanding any act, &c. by them, or any or either of them, done to the contrary, they had good title to convey certain lands in fee; and also, that they, or some or one of them, for and notwithstanding any such matter or thing as aforesaid, had good right and full power to grant, &c.; and likewise that the releasee should peaceably and quietly enter, hold and enjoy the premises granted without the lawful let or disturbance of the releasors, or their heirs or assigns, or for or by any other person or persons whatsoever; and that the releasee should be kept harmless and indemnified by the releasors and their heirs, against all other titles, charges, &c., save and except the chief rent issuing and payable out of the premises to the lord of the fee; the court held, that the generality of the covenant for quiet enjoyment against the releasors and their heirs, and any other person or persons whatsoever, was not restrained by the qualified covenants for good title and right to convey, for and notwithstanding any act done by the releasors to the contrary (*i*). But where the assignor covenanted that for and notwithstanding any act or thing by him done, the lease was valid; and further, that it should be lawful for the assignee at all times, during the term, quietly to enjoy, without the lawful let or interruption of the assignor, his executors, administrators or assigns, or any of them, or any other person or persons whomsoever, claiming any estate or right in the premises; and that clearly discharged by the assignor, his heirs, executors or administrators, from all former incumbrances made or suffered by him, or by their or either of their acts or privity; and then followed a covenant for further assurance by the assignor, his executors and administrators, and all persons whomsoever claiming under him; it was held, that the general words in the covenant for quiet enjoyment were restrained by the restrictive words in the covenant for title and further assurance, which preceded and followed it; and therefore, that such covenant was confined to the acts of the covenantor, and those claiming under him (*k*): but in another case it was held, that where the covenants for

(*g*) *Williams* v. *Burrell*, 1 Com. B. Rep. 402.

(*h*) *Dawson* v. *Dyer*, 5 Barn. & Adol. 584; 2 Nev. & Man. 559.

(*i*) *Howell* v. *Richards*, 11 East, 633.

(*k*) *Nind* v. *Marshall*, 1 Brod. & Bing. 319; 3 Moore, 703; and see *Foord* v. *Wilson*, 8 Taunt. 543; 2 Moore, 592; *Browning* v. *Wright*, 2 Bos. & Pul. 13; *Stannard* v. *Forbes*, 6 Ad. & El. 572; Will. Wol. & Dav. 321; 1 Nev. & Per. 633; *Young* v. *Raincock*, 7 C. B. Rep. 310.

title were general and absolute against all persons, they were not to be qualified by reference to other covenants, unless there are words either in the absolute covenants themselves, or in preceding or subsequent ones, to connect them (*l*). If the lessor covenant with the lessee that he has not done any act to prejudice the lease, but that the lessee shall enjoy it against all persons; in this case, the words "against all persons" refer to the first branch of the covenant, and are limited and restrained to acts done by him (*m*). Where the lessors covenanted that the lessee of a mill should enjoy the mill and stream without interruption by them, or by persons claiming under them, or by their acts or procurement, a diminution of the water occasioned by supplies under contracts entered into by the lessors prior to making the lease, is not a breach of the covenant for quiet enjoyment (*n*). But where *A. B.* covenanted with his lessee for quiet enjoyment as against any person "claiming by, from or under" him, it was held, that an eviction by a prior appointee of *A. B.* and *C. D.* was a breach of the covenant, and that the case was not altered by the grant to the lessee being "as far as in his power lay, or he lawfully might or could" (*o*). A covenant that the lessee shall enjoy without disturbance by the lessor or any other person lawfully claiming *by, from or under him*, is not broken by a distress put in for land-tax due before the demise, that being a claim *against* the lessor (*p*).

To whose Acts the Covenant for Quiet Enjoyment extends.

Of course if the lessee be ousted or molested by the lessor himself, it amounts to a breach of the covenant for quiet enjoyment, in whatever form it may be; and if the lessor merely covenants against the acts of a particular person, a molestation by that person can be the only ground of a breach of covenant (*q*). Although a doubt has arisen as to the extent of such a covenant, where the eviction has been by a stranger, it may be laid down, that if one make a lease of land to another, and covenant that he shall quietly enjoy it without the let or molestation of any person whatsoever, or without the let of any person whatever claiming by or under the lessor; in both these cases the covenant, it is said, shall be taken to extend only to such persons as have lawful title, or claim some estate under the lessor; for if, in the first case, the lessee shall be disturbed by any claim, entry or otherwise, by any person who has no title; or in the second case, by any person claiming under a third person although he has title, or who shall claim under the lessor, it is no breach of the covenant (*r*). It seems, however, at one time to have been held, that if the lessor

(*l*) *Smith* v. *Compton*, 3 Barn. & Adol. 189.

(*m*) Shep. Touch. 166.

(*n*) *Blatchford* v. *Plymouth* (*Mayor*), 3 Bing. N. C. 691; 4 Scott, 429; 3 Hodges, 86.

(*o*) *Calvert* v. *Sepright*, 15 Beav. 156.

(*p*) *Stanley* v. *Hayes*, 3 Queen's B. Rep. 105; 2 Gale & Dav. 411.

(*q*) *Foster* v. *Mapes*, Cro. Eliz. 213; *Perry* v. *Edwards*, 1 Stra. 400.

(*r*) Shep. Touch. 166; *Anon.*, Lofft. 460; Bull. N. P. 161; *Brooking* v. *Cam*, Cro. Jac. 425. As the covenant for quiet enjoyment does not extend to a wrongful ejectment by a stranger, the lessee has his remedy by action against the stranger himself.

undertook expressly that the lessee should enjoy during the term "quietly, peaceably, and without interruption," it would extend as a covenant against all tortious evictions whatsoever (*s*); but this doctrine is now overruled; for where a covenant was inserted in a conveyance of lands in America, during the revolutionary war in that country, that the grantor had a legal title, and that the grantee might peaceably enjoy, &c., without let, interruption, &c., of the grantor and his heirs, "and of and from all and every other person or persons whomsoever," it was held not to be broken by the States of America seizing the lands as forfeited for an act done previous to the conveyance, notwithstanding the subsequent acknowledgment of her independence by this country, for such a covenant does not extend to the acts of wrong-doers, but only to persons claiming title; and even a general warrantry, which is conceived in terms more general than such a covenant, has been restrained to lawful interruptions (*t*). Again, in an action against executors in their own right, on a covenant for "good title and quiet enjoyment against any person or persons whatsoever," contained in an assignment of a lease of the testator by way of mortgage, it was held, that the cause of action must arise from some act of the covenantors (*u*). It has indeed been held, that a covenant that the lessee shall quietly enjoy against all claiming, or pretending to claim, a right in the premises, extends to all interruptions, be the claim legal or not, provided it appear that the disturber do not claim under the lessee himself (*x*). Where a tenant for life under a marriage settlement, with power to grant leases for years, determinable on three lives, granted a lease of part of the estate to *A.* during the life of the latter and his two sons, and the survivors and survivor, covenanting for quiet enjoyment for and during the said term, without interruption of the lessor, his heirs and assigns, or any other person claiming any estate, &c., under him, or any of his ancestors; and the lessor having died, his eldest son, who was tenant in tail under the settlement, evicted the eldest son of lessee, the third life being still in being; it was held, that the eviction by the tenant was a breach of the covenant for quiet enjoyment (*y*). A fine being levied of a married woman's estate, with a joint power to the husband and wife to declare the uses; and the uses being declared by the husband and wife in remainder to *A.*; if the husband make a lease, and covenant for quiet possession against any person claiming under him, and *A.* evict the tenant, an action on the covenant will lie against the husband's executors (*z*).

What Acts amount to a Breach of a Covenant for Quiet Enjoyment.

A breach of the covenant for quiet enjoyment may occur either by a molestation arising from a suit at law or in equity relating to the title

(*s*) 1 Esp. N. P. 273.
(*t*) *Dudley* v. *Folliott*, 3 Term Rep. 584.
(*u*) *Noble* v. *Smith*, 1 H. Black. 34.
(*x*) *Chaplin* v. *Southgate*, 10 Mod. 384; 1 Comyn, 230.
(*y*) *Evans* v. *Vaughan*, 4 Barn. & Cres. 261; 6 Dowl. & Ryl. 349; *Williams* v. *Burrell*, 1 Com. B. Rep. 402.
(*z*) *Hurd* v. *Fletcher*, 1 Dougl. 43.

or possession, or by any act by which the lessee is disturbed in the possession of the premises. Of the first sort is a recovery by ejectment by a person having a lawful title; or any other suit by which the peaceable occupation of the premises is prevented; thus, a covenant in a lease, that the lessee should quietly enjoy the estate discharged from tithes, is broken by a suit for them, after the expiration of the term (*a*): but where in covenant for quiet enjoyment the breach assigned was, "that the defendant had exhibited a bill in Chancery against him for ploughing meadow, and obtained an injunction, which had been dissolved with 20*s*. costs;" it was held on demurrer to be no breach of covenant, for the covenant was for quiet enjoyment, and this was a suit for waste (*b*). On the other hand, any description of annoyance to the occupation of the premises, which prevents the lessee from enjoying his property in so ample a manner as he is entitled to do by the terms of the lease, amounts to a breach of the covenant for quiet enjoyment of the second sort; thus, if a man covenant that he will not interrupt the covenantee in the enjoyment of a close, the erection of a gate which intercepts it is a breach of the covenant, although he had a right to erect it (*c*): and it has been held, by Sir James Mansfield, C. J., that an action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity (*d*); or of a way by grant from the covenantor (*e*). It must be remembered, however, that the act done must be in the assertion of title, and not a mere tortious act for which an action of trespass might be maintained (*f*).

Between what Parties a Covenant for Quiet Enjoyment is binding.

The covenant for quiet enjoyment runs with the land (*g*), and is therefore binding on the assignees of the reversion; and may be rendered available by the assignees of the term: thus, where *A*. demised by lease to *B*., who assigned his interest to *C*., and *C*. to *D*.; and *B*. covenanted for quiet enjoyment with *C*. and his assigns; it was held, that *D*. might maintain an action of covenant against *B*., on being ejected by *A*. for a forfeiture made by *B*. before the assignment to *C*. (*h*). Where the governors of the Foundling Hospital granted a lease for years of a certain dwelling to *L*., who covenanted that the demised premises, or any part thereof, should not be converted into a shop, or other place for carrying on any trade or public show of business during the term, without the consent in writing of the lessors; and *L*. assigned the premises to *M*., who by an under-lease demised the premises to *F*., with a covenant for quiet enjoyment, "to hold the same, without any lawful let, suit, trouble, molestation, eviction, in-

(*a*) *Laming* v. *Laming*, Cro. Eliz. 316.
(*b*) *Morgan* v. *Hunt*, 2 Ventr. 215.
(*c*) *Andrews* v. *Paradise*, 8 Mod. 318.
(*d*) *Morris* v. *Edgington*, 3 Taunt. 24.
(*e*) *Pomfret* v. *Ricroft*, 1 Saund. 322.
(*f*) *Sedden* v. *Senate*, 13 East, 72.
(*g*) *Lewis* v. *Campbell*, 8 Taunt. 715; 3 Moore, 35, 51; 3 Barn. & Ald. 392; *Nake* v. *Awder*, Cro. Eliz. 375; see ante, Book I., Chap. IV., Sect. 5, (b), p. 88.
(*h*) *Campbell* v. *Lewis* (*in error*), 8 Taunt. 715; 3 Barn. & Ald. 392; 3 Moore, 35, 51.

terruption, claim, or demand whatsoever, by or from her, her heirs, executors, administrators, or assigns, or any person or persons whomsoever claiming or to claim by, from, under, or in trust for her, them, or any of them, or by or through her or their acts, means, right, title, forfeiture, privity, or procurement;" but in this lease the covenant against converting the premises into a shop, &c., was omitted; and *F.* assigned the lease to *S.*, who under-let it to *W.*, and he converted part of the premises into a shop, without the consent of the original lessors, who brought an ejectment, and evicted him for a forfeiture; and *M.* having died, *S.* declared against her executor for a breach of the covenant for quiet enjoyment, averring that by her act, and through her means and procurement, in making the under-lease to *F.* without any covenant similar to that in the original lease to *L.*, he was hindered from quietly enjoying, &c.; it was held, on demurrer, that the action would not lie (*i*).

SECT. 9.—*Covenants for Title and further Assurance.*

Propriety and Construction of Covenants for Title and further Assurance.

Covenants for title or further assurance are not usually inserted in leases; because the covenant for quiet enjoyment necessarily implies that the lease is perfect as a good and valid demise; and granting an imperfect, and therefore a bad lease, would be a breach of the latter covenant. They are always, however, inserted in conveyances of freehold property; and generally in assignments of leasehold premises. With respect to the construction of such covenants;—where the assignor of a lease covenanted that he had not at any time done or suffered any act or thing whereby the premises intended to be assigned could be impeached or affected in title or estate; and that for and notwithstanding any such act, &c., the lease was a good, valid, and subsisting lease, and not forfeited, surrendered, or become void; and that he had in himself good right, full power, and authority, to grant, assign, transfer, and set over the same, to the assignee, in manner aforesaid; and then followed a covenant for further assurance by the assignor, and all persons claiming under him; it was held, that the general words, that the assignor had full power to grant, assign, and set over, were restrained by the preceding part of the covenant; and, therefore, that such covenant was confined to the act of the assignor alone (*k*). But where the assignor, in a deed of assignment of a lease, after reciting the original lease, granted to another for the term of ten years, which by mesne assignments had vested in him, and that the plaintiff had contracted for the absolute purchase of the premises, bargained, sold, assigned, transferred, and set over the same to the

(*i*) *Spencer* v. *Marriott*, 1 Barn. & Cres. 457; 2 Dowl. & Ryl. 665.

(*k*) *Foord* v. *Wilson*, 8 Taunt. 513; 2 Moore, 591; and see *Nind* v. *Marshall*, 1 Brod. & Bing. 319; 3 Moore, 703; ante, 511; and *Young* v. *Raincock*, 7 C. B. Rep. 310.

plaintiff, for and during all the rest, &c., of the said term of ten years, in as ample manner as the assignor might have held the same; subject to the payment of rent and performance of covenants; and then covenanted that it was a good and subsisting lease, valid in law, in and for the said premises thereby assigned, and not forfeited, &c., or otherwise determined, or become void or voidable; it was held, that the generality of this covenant for title, which was supported by the recital of the bargain for an absolute term of ten years, was not restrained by other covenants, which went only to provide for or against the acts of the assignor himself, or of those who claimed under him; such as, 1st, a covenant against incumbrances, except an under-lease of part by the assignor for three years; 2dly, for quiet enjoyment; 3dly, for further assurance; and therefore where it appeared that the original lease was for ten years, determinable on a life in being, which dropped before the ten years expired, though not till after the covenant of the assignor; it was held, that the assignee might assign a breach upon the absolute covenant for title (*l*). An action of covenant lies by the devisee of lands in fee, upon a covenant made by the defendant to the testator, to whom the defendant conveyed the lands in fee, that the defendant was lawfully seised, &c., and had a good right to convey, &c., for such covenant runs with the land; and though broken in the lifetime of the testator, there is a continuing breach in the time of the devisee, and it is sufficient to allege for damage that thereby the lands are of less value to the devisee, and that he is prevented from selling them so advantageously (*m*).

What amounts to a Breach of Covenant for Title and further Assurance.

To show what has been considered as a breach of covenant for title and for further assurance, the following decisions may be stated. A covenant to surrender a copyhold to a purchaser, and to make and do all acts, deeds, &c., for the perfect surrender and assurance of the premises at the costs and charges of the seller, is not broken by the non-payment of the fine to the lord on the admission of the purchaser; for the title is perfected by the admittance of the tenant, and the fine is not due till after the admittance (*n*). Where a party covenanted that he had not done, nor permitted, nor suffered to be done any act whereby an estate was encumbered; it was held, that assenting to an act which he could not have prevented, was not a breach of the covenant (*o*). Where a defendant covenanted for good title, and a formedon was brought against the plaintiff, the covenantee, by a party having a better title, and he compounded it; it was held, that he might recover the whole sum paid, and costs as between attorney and client, in the compounded suit, although he had given no notice of the

(*l*) *Barton* v. *Fitzgerald*, 15 East, 530.

(*m*) *Kingdon* v. *Nottle*, 4 Maule & Selw. 53.

(*n*) *Graham* v. *Sime*, 1 East, 632; and see *Rex* v. *Hendon*, 2 Term Rep. 484.

(*o*) *Hobson* v. *Middleton*, 6 Barn. & Cres. 295; 9 Dowl. & Ryl. 249.

suit to the defendant; for the only effect of such want of notice was to let in proof that the compromise was improvidently made (*p*). Where a defendant, by an agreement of present demise, let premises to the plaintiff, which the parties in possession refused to quit, it was held, that the defendant was bound to give up possession, as a contract to do so was implied; that the plaintiff might maintain assumpsit for the breach of the agreement, and was not obliged to bring ejectment against the wrongful occupier (*q*). A lease and entry by the lessee is not a disseisin in fact, unless the entry be forcible, or with a manifest intention to disseise. A disseisin being the wrongful act of a stranger, it is not a breach of the covenant for validity of the title, that the person under whom the vendor derives title had leased part of the premises sold, to one who had afterwards entered on the premises demised (*r*).

SECT. 10.—*Remedies for Breach of Contract.*

What Remedies are applicable to the Breach of Contract.

Upon the subject of the several remedies by a suit at law for damages incurred by a breach of any of the contracts specified in this chapter, it will again be necessary to remind the reader, that the main difference depends upon the circumstance of the instrument on which the contract is grounded being under seal, or merely by writing not under seal, or word of mouth (*s*). As, however, the injury sustained by the party in every instance now under consideration must be in the nature of unliquidated damages, the forms of action are confined to two, viz., assumpsit and covenant. If the contract of demise be merely verbal, the only ground of action will be a breach of the implied covenant for quiet enjoyment; in that case, and in every other instance where the demise is by writing not under seal, the proper remedy is by action of assumpsit; but where the lease is by deed, the proper form of action is covenant (*t*). Where the contract is for the performance of a certain act, the neglect to perform which cannot readily be compensated in damages, a court of equity will decree a specific performance.

(*p*) *Smith* v. *Compton*, 3 Barn. & Ald. 407.
(*q*) *Coe* v. *Clay*, 5 Bing. 440; 3 Moore & Pay. 57.
(*r*) *Jerritt* v. *Weare*, 3 Price, 575; and see *Doe* d. *Souter* v. *Hull*, 2 Dowl. & Ryl. 38.
(*s*) See ante, 409, 446.
(*t*) See also post, Book III., Chap. II., Chap. IV. and Chap. IX.

CHAPTER VI.

RIGHTS AND LIABILITIES OF THE PARTIES ON THE TERMINATION OF THE CONTRACT.

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BOOK II. CHAPTER VI. SECT. 1.

General Scheme of the Chapter.

SECT. 1.—*Generally.*

THE rights which the parties possess, and the liabilities to which they are subject, at the termination of the contract of tenancy, are of a most important nature, and have been a great source of dispute in our courts of judicature. A very considerable portion of this litigation is to be attributed to the extremely vague and undefined manner in which the subject is regulated by usage, in the absence of any specific terms of agreement; for the usages not only differ in themselves in almost every district, but the same usage is differently construed and acted upon in the same neighbourhood. It will be the object of this chapter to consider the subject in all its bearings—to point out, first, the rights and liabilities which subsist between the landlord and his tenant after the tenancy has been determined; secondly, those which arise between the personal representatives of a tenant, whose interest is ended by the happening of an uncertain event, and his successor; and thirdly, those which exist between the outgoing tenant and the person who succeeds him in the occupation, or the incoming tenant, as he is called.

SECT. 2.—*Tenant's Duty, Rights and Liability at the end of his Tenancy.*

Tenant must deliver up the Premises with all Erections, &c.

The tenant must, at the expiration of his tenancy, deliver up to his landlord the peaceable and quiet possession of the premises demised to him, together with all erections, buildings, improvements and landlord's fixtures, which he is not entitled to remove. If he has let the whole or any part of the premises to an under-tenant, who is in pos-

session at the time of the determination of the term, he must get him out, for otherwise he will not be in a situation to render that complete possession to which the landlord is entitled. It is clear that a tenant wrongfully holding over cannot bring trespass quare clausum fregit against his landlord in respect of a peaceable entry (*a*): but that under such circumstances the landlord having entered may maintain trespass quare clausum fregit against such tenant for remaining in the possession (*b*). It seems also clear that if, at the expiration of the term, the tenant and his family have gone away from the house, and the house is locked up, no one being in possession, the landlord would be justified in breaking into the house forcibly and obtaining possession; and trespass quare clausum fregit, at the suit of the tenant, could *not* be maintained against him (*c*). So where a pauper, who was not a tenant, but had been permitted to occupy a parish house, went away from home, it was held, that the overseers might lawfully resume possession (*d*). It would seem that a landlord, who has entered *peaceably* into his tenant's house, after the determination of the term, may use as much violence as is necessary to eject the tenant, without being liable to trespass quare clausum fregit, or to an action for the assault. But where a landlord, on the expiration of his tenant's term in a house or apartments, enters *forcibly* and expels him therefrom, using no unnecessary violence, a question arises whether the tenant can maintain any action of trespass quare clausum fregit, or for the assault. The point arose in *Newton and wife* v. *Harland* (*e*), where the landlord of apartments let to the plaintiff *forcibly* took possession of them at the end of the term, and removed the female plaintiff, using no unnecessary violence. It was held by Tindal, C. J., Bosanquet, J., and Erskine, J., dissentiente Coltman, J., that the landlord was liable at the suit of the tenant for the assault, the principal ground for the decision being, that the landlord's possession having been obtained by an illegal act, for which he was indictable for a forcible entry, he could not be considered to have obtained lawful possession of the premises. In support of the contrary view it was urged, that although the landlord might be responsible criminally for the forcible entry, yet that as against the plaintiffs, who were wrong-doers and altogether without title, he had obtained by the forcible entry a lawful possession, and might, in a civil action, justify the removal of the tenant. In that case Erskine, J., drew a distinction between an action of trespass quare clausum fregit and an action for the assault, conceding that in the former case there were many authorities (*f*) which decided that trespass

(*a*) *Taunton* v. *Cortar*, 7 Term Rep. 431; *Turner* v. *Meymott*, 1 Bing. 158; *Lacey* v. *Lear*, Peake, Add. Cas. 210.

(*b*) *Butcher* v. *Butcher*, 7 Barn. & Cres. 399.

(*c*) *Turner* v. *Meymott*, 1 Bing. 158; *Hillary* v. *Gay*, 6 Car. & Pay. 284; and see *Davison* v. *Wilson*, 11 Queen's B. Rep. 890.

(*d*) *Wildbor* v. *Rainsforth*, 8 Barn. & Cres. 4.

(*e*) 1 Scott, N. R. 474.

(*f*) *Taylor* v. *Cole*, 3 Term Rep. 292; *Taunton* v. *Cortar*, 7 Term Rep. 431; *Argent* v. *Durrant*, 8 Term Rep. 403; *Turner* v. *Meymott*, 1 Bing. 158; Dalton's Justice, cap. 129, p. 431.

quare clausum fregit would not lie at the suit of a tenant against a landlord for a forcible entry after the expiration of the term. The same distinction was also adverted to by Tindal, C. J. (*g*). The language of Parke, B., and Alderson, B., in *Harvey* v. *Brydges* (*h*), raises a doubt as to the correctness of this distinction (*i*). The former learned Judge says: "The next point was that raised in *Newton* v. *Harland*, and if it were necessary to decide it, I should have no difficulty in saying, that when a breach of the peace is committed by a freeholder who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed. But the point does not arise in this case." Alderson, B., says: "The other point comes to this—may a freeholder lawfully enter on his own premises with any degree of force? for the distinction is very plainly taken in *Rex* v. *Wilson* (*k*) between entering, even a dwelling-house, vi et armis simply, and entering it manu forti. I have still the misfortune to retain the opinion that I expressed in *Newton* v. *Harland*, although the majority of the Court of Common Pleas have held the contrary."

The following old authorities seem to show that no action, either of trespass quare clausum fregit, or for an assault, is maintainable under the circumstances of *Newton* v. *Harland*. "If a man entereth with force into lands and tenements to which he hath title and right of entry, and put the tenant of the freehold out of those lands or tenements; now he who is so put out with force shall not maintain an action (*l*) of forcible entry against him who had title or right of entry, because that entry is not any disseisin of him; but he may (*m*) indict him for his entering by force, and by this indictment he shall be restored to his possession again; and that is by the statute of 8 Hen. VI. c. 9." "However, even at this day, in an action of forcible entry grounded on those laws, if the defendant make himself a title, which is found for him, he shall be dismissed without any inquiry concerning the force. For howsoever he may be punishable at the king's suit for doing what

(*g*) The case of *Newton* v. *Harland* was tried three times. On the two first occasions, Parke, B., and Alderson, B., expressed an opinion favourable to the right claimed by the landlord. On the other hand, Tindal, C. J., Parke, Vaughan, Bosanquet and Erskine, JJ., on the motions for a new trial, expressed a different opinion.

(*h*) 14 Mees. & Wels. 442.

(*i*) See *Davis* v. *Burrell*, 10 C. B. 825: and per Cresswell, J., in this case, as reported in 17 Law Times, 51.

(*k*) 8 Term Rep. 357.

(*l*) Fitz. Nat. Br. 248.

(*m*) Viz., he shall not maintain on the stat. Ric. II.; see 9 Hen. VI. 19; but the party shall make fine to the king for his forcible entry; see 31 Hen. VI. 39; 17 Hen. VII. 17.

is prohibited by statute, as a contemner of the laws, and disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself (*n*)." "But (this action being at the suit of the party, and only for the right) is only where the entry of the defendant was not lawful; for if a man entereth with force, where his entry is lawful, as if a disseisee should enter upon the disseisor with force, he shall not be punished by way of action: but yet he may be indicted upon the statute, and upon such indictment found, the party put out (*sc.* the disseisor) shall be restored; for the indictment is for the force and for the king. And the offender (*sc.* the disseisee) shall make fine to the king, although his right be ever so good. Br. Forc. 11, 15 Hen. VII. c. 17 (*o*)." On the whole, it would seem that the weight of principle and authority is in favour of the position that a lessor, at the determination of the term, may enter forcibly into possession of the demised premises, and expel the tenant with as much violence as is necessary, without being liable to an action of trespass quare clausum fregit, or for assault, at the suit of the tenant; although he may have made himself liable to an indictment for a forcible entry (*p*). A proviso for re-entry may, however, be so framed as to justify the lessor, on breach of covenants, in forcibly resuming possession of the premises and expelling the tenant (*q*).

Where a landlord having, in respect of a breach of covenant, entered his tenant's premises in his absence, and put locks on the doors, and the tenant on his return broke the locks, it was ruled at Nisi Prius that the landlord, being lawfully in possession of the premises, might justify giving his tenant into custody under the Metropolitan Police Act, 2 & 3 Vict. c. 47, ss. 54, 66, but it was considered questionable whether he could have done so if he had been simply in possession (*r*).

Rights with respect to Encroachments made by the Tenant.

It seems to be now settled, that encroachments made by a tenant are primâ facie for the benefit of his landlord, unless it appear by some evidence that the tenant intended them for his own benefit, and not to hold them as he held the farm to which they were adjacent (*s*): he is

(*n*) Hawk. P. C. Book I., ch. 64, s. 3.

(*o*) Dalton's Justice, chap. 129, *Forcible Entry*, p. 431.

(*p*) And see *Davison* v. *Wilson*, 11 Queen's B. Rep. 890; and *Burling* v. *Read*, ibid. 904.

(*q*) *Kavanagh* v. *Gudge*, 6 Scott, N. R. 508; 7 ibid. 1025; 7 Man. & Gr. 316; 1 Dow. & Low. 928; and see *Milner* v. *Myers*, 15 Law J., N. S., Q. B., 157. There the plaintiff had become tenant to the lessor by an agreement, which stipulated that, on the non-performance of certain terms "without any demand whatsoever," it should be lawful for [the lessor] and her agents to re-enter upon and be possessed of the house and premises, and [the plaintiff] to expel and remove therefrom without any legal process whatsoever, and as effectually as any sheriff might do, in case [the said lessor] had obtained judgment in ejectment, and a writ of hab. fac. poss. had issued, and that in case of such entry and action brought the defendants might plead leave and license in bar thereof, and the agreement might be used as conclusive evidence of the leave and license of [the plaintiff] to [the lessor] for the entry or trespassers to be complained of in such action. The terms not having been complied with, the defendants, as agents of the lessor, entered and forcibly turned out the plaintiff, and an action of trespass having been brought, pleaded leave and license. It was held, that the entry and expulsion were justified.

(*r*) *Davis* v. *Burrell*, 17 Law Times, 56.

(*s*) *Doe* d. *Lloyd* v. *Jones*, 15 Mees. &

therefore bound to deliver them up at the end of his term. This presumption, however, holds only as between the tenant and his landlord, and will not prevail for the landlord's benefit against third persons (*s*). At one time this was in doubt; and in one case (*t*) Lord Kenyon is reported to have revolted at the idea that the tenant could make the landlord a trespasser, which would unavoidably be the case if the encroachments were to belong to the landlord; but in a subsequent case (*u*), Thompson, B., allowed a landlord to recover in ejectment encroachments made by his tenant. So in another case in the Common Pleas, a similar recovery in ejectment was allowed to stand (*x*). A conveyance by a lessee of the encroachments to his son not appearing to have been delivered, and not followed by possession, does not rebut the presumption that the lessee made the encroachments for the benefit of his lessor (*y*). An indorsement on a lease, by which the lessee agrees to surrender all inclosures made by him at the end of his lease, and to pay 6*d.* annually as an acknowledgment, is an admission they were made for the benefit of the lessor (*z*).

Rights as to the Indenture of Lease.

On the expiration of a lease by forfeiture or otherwise, the lessor is not entitled to have the indenture of lease from the lessee who has executed a counterpart (*a*).

SECT. 3.—*Consequences of holding over.*

(a) *Continuance of Liability.*

Under what circumstances the Tenant's Liability continues by holding over.

Upon the determination of the tenancy, by any means whatever, the landlord is entitled to receive the full and complete possession of the premises from his tenant; and if such possession be not given up, the tenant remains liable to him, in the same manner as before stated, in case of his holding over; for although the lease be expired, the tenant's responsibility is not at an end, unless possession be given up. This is even the case where it has become impossible for the tenant to give up possession at the end of his term, in consequence of the obstinacy or ill-will of an under-tenant, to whom he has let a part or the whole of the premises, and who refuses to quit; for in such case it has been held, that the landlord may refuse to accept the possession, and hold the original tenant liable (*b*). Therefore, where an under-tenant held

Wels. 580; *Doe* d. *Lewis* v. *Rees*, 6 Car. & Pay. 610; *Doe* d. *Dunraven* (*Earl*) v. *Williams*, 7 Car. & Pay. 333; *Doe* d. *Harrison* v. *Murrell*, 8 Car. & Pay. 134; *Andrews* v. *Hailes*, 2 Ell. & Bl. 349; *Doe* d. *Croft* v. *Tidbury*, 23 Law J., C. P., 57; and post, Chap. VII., Sect. 1, (f).

(*s*) *Doe* d. *Baddeley* v. *Massey*, 17 Queen's B. Rep. 373. As to the presumption where the tenant held two tenements of two different landlords, see *Doe* d. *Bluck* v. *Moyes*, 13 Law Times, 325; see also post, Book II., Chap. VII., Sect. 1, (f); and Sect. 4, (c).

(*t*) *Doe* d. *Colclough* v. *Mulliner*, 1 Esp. 460.

(*u*) *Doe* d. *Challnor* v. *Davies*, 1 Esp. 461. See the answer to this observation in *Doe* d. *Lloyd* v. *Jones*, 15 Mees. & Wels. 580.

(*x*) *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208; *Doe* d. *Watts* v. *Morris*, 2 Bing. N. C. 189; 1 Hodges, 215; 2 Scott, 276.

(*y*) *Doe* d. *Lloyd* v. *Jones*, 15 Mees. & Wels. 580.

(*z*) Ibid.

(*a*) *Hall* v. *Ball*, 3 Scott, N. R. 577; 3 Man. & Gr. 242; and see *Doe* d. *Egremont* (*Earl*) v. *Pulman*, 3 Queen's B. Rep. 622.

(*b*) *Harding* v. *Crethorn*, 1 Esp. 57.

over after the expiration of a term against the will of the lessee, and during the holding over the lessee distrained for rent previously due; it was held, that the lessee was liable for the period of the holding over, but not for a whole year's rent (*c*). Where a tenant holds over he does not necessarily become tenant from year to year; but where a person, who took premises for nine months, with an option at the end of that time of taking a lease for seven, fourteen, or twenty-one years, before the expiration of the nine months under-let the premises for six months after the nine, and the under-lessee occupied them for that time, it was held, that the lessee was liable for a whole year's rent (*d*). A tenant holding over after the expiration of a lease for years may be taken to hold upon any of the terms of such former lease that are consistent with a yearly tenancy. Whether he does hold on any of such terms or not is a question for the jury on the facts proved. A covenant in a lease for years, ending at Michaelmas, that the tenant shall and may retain and sow forty acres of wheat on the arable land demised (consisting of 213 acres), at the seed-time next after the term, and have the standing thereof till the harvest then next following, rent free, with the use of premises for the threshing, &c., till a day named, is a term which may be made incident to a tenancy from year to year (*e*). The landlord may, however, in such case, discharge the original lessee by accepting the under-tenant as his immediate lessee —as by accepting the key from the original tenant whilst the under-tenant is in possession—by accepting rent from him, or other act tantamount to it; but the mere circumstance of the landlord signing a notice, by which a tenant, whose lease is expired, orders his under-tenant to pay his rent to him in future, is not evidence of his agreement to accept him as a tenant, unless it be proved that he knew the contents of the notice (*f*). Where four persons, directors of a bank, hired a house for a year, before the expiration of which negotiations were entered into for a further hiring, with an intimation to the lessor that the parties were different, but the negotiations were not perfected, though the premises were held over for another quarter; it was held, that all four were liable in an action for use and occupation, though two had ceased to be directors before the expiration of the first year (*g*). In a second action for subsequent use and occupation of the same premises, it was held, that if premises are let to two persons for a term, at the end of which one holds over with the assent of the other, both continue liable for the time the one actually occupies (*h*); but both will not be liable if the holding over has been without such assent (*i*). It

(*c*) *Ibbs* v. *Richardson*, 9 Ad. & El. 849; 1 Per. & Dav. 618.

(*d*) *Waring* v. *King*, 8 Mees. & Wels. 571.

(*e*) *Hyatt* v. *Griffiths*, 17 Queen's B. Rep. 505.

(*f*) *Harding* v. *Crethorn*, 1 Esp. 57.

(*g*) *Christy* v. *Tancred*, 7 Mees. & Wels. 127; Hurl. & Walm. 50.

(*h*) *Christy* v. *Tancred*, 9 Mees. & Wels. 438; *Tancred* v. *Christy*, 12 Mees. & Wels. 316.

(*i*) Ibid.; and *Draper* v. *Crofts*, 15 Mees. & Wels. 166.

has been before stated, that where a tenant holds over after the expiration of his term, and the landlord accepts rent from him, a tenancy is created under the terms of the former holding; and that the mere circumstance of an increase of rent will not alter such a position (*k*). But where a tenant holds over and nothing is said as to the amount of rent to be paid, it is not necessarily to be the same as before, but the landlord may be entitled to an increased rent if the circumstances exclude the first agreement from attaching to the subsequent holding (*l*). In one case, where the tenant held over, and paid rent after the expiration of a lease, which contained covenants for a particular mode of husbandry; it was held, that the landlord might compel him to perform such covenants, in the same manner as if they were still expressly agreed upon between them (*m*). The right to a partial occupation of farming premises, for the purpose of taking an away-going crop, hereafter considered, will of course form an exception to the observations here made. Where a tenant remains in possession, it is a question for the jury whether he intends to continue the tenancy (*n*). It would appear that where the landlord has given a notice to quit or pay a certain rent, that he may recover that amount of rent if the tenant held over, it being a question for the jury whether the tenant has acquiesced (*o*).

(b) *Double Value.*

Statutory Enactment giving an Action for double Value.

By statute 4 Geo. II. c. 28, s. 1, it is enacted, that if any tenant or tenants for life or lives, or years, or persons coming in under or in collusion with them, hold over any lands, tenements or hereditaments, after the determination of their estates, after demand made, and notice *in writing* given for delivering the possession thereof, by the landlord, or the person having the reversion or remainder therein, or his agent thereunto lawfully authorized, such tenant or tenants so holding over shall pay to the person so kept out of possession, at the rate of *double the yearly* value of the *lands, tenements and hereditaments* so detained, for so long a time as the same are detained; to be recovered by action of debt, against which recovery there shall be no relief in equity.

Decisions on this Statute.

It has been held, that this statute is a *remedial* law, as the penalty is given to the party grieved (*p*); it is therefore to be construed *liberally*; it has accordingly been held, that although the words are "after demand made, and notice in writing given," the notice in writing is of itself a sufficient demand: and that a receiver appointed under an

(*k*) Ante, Book I., Chap. V., Sect. 1, pp. 182, 184, 185; and see *Roberts* v. *Hayward*, 3 Car. & Pay. 432; *Beale* v. *Sanders*, 3 Bing. N. C. 850; 5 Scott, 58; 3 Hodges, 147.

(*l*) *Elgar* v. *Watson*, 1 Car. & Mar. 494; see also *Thetford* (*Mayor, &c.*) v. *Tyler*, 8 Queen's B. Rep. 95.

(*m*) *Roe* d. *Jordan* v. *Ward*, 1 H. Black. 97.

(*n*) *Jones* v. *Shears*, 4 Ad. & El. 832; 2 Har. & Wol. 43; 6 Nev. & Man. 428.

(*o*) *Anon.*, Lofft, 153; *Roberts* v. *Hayward*, 3 Car. & Pay. 432; *Hyatt* v. *Griffiths*, 17 Queen's B. Rep. 505.

(*p*) *Wilkinson* v. *Colley*, 5 Burr. 2694.

order of the Court of Chancery is "an agent lawfully authorized" within the words of the statute (*q*): but in another case it was considered by Lord Ellenborough, that the statute being *penal* is to be construed *strictly;* and therefore that it does not extend to weekly tenants (*r*). For the same reason, in estimating the double value, the value of power supplied by the owner of a mill by means of a revolving shaft, and let together with a room in the mill, cannot be included, such power not being "lands, tenements or hereditaments (*s*)." The statute only extends to cases were the tenant contumaciously continues to retain the possession, and not to cases where no fraud is intended, and where the resistance to the possession is under a fair claim of right (*t*); therefore, where the tenant held possession under a treaty for a further term, which went off, Lord Mansfield held, that the penalty in the statute did not apply (*u*). Under the County Courts Act, 9 & 10 Vict. c. 95, it is not a dividing of the cause of action, within sect. 63, to levy one plaint for rent of premises and another for double value (*x*). An action for double value lies in the County Courts (*y*). A party sued in such court for rent and double value cannot avail himself of the 58th section of the act to oust the court of jurisdiction by alleging title to the premises in himself, if it be proved that he has admitted himself to have been tenant to the plaintiff at the time when the rent accrued, and from which the holding over commenced (*z*).

Demand of Possession and Notice.

Although a demise be for a time certain, a demand of possession and notice in writing are necessary to entitle a landlord to recover double value under the statute. The notice to quit at the expiration of the lease or tenancy is good, though given before; and the tenant holding over will be liable to double value (*a*); but it need not necessarily be given *before* the expiration: thus, where it was not given until more than six weeks afterwards, it was held, that the landlord was entitled to double value from the time of the demand, where it appeared that he had done no act in the meantime to acknowledge the continuance of the tenancy (*b*). A notice to quit on a certain day, or on such other day as the holding should require next after the expiration of half a year from the receipt of the notice, is a sufficiently absolute notice to entitle a party to recover under the act (*c*). Where there was a demise to a wife, and notice to quit given to her, after which, but before the expiration of the time, she married; it was held, that it was not necessary to give a notice to the husband subsequently to the marriage, in

(*q*) *Poole* v. *Warren*, 8 Ad. & El. 582; 3 Nev. & Per. 693; 1 Will. Wol. & Hod. 518.
(*r*) *Lloyd* v. *Rosbee*, 2 Camp. 453.
(*s*) *Robinson* v. *Learoyd*, 7 Mees. & Wels. 48.
(*t*) *Wright* v. *Smith*, 5 Esp. 203.
(*u*) *Anon.*, 5 Esp. 215.
(*x*) *Wickham* v. *Lee*, 12 Queen's B. Rep. 521.
(*y*) Ibid.
(*z*) Ibid. As to title coming-in question, see *Marwood* v. *Waters*, 13 C. B. 820.
(*a*) *Messenger* v. *Armstrong*, 1 Term Rep. 53; *Cutting* v. *Derby*, 2 W. Black. 1076.
(*b*) *Cobb* v. *Stokes*, 8 East, 358.
(*c*) *Hirst* v. *Horn*, 6 Mees. & Wels. 393.

By and against whom and under what circumstances an Action for double Value may be maintained.

order to support debt for double value on the statute (*d*). A mistake in the notice of "rent" for "value" would seem to be immaterial (*e*).

One tenant in common may maintain an action for the double value of his moiety; for where the injury is separate, tenants in common may have several actions (*f*). It is now held, that they must sever, if the tenant held the premises by a separate demise from each (*g*). The administrator of an executor cannot sue for double value of lands held over, after notice to the tenant under a demise from the testator, without taking out administration de bonis non, even though the tenant has attorned to her (*h*). If one tenant holds over, it is doubtful whether it will make his co-tenant liable under the statute (*i*). After a landlord has recovered in ejectment against his tenant, he may maintain an action of debt upon the statute for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit (*k*). In debt for double value and for use and occupation, the plaintiff took out of court before trial a sum of money, paid in on a plea to the second count of tender of the single rent before the action brought; and it was held, that this was no case of nonsuit on the ground of such acceptance of the single rent being a waiver of the plaintiff's right to proceed for the double value, as the plaintiff's going on with the action was evidence to show that he did not mean to waive his claim for the double value, but to take it *pro tanto* (*l*). An action for double value may be brought in the County Courts, established under the statute 9 & 10 Vict. c. 95 (*m*). It would seem that double value cannot be distrained for. Where a tenant was served with a requisition to give up possession at twelve at noon on, &c. (the day when the tenancy was determinable), at which time the landlord will attend to receive the keys and rent; and that in the event of the tenant not surrendering, the landlord will demand 7*s*. daily rent (a rate more than double the original rate of rent) till he has obtained legal possession: such a requisition was held bad, as being premature, as not amounting to a demand of possession, and as being insufficient as a notice to determine the tenancy (*n*).

(c) *Double Rent.*

Statutory Enactment respecting double Rent.

By statute 11 Geo. II. c. 19, s. 18, it is enacted, that in case any tenant or tenants shall give notice of his, her or their intention to quit the premises, and shall not accordingly deliver up the possession thereof at the time in such notice contained, the said tenant or tenants, his,

(*d*) *Lake* v. *Smith*, 1 New Rep. 174.
(*e*) *Doe* d. *Matthews* v. *Jackson*, 1 Dougl. 175.
(*f*) *Cutting* v. *Derby*, 2 W. Black. 1076.
(*g*) *Wilkinson* v. *Hall*, 1 Bing. N. C. 713; 1 Hodges, 170; 1 Scott, 675.
(*h*) *Tingrey* v. *Brown*, 1 Bos. & Pul. 310.
(*i*) *Hirst* v. *Horn*, 6 Mees. & Wels. 393.
(*k*) *Soulsby* v. *Neving*, 9 East, 310; and see *Wright* v. *Smith*, 5 Esp. 203.
(*l*) *Ryal* v. *Rich*, 10 East, 48.
(*m*) *Wickham* v. *Lee*, 12 Queen's B. Rep. 521. See post, Book III., Chap. IX.
(*n*) *Page* v. *More*, 15 Queen's B. Rep. 684.

er or their executors or administrators, shall from thenceforward pay the landlord double the rent or sum which he, she or they should therwise have paid.

To what Cases the Statute applies.

The statute only applies to those cases where the tenant has the ower of determining his tenancy by a notice; and where he has etually given a valid notice sufficient to determine such tenancy (*o*). t extends, however, to a parol demise from year to year, so as to ubject the tenant to the penalty of double rent, if he hold over after e has given a notice to quit (*p*). It has been held not to extend to eekly tenants (*q*). If a tenant from year to year give his landlord otice that he will quit upon a contingency, *e. g.* "as soon as he gains nother situation," and do not quit when the contingency happens, e is not liable to an action on the statute for double rent (*r*). By nalogy with the statute 4 Geo. II. c. 28, it would seem that although e demise be for a term certain, the tenant would not be liable for ouble rent, unless he had given the requisite notice (*s*). The notice quit mentioned in the statute need not necessarily be in writing; a arol notice is quite sufficient to enable the landlord to recover double ent under the statute (*t*). A tenant who has given notice and paid ouble rent may quit without fresh notice (*u*).

What is a Waiver of the Right to double Rent.

The acceptance of single rent, which has accrued due subsequently the notice is, it seems, a waiver of the landlord's right to double ent, although it does not necessarily imply that the tenancy should ontinue (*x*).

Proceedings for double Rent.

By the above statute the double rent may be levied, sued for and ecovered, at the same times, and in the same manner, as the single ent might have been levied, sued for and recovered before the giving f such notice. The mode of proceeding, therefore, to recover double ent under the statute, is by distress, and by action at law. In such n action the jury may find for so much as the tenant appears to have verheld, without reference to the sum demanded, so that it be not more than that sum (*y*).

SECT. 4.—*Emblements.*

(a) *Nature of Emblements.*

Nature and Description of Emblements generally.

The word "emblements" is derived from the French emblavence de bled, corn sprung, or put above ground, and strictly signifies the profits of sown land merely; but the doctrine of emblements extends not only to corn sown, but to roots planted, and other annual artifi-

(*o*) *Johnston* v. *Huddleston*, 4 Barn. & Cres. 922; 7 Dowl. & Ryl. 411.

(*p*) *Timmins* v. *Rowlinson*, 3 Burr. 1607; 1 W. Black. 533.

(*q*) *Sullivan* v. *Bishop*, 2 Car. & Pay. 359.

(*r*) *Farrance* v. *Elkington*, 2 Camp. 591.

(*s*) See ante, 524.

(*t*) *Timmins* v. *Rowlinson*, 1 W. Black. 533; 3 Burr. 1607; *Johnston* v. *Huddleston*, 4 Barn. & Cres. 922; 7 Dowl. & Ryl. 411.

(*u*) *Booth* v. *Macfarlane*, 1 Barn. & Adol. 904.

(*x*) *Doe* d. *Cheney* v. *Batten*, Cowp. 243.

(*y*) *Anon.*, Lofft, 275.

cial profits (*z*). Hops growing out of ancient roots have been held to be *like* emblements, and are not to be compared to apples, fruit, grass, or the like, which grow of themselves, and are not planted annually at the expense and labour of the tenant, but are either a permanent or a natural profit of the earth (*a*); for when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit, but merely with a prospect of its being useful to himself in future; and to future successions of tenants (*b*). A tenant for a term determinable upon a life, sowed the land in spring, first with barley, and soon after with clover; the life expired in the following summer; in the autumn the tenant mowed the barley, together with a little of the clover plant which had sprung up; the clover so taken made the barley straw more valuable by being mixed with it, but the increase of the value did not compensate for the expense of cultivating the clover, and the farmer would not be repaid such expense in the autumn of the year in which it was sown; the reversioner came into possession in the winter, and took two crops of the same clover, after more than a year had elapsed from the sowing; it was held, that the tenant was not entitled to emblements of either of those two crops; first, because emblements can be reclaimed only in a crop of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed; and secondly, because even if the tenant were entitled to one crop of the vegetable growing at the time of the cesser of his interest, this had been already taken by him at the time of cutting the barley (*c*). Emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels: thus they were devisable by testament before the Statute of Wills, and at the death of the owner they vest in his executor, and not his heir; they are forfeitable by outlawry in a personal action, and by the statute 11 Geo. II. c. 19, they may be distrained for rent in arrear; but though emblements are thus in many respects considered as mere personal chattels, that is not the case in every instance, for they cannot be the subject of larceny before they are severed. It may be stated, however, generally, that where there is a right to take emblements, they belong either to the tenant himself, whose estate is determined in such a manner as to give him the right; to his grantee or devisee, where he has granted or devised them; or to his personal representatives, where the right arises upon the death of a tenant who has made no disposition respecting them (*d*).

(*z*) *Latham* v. *Attwood*, Cro. Car. 515.
(*a*) Ibid.
(*b*) 2 Black. Com. 123.
(*c*) *Graves* v. *Wild*, 5 Barn. & Adol. 105; 2 Nev. & Man. 725. It had been previously held in the Court of Common Pleas, that there might be a right of emblements in teazles; *Kingsbury* v. *Collins*, 4 Bing. 202: but the point was not argued, and it does not appear that the court was made acquainted with the nature of the crop, or its mode of cultivation.
(*d*) 2 Black. Com. 404.

Rights incidental to the Right to take Emblements.

Where there is a right to emblements, ingress, egress, and regress, are allowed by law, to enable the party to enter, cut and carry them away after the estate is determined (*e*): so if a party who is entitled to emblements grant them to another, the grantee may cut and take them away after the death of the grantor (*f*). The right to emblements does not, however, give a title to the exclusive occupation of the land; therefore it seems that if the executors occupy till the corn or other produce be ripe, the landlord may maintain an action for the use and occupation of the land (*g*).

(b) *Who are entitled to Emblements.*

General Rule as to Persons entitled to Emblements.

It can by no means be laid down as universally true, that he is entitled to the emblements who sows the seed; as the rule of law upon the subject is, that only those are entitled to emblements who have an uncertain estate or interest in land, which is determined either by the act of God, or of the law, between the period of sowing and the severance of the crop (*h*). Amongst other reasons given for this rule, by which the profits of a crop are secured to a tenant or his representatives, when deprived of the estate by an uncontrollable event, it is said, that, the public being interested in the production of corn and grain, some such encouragement was necessary to be given to husbandry; for otherwise, if the emblements followed the lands, no tenant would lay out his money for the benefit of the remainderman, who might possibly be a perfect stranger to him. Emblements therefore are given to compensate for the labour and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege which the law can give it. Of course, if the estate, although uncertain and contingent in its nature, be determined by the tenant's own act,—as by forfeiture of tenant for life for waste committed, or by marriage of a tenant during widowhood merely,—the principle of the rule does not apply, and there shall be no emblements. It seems clear, that a lessor who enters for a condition broken, or one who enters by title paramount, is entitled to emblements (*i*).

Tenants at Rack-rent.

An important alteration as to the rights of tenants at rack-rents to emblements has been made by the 14 & 15 Vict. c. 25, s. 1, which enacts—"That where the lease or tenancy of any farm or lands, held by a tenant at rack-rent, shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then

(*e*) 1 Inst. 56.
(*f*) Shep. Touch. 244.
(*g*) Chamb. Land. & Ten. 340; see 14 & 15 Vict. c. 25, s. 1, infra.
(*h*) Shep. Touch. 244, n.
(*i*) *Nicholas* v. *Simonds*, 2 Roll. Rep. 468.

current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant so respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions, to which the preceding landlord or lessor, and such tenant respectively, would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: Provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid." Under this section of the statute the following case has been decided: —An ejectment on the plaintiff was brought by an owner in fee against a lessee, who had held certain lands pur autre vie which he had sublet to under-tenants from year to year. On the determination of the life it appeared that some of the under-tenants had cropped the lands, others had not; and at the time of the bringing of the ejectment the current year of the under-tenancy had not expired. The under-tenants suffered judgment by default; and the tenant pur autre vie, not being in occupation, having taken defence generally, relied on the 14 & 15 Vict. c. 25, giving to tenants an extended term until the expiration of the current year of their tenancy, if the tenancy determine by death or cesser of the estate of a landlord entitled for life. The court held, Perrin, J., dubitante, that the tenant pur autre vie had no right to set up that defence, as he had no claim to emblements; and the under-tenants having suffered judgment to go by default had thereby ended their title, and therefore that the owner of the land was entitled to recover possession. It is doubtful whether 14 & 15 Vict. c. 25 applies to tenants not entitled to emblements (*k*).

Tenants for Life and their Under-Tenants.

Tenants for life, whether for their own lives, or pur autre vie, are strictly within the rule applicable to persons entitled to emblements; and therefore neither they nor their representatives shall be prejudiced by the sudden determination of the estate, by the death of the party for whose life it is held, because such a determination is contingent and uncertain. The same rule applies to the under-tenants or lessees of tenants for life, and they have not only the same privileges respecting emblements,

(*k*) *Stradbrooke (Lord)* v. *Malchy*, 2 Ir. Rep., N. S., 406.

but in some instances greater; for in those cases where the tenant for *life* shall not have emblements because the estate is determined by his own act, it shall not prejudice his under-tenant, who cannot be answerable for it, and he has still, therefore, a right to emblements. Where, however, the tenant for life sows land, and afterwards grants over his estate, the executor of the grantee, who dies before the corn is severed, shall not have emblements; and if a man sow land, and let it for life, and the lessee for life die before the corn be severed, the reversioner, and not his executor, shall have the emblements, although if he had sown it himself it would have been otherwise (*l*).

Clergymen and their Under-Tenants.

The parochial clergy are also tenants for their own lives, and their personal representatives are therefore entitled to the advantages arising from the right to emblements; by stat. 28 Hen. VIII. c. 11, s. 6, this right, together with a power to enable the person to dispose of the corn by will, is expressly given to them. It should, however, be remarked, that the rule above noticed equally applies to clergymen as to other tenants for life, where the estate is determined by the act of the party himself; and therefore that a parson who resigns his living is not entitled to emblements, although his lessee and under-tenant is; because the tenancy of the latter is determined not by his own act, but by the act of another (*m*).

Tenants in Dower and Jointure.

A widow endowed with lands sown shall have the emblements, and not the heir: and a tenant in dower may dispose of corn sown on the ground; or it may go to her executors, if she died before severance (*n*). Where lands are limited to a woman during life for her jointure, she has the same rights with respect to estovers and emblements, and is under the same restrictions respecting waste, (unless there is a deficiency in her jointure,) as other tenants for life. A jointress is not, however, entitled to the crop sown at the time of her husband's death; because a jointure is not a continuance of the estate of her husband, like dower: nor on the death of a jointress are her representatives entitled to emblements (*o*).

Tenants for Years.

A tenant for years is not entitled to emblements where the duration of the term depends upon a certainty: thus, if he hold from Midsummer for ten years, and in the last year sow a crop of corn, and it is not ripe and cut before Midsummer, at the end of the term his landlord shall have it; for he knew the expiration of his term, and therefore it was his own folly to sow that of which he never could reap the profits; but where the lease for years depends upon an uncertainty,—as upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife,—or if the term of years be determinable upon a life or lives,—in all cases of this

(*l*) *Knevett* v. *Poole*, Cro. Eliz. 464.
(*m*) *Bulwer* v. *Bulwer*, 2 Barn. & Ald. 470.
(*n*) 2 Inst. 80.
(*o*) Cruise's Dig. VII. c. 1, ss. 34, 35, 36.

kind the estate for years, not being certainly to expire for a time foreknown, but merely by the act of God, the tenant or his executors shall have the emblements, in the same manner as a tenant for life would be entitled thereto. The same rule above noticed applies where the term is determined by the act of the party himself; thus, if a tenant for years surrender before severance, or do anything which amounts to a forfeiture, the emblements shall go to the lessor, and not to him, because he has determined the estate by his own default (*p*). So where a lease was made on condition that if the lessee contracted a debt on which he should be sued to judgment, which should be followed by execution, the lessor should re-enter, it was held that the lessor having done so, was entitled to emblements (*q*).

Tenants from Year to Year.

As tenants from year to year have as certain an estate, while it lasts, in the lands they occupy, as those who hold for a longer term, it follows that they are entitled to emblements like tenants for years, where their tenancy is determined by the happening of an uncertain event over which they have no control (*r*): but it is otherwise, either when they themselves put an end to the tenancy, or where, by means of a notice to quit or otherwise, the period of determination has been ascertained.

Strict Tenants at Will.

Strict tenants at will are entitled to emblements for precisely the same reason as regulates other cases, viz. the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption of taking the profits, the law will not suffer him to be a loser by it (*s*). This applies to all cases where the estate of the tenant at will is determined either by his own death, or by the act of the landlord; but not to cases where the tenant has himself determined the will.

Tenants under Execution.

Tenants under execution—as by Statute Merchant (*t*), under extent (*u*), or elegit—are entitled to emblements, where by some sudden and casual profit arising between seed-time and harvest, the tenancy is put an end to by the judgment being satisfied. Where judgment was given against a person, and then he sowed the land, and brought a writ of error to reverse the judgment, but it was affirmed; it was held, that the recoverer should have the corn (*x*).

Devisees and Legatees.

Where a tenant in fee simple sows land, and then devises the land by will, and dies before severance; the devisee shall have the corn, and not the devisor's executors (*y*). The remainderman for life shall

(*p*) 2 Black. Com. 145.
(*q*) *Davis* v. *Eyton*, 7 Bing. 154; 4 Moore & Pay. 820; and see Bac. Abr. Embl. pl. 3, 4.
(*r*) See *Kingsbury* v. *Collins*, 4 Bing. 207; 12 Moore, 429.
(*s*) Co. Litt. 55 b; 2 Black. Com. 146.
(*t*) Co. Litt. 55 b.
(*u*) 2 Leon. 54.
(*x*) 2 Bulst. 213.
(*y*) *Anon.*, Cro. Eliz. 61; *Spencer's case*, Winch. 51; Williams' Exors. 497.

also have the emblements sown by the devisor in fee, in preference to the executor of the tenant for life (z). The devisee or rather legatee, however, of the goods, stock, and moveables, is entitled to growing corn in preference both to the devisee of the land and the executor.

SECT. 5.—*Between Out-going and In-coming Tenant.*

(a) *Partial Occupation.*

Nature of a partial Occupation of Land after the Expiration of the Tenancy.

It is very generally the case, that out-going farming tenants leave, and the in-coming tenants enter upon, the premises at different periods of the year; as, the house and buildings at one time, the arable land at another, and the pasture and meadow land at a third. Sometimes, however, the general quitting of the farm takes place at one time; and there exists the privilege for the out-going tenant to retain possession of the land upon which his away-going crops are growing, and the use of barns and stables for the purpose of thrashing and conveying it to market. This privilege is occasionally given on condition of his paying the rent and taxes applicable to the land which he retains; but, perhaps, more commonly without any such stipulation. The in-coming tenant has also the privilege of entering before the expiration of the existing tenancy, for the purpose of ploughing and preparing for his crops; particularly where there is a Lady-day holding. These privileges of partial occupation are sometimes expressly given by the terms of the contract of demise; and, where that is not the case, frequently may be supported by the custom or usage of the country. Upon this subject it has been held, that although a custom that the tenant should hold over for half a year after the expiration of his term is bad (a); yet that a custom to take an away-going crop, and house the same in the barns of the farm for a certain time after he has quitted possession of the bulk of the farm, is good (b). The effect of thus allowing the out-going tenant to take an away-going crop, is to give him a prolongation of the term as to the land on which it grows; and he continues in possession until the crop is taken (c). And therefore where by the custom the out-going tenant was entitled to a share of the crop of wheat sown by him in the last year, and he by the custom had to cut the whole crop and to keep the fences in repair until it was cut and carried away, it was held, that he had such a possession until the crop was both cut and carried away as would support a plea of not possessed in an action by the in-coming tenant (d). The proof of a custom to hold over any part lies on the out-going tenant (e).

(z) Toll. Exors. 157.
(a) *White* v. *Sayer*, Palm. 211.
(b) *Wigglesworth* v. *Dallison*, 1 Dougl. 201; *Beavan* v. *Delahay*, 1 H. Black. 5.
(c) *Boraston* v. *Green*, 16 East, 71.
(d) *Griffiths* v. *Puleston*, 13 Mees. & Wels. 358.
(e) *Caldecott* v. *Smythies*, 7 Car. & Pay. 808.

Origin and Nature of the Right to an away-going Crop.

(b) *Crops, &c., on the Land.*

The right which an out-going tenant has to take an away-going crop—which may be explained to be the crop sown during the last year of his tenancy, but not ripe until after the expiration of it—is sometimes given to him by the express terms of the contract; and where that is not the case, he is generally entitled to do so by the custom of the country: such custom, or, more properly speaking, usage, has been held to be reasonable and valid, and to apply equally to tenants by parol agreement, and by deed or written contract of demise (*f*); and Lord Mansfield, in the case cited, observed, that such a custom is good and just, and for the benefit and encouragement of agriculture; for that it is but reasonable, that he who sows should reap the profit. The Courts have even gone further than this, and have held, that a custom that a tenant may leave his away-going crop in the barns of a farm after he has quitted the premises, is good (*g*). The propriety and reasonableness of allowing this right to the out-going tenant will be obvious, when it is considered, that unless it were allowed, few tenants would be at the expense of sowing any crop at all during the latter part of the last year of their tenancy, when they must know that they could not take their profit after the end of their term. The right, however, is now distinctly recognized by the law where a custom to that effect exists: and it should be again remarked, that a strictly legal custom, which has immemorially existed, is not necessary; for a common usage of the neighbourhood is quite sufficient to confer the right, in the absence of any specific agreement between the parties, or any express words which would exclude the custom where any agreement does exist (*h*): yet the custom of the country can have no place where the off-going tenant holds under a lease expressly making a different provision in respect of the away-going crop (*i*); or where he continues to hold over after the expiration of such a lease, without coming to any fresh agreement with his landlord, by which he must be taken to hold under the same terms (*k*): but where the lease contains no stipulations as to the mode of *quitting*, the off-going tenant is entitled to his away-going crop according to the custom, even though the terms of *holding* may be inconsistent with such a custom (*l*). The fact of the existence of the usage is to be collected not only from what is usually done in cases of tenancy from year to year, but from the usual course pursued where tenants hold under regular leases. In one

(*f*) *Wigglesworth* v. *Dallison*, 1 Dougl. 201.

(*g*) *Beavan* v. *Delahay*, 1 H. Black. 5.

(*h*) *Senior* v. *Armytage* (*Bart.*), Holt, 197.

(*i*) *Webb* v. *Plummer*, 2 Barn. & Ald. 746; and see *Hutton* v. *Warren*, 1 Mees. & Wels. 466; 2 Gale, 71; Tyr. & Gr. 646.

(*k*) *Boraston* v. *Green*, 16 East, 71.

(*l*) *Holding* v. *Piggott*, 7 Bing. 465; 5 Moore & Pay. 427; and see *Webb* v. *Plummer*, 2 Barn. & Ald. 746; *Hutton* v. *Warren*, 2 Gale, 71; 1 Mees. & Wels. 466; Tyr. & Gr. 646.

case (*m*), where the defendant, a tenant from year to year, had received notice to quit, and a motion was made for an injunction to restrain him from taking away the crops, manure, &c., contrary to the usual course of husbandry, the Lord Chancellor said, that the principle applied equally to the case of a tenancy from year to year, as to a lease for a longer term, with respect to the right to take an away-going crop. Where a lessee became bankrupt, and his assignees refused to accept the lease, it was held, that they were entitled to the off-going crop on paying rent up to the time when possession was delivered up (*n*). The circumstance of the farm being glebe land makes no difference during the incumbency of the landlord. Where a tenant held from Lady-day, and there was a custom that the tenant, at the regular expiration of a Lady-day tenancy, should have the away-going crops, and the tenancy was determined on the 1st of June by an award made on a reference of disputes between the landlord and tenant, it was held, that the custom had no operation (*o*).

Against whom the Out-going Tenant may claim the Right to an away-going Crop.

Where the out-going tenant is entitled to take an away-growing crop, he may avail himself of that right, whether the farm revert back into the hands of his landlord, or an in-coming tenant take possession. An agreement between the out-going and in-coming tenants with respect to crops does not, however, at all affect any existing rights the landlord may have: thus, where a tenant of a farm, entitled to the away-growing crop of the harvest of 1801, after his term expired, and paying rent up to Lady-day preceding, previous to that day, viz. in June, 1800, agreed to let in the new tenant, and sold the standing crops, and took a receipt for the value thereof, and also for 20*l.* "for the right of cropping the lands from June 18th;" it was held, that by this sale of the right of cropping, the tenancy was not to be considered as changed; and, therefore, that the out-going tenant must pay for the time from Lady-day, 1800, to Lady-day, 1801, he having paid tithes and poor-rate for that time (*p*). By a clause in a lease it was agreed that in case the tenant should duly observe and perform the several covenants and agreements, &c. (one being for the payment of rent), and should peaceably quit, &c., on notice, &c., he should be entitled to an away-growing crop, which was to be left for the landlord or his incoming tenant at a valuation; it was held, that this clause did not give the tenant the right of possession as against the landlord, after the determination of the tenancy, but that the tenant at most could only go on the land for the purposes of an away-going crop, and could not exclude the landlord (*q*). A permission by a landlord to an out-

(*m*) *Onslow* v. ——, 16 Ves. jun. 173.

(*n*) *Ex parte Mandrell*, 2 Mad. 315; Buck, 83.

(*o*) *Thorpe* v. *Eyre*, 1 Ad. & El. 926; 3 Nev. & Man. 214.

(*p*) *Petrie* v. *Daniel*, 1 Smith, 199.

(*q*) *Strickland* v. *Maxwell*, 2 Cromp. & Mees. 539; 4 Tyr. 346. Quære, whether

Remedies of the Parties as to Crops, &c.

going tenant to sow more land than by the custom of the country he was entitled to on quitting, is good against the in-coming tenant (r).

Where an out-going tenant has no right to an away-growing crop, but cuts and carries away the corn after the expiration of his term, an action of trover may be maintained against him, although the crop was sown by him before that time, under an idea that he was entitled to an away-going crop (s). It has, however, been held, that trover does not lie by an in-coming tenant to recover the value of the away-going crops taken by the off-going tenant, who continued to hold the land as tenant from year to year after the expiration of an old lease, which reserved to him the right, after the end of the term at Lady-day, "to fence in and preserve all such hard corn as should be sown on the premises the winter-seed time preceding, so as the same exceeded not twenty-nine acres, and was summer fallowed and well manured, &c., and at harvest to reap and carry away the same;" for neither is trover the proper action to try the question as to the right to the land, nor does the proper remedy for any mismanagement of the land during the former time appertain to the in-coming tenant, but to the landlord (t). Where there was an agreement between an out-going and an in-coming tenant, that the latter should buy the hay, &c., of the former upon the farm, and that the former should allow to the latter the expenses of repairing the gates and fences of the farm, and that the value of the hay, &c., and of repairs, should be settled by third persons; it was held, that the balance settled to be due to the out-going tenant for his hay, &c., after deducting the value of the repairs, might be recovered by him in a count upon a general indebitatus assumpsit for goods sold and delivered, after having failed upon his count on the special agreement for want of including in it that part of the agreement which related to the valuation of the repairs (u). Where *A.* agreed with *B.* to let him land rent free, on condition that *A.* should have a moiety of the crops; and while the crop was on the ground it was appraised for both parties; it was held, that *A.* might declare in indebitatus assumpsit for a moiety of the value of the crop sold to *B.*, without stating the special agreement; as the special agreement was executed by the appraisement, and the action arose out of something collateral to it (x). Where the plaintiff gave up possession of a farm to the defendant, having previously sown forty acres of it with wheat, and at a meeting in the previous month the plaintiff asked the defendant if he would take the wheat at 200*l.*, saying, that if he would not, he should not have the farm; to which the defendant replied, that he would take the wheat; and being asked to whom the dead stock

in this case the payment of the rent and the performance of the other covenants were a condition precedent to the having the right to the away-going crop.

(r) *Griffiths* v. *Tombs*, 7 Car. & Pay. 810.

(s) *Davies* v. *Cannop*, 1 Price, 53.

(t) *Boraston* v. *Green*, 16 East, 71.

(u) *Leeds* v. *Burrows*, 12 East, 1.

(x) *Poulter* v. *Killinbeck*, 1 Bos. & Pul. 397.

should be valued, replied "to me;" the defendant afterwards undertook to pay for the wheat and dead stock on a specified day, and did pay 75*l.* on account generally, and eventually had possession of the farm, the wheat, and the dead stock; in indebitatus assumpsit for crops bargained and sold, and for goods sold and delivered, it was held, 1st, by the whole Court, that the contract for the dead stock being distinct from the contract for the sale of the wheat, or the giving up of the farm, the plaintiff might recover for that amount; 2nd, per Bayley and Holroyd, Js. (Littledale, J., dubitante), that the defendant having received the wheat, and made a payment on account of it, the plaintiff might recover for the rest of the amount (*y*).

Statute of Frauds.

A contract with an in-coming tenant for the sale of growing crops, connected with a contract for taking the land itself, is within the Statute of Frauds (*z*): but in one case it was intimated, that a mere contract between out-going and in-coming tenants for such a sale was not, because the contract for the interest in the land proceeded from the landlord (*a*).

(c) *Remuneration for Straw, Hay and Dung.*

Where an Out-going Tenant can claim Remuneration.

In the absence of any agreement respecting the removal of straw and hay, the right to do so is regulated by the custom of the country; and where the removal is prohibited, of course no remuneration can be obtained for what is left on the farm: the custom on this subject in the several counties of England, and indeed often in different parts of the same county differs considerably (*b*). Whatever question there may be with respect to the hay and straw, as before noticed, all the litter, fodder, dung, manure, and compost, must invariably be consumed upon the lands. Indeed, if this is not expressly provided for by the terms of the contract it is always implied; as a removal would clearly be a breach of good husbandry. Where there is no express stipulation on the subject, it may be observed, that in general the out-going tenant is entitled to no compensation for dung or manure left upon the premises. In some cases, however, contracts relative to the disposal of manure are entered into between the landlord and tenant, which will give the latter, when he leaves the farm, a power of disposing of it to an in-coming tenant; for it must be remembered, that in all cases the usage of the country may be waived or controlled by express contract, if the intention to do so be clearly apparent. A tenant held under the terms of an expired lease, by which it was stipulated that, on quitting, the tenant should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his suc-

(*y*) *Mayfield* v. *Wadsley*, 3 Barn. & Cres. 357; 5 Dowl. & Ryl. 224.

(*z*) *Falmouth* (*Earl*) v. *Thomas*, 1 Cromp. & Mees. 89; 3 Tyr. 26. See also ante, 240.

(*a*) Per Littledale, J., in *Mayfield* v. *Wadsley*, 3 Barn. & Cres. 357; 5 Dowl. & Ryl. 224.

(*b*) See the Practice of Tenancy, by Messrs. Kennedy and Grainger.

ceeding tenant, but there was no provision for payment to the tenant; by the custom, the tenant was bound in the same way, but he would have been entitled to payment; it was held that, as an express stipulation had been made on the subject, the custom was excluded, and that the tenant was not entitled to be paid for the manure (*c*). Where an out-going tenant had contracted with his landlord to leave the manure on the premises, and to sell it to the in-coming tenant at a valuation; it was held, that it gave him a right of *on-stand* for the manure on the farm; and that, possession and property remaining in him until the valuation was made, a removal or use of it by the in-coming tenant before that was done would render him liable to an action of trespass by the out-going tenant (*d*). Where a tenant, who was bound to bring back dung for all hay sold by him to be carried off the premises, at the time of his quitting, sold a part of a rick, then standing, to a purchaser, without mentioning his liability to bring back manure; it was held, that the succeeding tenant had a right to refuse to permit the hay to be removed until the manure should be deposited (*e*). Where two parties entered into a written agreement, by which one was to take a farm of the other, and to take the straw, chaff, &c., at a valuation, to be made by such competent persons as the two parties should respectively appoint; it was held, that such an agreement was entire, and that the two parts could not be separated; and that if one person only was by parol agreement afterwards appointed to make the valuation, an action could not be maintained on the parol agreement so substituted, even though the straw, chaff, &c., had been taken and used (*f*). Where, in an action by an out-going tenant against his landlord for the value of hay and straw left on the premises that the plaintiff held, subject to the terms of a draft lease, by which it was agreed, first, that the tenant was to consume the hay and straw on the premises, and not to sell it except as afterwards mentioned; secondly, that the tenant might sell his hay and wheat-straw (except the last year's), provided for each load he brought back two loads of dung, or equivalent manure on the lands; and thirdly, that all the hay and straw not used for fodder, arising from the last year's crop, should be left on the determination of the tenancy, the tenant being paid at a fair valuation; and the words "fair valuation" had been substituted in the draft for the words "consuming price;" the court held, without considering the effect of the alteration in the draft, that the tenant was entitled to be paid according to a "fair valuation;" and that those words did not mean a "consuming price (*g*)."

(*c*) *Roberts* v. *Barker*, 1 Cromp. & Mees. 808; 3 Tyr. 945.

(*d*) *Beatty* v. *Gibbons*, 16 East, 116.

(*e*) *Smith* v. *Chance*, 2 Barn. & Ald. 753.

(*f*) *Harvey* v. *Grabham*, 5 Ad. & El. 61; 2 Har. & Wol. 146; 6 Nev. & Man. 754.

(*g*) *Cumberland* v. *Glamis* (*Lady*), 24 Law J., C. P., 46.

When an Out-going Tenant is entitled to Remuneration.

(d) *Remuneration for Tillage.*

Arable land requires to be fallowed at certain periods, in order not only that it may be cleansed of all couch and root weeds, but that it may be refreshed, and its vegetable powers, which have been exhausted by cropping, restored. This process requires a considerable outlay of capital, whilst the land is perfectly unproductive during the fallow season; but the benefit derived is considered to extend to a series of subsequent crops. It is also extremely desirable that the regular rotation of fallowing upon a farm should be kept up, notwithstanding any change of the tenants; but it is not to be expected that a tenant should lay a capital in the process of fallowing, which it is certain cannot be exhausted before his tenancy expires; and from which therefore he cannot derive the complete benefit he has a right to expect. From these circumstances has arisen the right which an out-going tenant has to remuneration for tillage which is not exhausted at the time of his quitting. The right is either given to him by the express stipulations of his contract of demise; or, in the absence of any such terms of agreement, he generally possesses it by the custom of the country. Such a custom is unquestionably valid; and it has accordingly been held, that an usage for the off-going tenant of a farm in a particular district to bestow his work, labour and expense in manuring, tilling, fallowing and sowing, according to the course of husbandry, and for the landlord to pay him a reasonable compensation in respect thereof, is a valid and reasonable usage (*h*); even notwithstanding the farm is held under a written agreement, if it cannot be collected from the instrument that the party did not mean to be governed by the custom. Therefore a custom, by which the tenant is entitled to receive an allowance for seeds and labour on the land, is not excluded by a stipulation that on leaving he should consume three-fourths of the hay and straw on the land, and bestow the manure therefrom on the land, leaving the unconsumed manure for the landlord, he paying for it (*i*). In delivering judgment in the first case cited, Dallas, C. J., said, "There can be no ground for contending that such a custom or rather usage is unreasonable; it affords the strongest encouragement to the cultivation of farms with good husbandry; it is beneficial to both landlords and tenants; the land of the former receiving a lasting benefit from the labour and expense bestowed by the latter, on payment of a reasonable compensation to him; and the tenant being thereby encouraged to pursue a good course of husbandry, by the assurance he has, that, if his continuance on the farm should not enable him to reap the full benefit of what he has done, he will have a right to call for proportionate compensation."

(*h*) *Dalby* v. *Hirst*, 1 Brod. & Bing. 224; 3 Moore, 536.

(*i*) *Hutton* v. *Warren*, 1 Mees. & Wels. 466; 2 Gale, 71; Tyr. & Gr. 646; *Senior* v. *Armytage* (*Bart.*), Holt, 197.

It is laid down by Sir Edward Coke, that in the case of an entry of the lessor before sowing, the lessee *at will* shall not have the costs of ploughing and manuring (*k*): but such a doctrine will not apply to the present tenancy from *year to year*, where there exists a custom to the contrary. Where there is any agreement between the parties, the extent of remuneration is regulated by it; where there is not, the usage of the country prevails. Where a farm was taken for fourteen years, and the tenant was to pay a given sum for tillages and improvements done before he entered, and to receive the value of such as he should leave, and in the first year he said he would leave, to which the landlord said he might, but no new bargain was made as to the tillages and improvements; it was held, that he was not entitled to the value of such as he left on so quitting (*l*). By the terms of a written agreement it was stated, that a certain quantity of manure had been spread on the land, and the tenant agreed, when given up by him, to leave the land in the same state, or allow a valuation to be made; it was held, that this agreement excluded a custom, as inconsistent with it, that the tenant should pay half tillage on going in, and receive it on going out (*m*).

The defendant's testator being in possession of an estate, of part of which he was the owner, and another part of which consisted of crown lands leased to him for a term, expiring on the 10th of October, 1849, contracted with the plaintiff for the sale to him of the former part, and, by agreement, demised to him the crown lands for one year from the 29th of September, 1848; and the plaintiff agreed that he would perform all the covenants and agreements contained in the crown lease; and the testator agreed that, in case he should be able to obtain a further lease from the crown for fourteen years, he would grant to the plaintiff a lease for thirteen years, subject to the same covenants. By a memorandum subsequently signed by the plaintiff, he agreed to take (with others) the crown lands, "subject to the same rents, covenants and obligations in all respects," as were contained and provided for in the leases by which the testator held or should hold the same. The plaintiff, on taking possession, paid to the out-going tenants, according to the custom of the country, the amount of the valuation for fallowing, &c., as well of the other lands as of the crown lands; by the terms of the crown lease, the custom of the country in that respect was excluded. At the desire of the plaintiff the crown lease was not renewed. It was held, first, that the custom of the country was not excluded by the agreement, which meant that the plaintiff was to perform all the covenants relating to the occupation and cultivation of the land. Secondly, That where such a custom existed there was an implied con-

(*k*) Co. Litt. 55 a, n. 4.

(*l*) *Whittaker* v. *Barker*, 1 Cromp. & Mees. 113; 3 Tyr. 135.

(*m*) *Clarke* v. *Roystone*, 13 Mees. & Wels. 752.

tract by the landlord, that if there were no in-coming tenant he would repay the out-going tenant according to the custom. It would seem that such a custom does not apply to cases where the term is put an end to by the determination of the landlord's interest, *e. g.* if in the above case the landlord's interest had expired prior to the 29th September, 1849 (*n*).

(e) *Valuation between the Parties.*

General system of Valuing for an Out-going Tenant.

As the system of allowing to an out-going tenant a remuneration for those expenses of husbandry to which he has been put without deriving any benefit arises from the necessity which exists of allowing the land to lie fallow, and therefore for the time unproductive; the amount of remuneration thus allowed must of course depend upon the length of time which has elapsed, and the number of crops which have been taken since the last fallow. When land has been laid in fallow one year, and made perfectly clean, and is valued before producing a crop, it is denominated a full tillage: and in taking the valuation the rent, taxes, dressings (*o*), manure, seed, if any sown, and labour, are calculated. When turnips, rape, or other green crops have been consumed on the ground by sheep, land also is said to be *in full tillage*, but one-half of the value of the crop is deducted. When land has sustained one white crop after a fallow or turnips, it is said to be only half a tillage; and only one-half of the rent, taxes, dressings and manure expended in the year of fallowing are allowed to the out-going tenant; and if the turnips be drawn and consumed off the land, half the dressing and one-fourth of the manure only are allowed, and nothing is charged for rent and taxes. Where the tenant is bound to a regular rotation of crops, either by express stipulation or the custom of the country, he is not entitled to any remuneration for tillages out of the regular course.

Valuation of Ploughing.

It seldom occurs that there is any occasion to value ploughing by itself, as it is usually included in the dressings; but when on any account the out-going tenant is entitled to claim a remuneration for simply ploughing land according to the course of good husbandry, the valuation is made according to the value of the labour employed.

Valuation of Manure in the Yard.

Manure in the heap is valued by ascertaining the quantity in solid square yards, the price of which of course varies according to local circumstances. The value of the cubic yard of the best dung may however be generally stated to be somewhat about half the price of a bushel of wheat.

(*n*) *Faviell* v. *Gaskoin*, 7 Exch. Rep. 273.

(*o*) In order to clean land perfectly, it is generally considered that five dressings during the fallow are necessary, but more than that number are never allowed. In level countries it is usual to value the dressings at about 11*s.* per acre each, and on unlevel ground at 13*s.* per acre; but this is thought by an accurate writer upon the subject to be too low; Bayldon on Rents, &c. 118, 4th ed.

Valuation of Manure or Bones laid on the Land.

The valuation of manure laid upon arable land is usually made by allowing a whole tillage after a fallow or turnips, and a half tillage after one white crop; but after the land has borne two white crops no valuation is made. On arable land it is customary to allow one tillage more for bones than for farm-yard dung: thus after one white crop, two-thirds of the value of the bones and labour of procuring them are allowed; after two white crops, one-third is allowed; and after three, no valuation is made.

Valuation of Lime and Marl laid on the Land.

When lime or marl is properly used as manure, it is usually considered that the benefit should be valued on pasture land for six years after it has been laid on, in the following proportions; namely, five-sixths of its value, including labour, carriage and cost price, when it has been laid on one year; two-thirds when laid two years; one-half when laid three years; one-third when laid four, and one-sixth when laid five years. The valuation of lime on arable land is made in the same way as manure.

Valuation of Manure quickly expended.

Rape dust, soot, and other manures which are quickly expended, are valued at the rate of a full tillage before a crop is produced, or after turnips eaten off; such tillage includes the costs of procuring, carrying and spreading them. If the turnips have been drawn, only one-third of the cost is allowed.

Valuation of Draining and Fixtures, &c.

In the valuation of draining it is the custom to allow something for ten, and in some places twelve years, or three courses of four years' husbandry; making a deduction of one-tenth of the value of the drains for every year which has elapsed since it was made. Corn in the stack, hay, straw, and the fixtures about the homestead—such as pumps, troughs, pipes and the like—which belong to the occupier, are valued according to the market price or their estimated value (*p*).

Draining by Tenants.

Tenants or occupiers at a rent joining in an application to the drainage commissioners for an improvement under the Drainage Act, 12 & 13 Vict. c. 100, s. 17, shall, during their tenancy or occupation, be liable to pay the charge or an apportioned part thereof. A custom of the country that, where a tenant has laid out money in tile draining, the landlord is to repay him five-sevenths of the expense, whether he has consented or not to such drainage, is not an unreasonable custom (*q*).

(*p*) For more full information on this subject, see Bayldon on Rents and Tillages. See also ante, Chap. IV., Sect. 9, p. 468.

(*q*) *Ludlam* v. *Mousseley*, 21 Law J., Q. B. 64.

CHAPTER VII.

MISCELLANEOUS RIGHTS AND LIABILITIES.

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SECT. 1.—*Right of Common.*

(a) *Generally.*

Nature and Description of the several Rights of Common.

COMMON signifies that soil whereof the use is common to this or that own or lordship; or it is a profit which a man has in the land of another person usually in common with others; or a right which a person has to put his cattle to pasture into ground which is not his own; and in all cases of common the law much respects the custom of the place, for the rule is consuetudo loci est observanda (*a*); for a right of common by prescription may even be regulated by custom (*b*). A right of common, therefore, is an incorporeal hereditament, which may be said to exist where two or more persons by virtue of a grant, prescription or custom, take in common with each other from the soil of a third person a part of the natural profits thence produced. Even the *occupiers* of land may by custom claim a right in the soil of another; but *inhabitants* cannot, because inhabitancy is too vague a description, and extends to many others besides the actual occupiers of houses or lands (*c*). The right of commoners in a common may be subservient to the right of the lord in the soil; so that the lord may dig clay-pits there, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right can be proved to have been always exercised by the lord (*d*). The owner of a common may, under the statute of 13 Edw. I. st. 1 (Westm. 2), c. 46, erect thereon a house necessary for a beast keeper or for a woodward (*e*).

(*a*) 7 Co. Rep. 55.
(*b*) 2 Lord Raym. 1186.
(*c*) *Bean* v. *Bloom*, 2 W. Black. 926; 3 Wils. 456.
(*d*) *Bateson* v. *Green*, 5 Term Rep. 411; and see *Place* v. *Jackson*, 4 Dowl. & Ryl. 318; *Clarkson* v. *Woodhouse*, 5 Term Rep. 412, n.; 3 Dougl. 189; and *Arlett* v. *Ellis*, 7 Barn. & Cres. 346; 9 Dowl. & Ryl. 897.
(*e*) *Patrick* v. *Stubbs*, 9 Mees. & Wels. 830.

By stat. 2 & 3 Will. IV. c. 71, s. 1, no claim by custom, prescription or grant to any right of common or other profit or benefit to be taken and enjoyed from or upon land which has been enjoyed thirty years without interruption (*f*), shall be defeated by showing the commencement of the right within the term of legal memory; and when the right has existed sixty years, it shall be absolute and indefeasible, unless it appears to have been enjoyed by license by deed or writing. The "interruption" mentioned in the statute must be an adverse obstruction, not a mere discontinuance of user; and, therefore, where for two intermediate years a commoner had ceased to use the common because he had no commonable cattle, a jury was held to be justified in finding a continued enjoyment for thirty years (*g*). Evidence of an enjoyment of a right of pasture for twenty-eight years, is not sufficient for a jury to presume an enjoyment for thirty years as stated in a plea under this statute (*h*). In like manner pleas of twenty and forty years' user respectively are not supported by proof of user for forty years and upwards before the commencement of the action to within fourteen months of it. Some act of user must be shown to have been exercised in the year in which the action is brought, and it would seem from the language of Parke, B., that some act of user ought to be shown to have been exercised at least once a year (*i*). An enjoyment for thirty years may be partly before and partly after an intervening life estate, during which also the enjoyment continued (*k*). Evidence of encroachments made on one part of 217 acres is not conclusive evidence of an interruption of the enjoyment of a right of pasturage pleaded under this statute to an action for a trespass for taking cattle damage feasant in another part (*l*). The most usual rights of common which exist are—common of estovers—common of pasture—common of turbary—and common of piscary; all these rights of common may be appendant, appurtenant, or in gross.

Remedies for a Disturbance of Common.

The remedies for disturbance of common may be considered as respects the lord and as regards the commoner. The former having the right to the soil may, if he be dispossessed, of course maintain an action of ejectment; and if he be disturbed by a mere stranger, who puts in cattle, having no colour of right, or by a commoner who surcharges the common, he may maintain an action of trespass or case. In some cases, also, where the right of common is clearly stinted as to number, he may distrain the surplus number damage feasant. The

(*f*) The interruption must be submitted to or acquiesced in for a year by the party interrupted, after notice, by sect. 4. See *Flight* v. *Thomas*, 11 Ad. & El. 688; 8 Cl. & Fin. 231; 1 West. 671; 3 Per. & Dav. 442; 7 Dowl. 741.

(*g*) *Carr* v. *Foster*, 3 Queen's B. Rep. 581.

(*h*) *Appleyard* v. *Bayley*, or *Bailey* v. *Appleyard*, 8 Ad. & El. 161; 1 Will. Wol. & Hod. 208; 3 Nev. & Per. 257; see also *Parker* v. *Mitchell*, 11 Ad. & El. 788; 3 Per. & Dav. 655.

(*i*) *Lowe* v. *Carpenter*, 6 Exch. Rep. 825.

(*k*) *Clayton* v. *Corby*, 2 Queen's B. Rep. 813; 2 Gale & Dav. 174.

(*l*) *Welcome* v. *Upton*, 6 Mees. & Wels. 536.

commoner may also maintain ejectment where he is completely ousted, or where he is disturbed in the exercise of his right he may bring an action on the case, but he cannot maintain an action of trespass. Where the injury complained of arises from an act of the lord, the commoner may often proceed himself to abate the nuisance: thus, if the lord so plant trees as to destroy the common, such an act would be considered as a nuisance, and the commoner might abate it; but he cannot justify cutting down trees planted by the lord on the waste, if it be not a total destruction of the common, though there be not a sufficiency of common left, his remedy being by action on the case (*m*). The distinction seems to be this: if the lord of the manor make a hedge round the common, or do any other act that entirely excludes the commoner from exercising his right, the latter may do whatever is necessary to let himself into the common; but if the commoner can get at the common, and enjoy it to a certain extent, and his right be merely abridged by the act of the lord, in that case his remedy is by an action on the case, and he cannot assert his right by any act of his own. In case of surcharge by other commoners, on stinted commons, the commoner may clearly distrain. It would seem that a commoner may pull down a house wrongfully erected on the common, but not if the person who has erected it be in at the time (*n*).

(b) *Common of Estovers.*

Nature and Description of Estovers.

Common of estovers is a liberty of taking necessary wood for the use and furniture of a house or farm from off another's estate (*o*). This right is generally considered as being divided into three distinct species, distinguished from each other by a different application of the Saxon word "bote," which is synonymous with the French "estovers:" thus there is a house-bote, plough-bote and hay-bote. House-bote is a sufficient allowance of wood to build or repair the house, or to burn in it, which latter is sometimes called fire-bote; plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry, as ploughs, carts, harrows, rakes, forks, &c.; and hay-bote or hedge-bote is wood for repairing hedges or fences, as pales, stiles and gates to secure inclosures (*p*). These botes or estovers must be reasonable ones, and such as any tenant or lessee, except a strict tenant at will, may take off the land demised to him without waiting for any leave, assignment or appointment of the lessor, unless he be restrained by special covenant to the contrary (which is usually the case (*q*)). House-bote, hay-bote and fire-bote belong to a termor of common right, and he may take wood for the same; but if he take

(*m*) *Kirby* v. *Sadgrove* (*in error*), 1 Bos. & Pul. 13; 3 Anst. 892; 6 Term Rep. 483.
(*n*) *Perry* v. *Fitzhowe*, 8 Queen's B. Rep. 757.
(*o*) Co. Litt. 122 a; 2 Black. Com. 35.
(*p*) Wood's Inst. 344.
(*q*) F. N. B. 59 M.; 1 Inst. 41.

more than is needful he may be punished for waste (r), as if he cut down wood to burn, when he has sufficient dead wood.

In what Right Estovers exist.

Common of estovers cannot be appendant to land, unless it be by prescription; but it must necessarily be to a house to be spent there (s).

For what Purpose Estovers may be taken.

Although the tenant may cut down and take sufficient wood to repair walls, palings, fences or hedges as he found them, yet he cannot do so to make new ones (t).

Who entitled to Estovers.

The right to estovers belongs and is incident to the estate of every tenant, whether for life or years, except that of a strict tenant at will, for that is said to be too mean.

Right of Copyholders to Estovers.

It is clear that a copyholder may take the necessary estovers or botes on his copyhold without a special custom; but to enable him to take them on the other lands, a special custom must be shown (u).

Remedies for the Interruption of the Right.

If a man have common of estovers in the woods of another, and the owner of the wood cut down all the wood, he who ought to have the estovers might formerly (before the statute 3 & 4 Will. IV. c. 27, s. 36, which abolished real and mixed actions) have an assize of his estovers, and now it seems that an action on the case is the proper remedy (x).

(c) *Common of Pasture.*

Description and Kinds of Common of Pasture.

Common of pasture is almost invariably restricted, with respect to the description of cattle, to such as are commonable, that is, such as plough and manure the land—as horses, oxen, cows and sheep—and does not extend to hogs, goats, geese, or the like. It is also generally stinted as to the number of cattle to be depastured, either by an express limitation of number, or by those only being allowed to depasture which are levant and couchant upon the land of the party claiming the right (y). Common of pasture is divided into common in gross—common appendant—common appurtenant—and common pur cause de vicinage.

Common of Pasture in Gross.

Common of pasture in gross is a liberty to have common alone, without any lands or tenements, in another man's land, granted by deed to a man and his heirs, or for life (z). Common in gross is a matter of tenure: Sir Edward Coke says a precipe will lie for it. Neither a common appendant nor a common appurtenant for cattle levant and couchant can be turned into a common in gross, because

(r) Terms de Ley, 387, 396.
(s) Co. Litt. 121 b; F. N. B. 180, C. b.
(t) 1 Inst. 53; Wood's Inst. 525; 9 Co. Rep. 113.
(u) 4 Co. Rep. 31 b.
(x) See 1 Chit. Plead. 159, 7th ed.; *Ashmead* v. *Ranger* (*in error*), 11 Mod. 18; 1 Lord Raym. 551; 2 Salk. 638; 12 Mod. 379.
(y) The terms levant and couchant have been variously interpreted; but it will be sufficient in a work like the present to say, that they are a sort of stint, and mean such cattle as the owner of land can maintain during the winter, when they cannot depasture on the common.
(z) F. N. B. 37; 4 Co. Rep. 30.

they cannot be severed from the land to which they appertain without extinguishment; but a common appurtenant for a certain number of beasts may, for such a grant has no reference to connection of tenure (*a*).

Common of Pasture appendant or appurtenant.

Common of pasture appendant is a right belonging to a man's arable land of putting beasts commonable into another's ground, and common of pasture appurtenant is belonging to an estate for all manner of beasts, commonable or not commonable (*b*). Common appendant and common appurtenant are in a manner confounded, as appears by Fitzherbert, and are there defined to be a liberty of common appertaining to or depending on a freehold, but limited to commonable beasts, as horses, oxen, kine and sheep, and not extending to goats, hogs and geese. A claim of a right of common of pasture without stint, as annexed to an ancient messuage without land, it has been held, cannot as such exist by law (*c*): nor can a right of common of pasture for cattle levant and couchant be claimed by prescription, as appurtenant to a house without any curtilage or land (*d*). It had been previously questioned whether a right of common of pasture could be appurtenant to a *messuage* without land (*e*). Common of pasture, however, without land, may be parcel of a manor, though demised and demisable by copy of court-roll (*f*); and a lord of a manor may have, in respect of the waste or common land in his own manor, a right to turn his own cattle upon the common of an adjoining manor (*g*). Tenants of a manor have no general common law right of common appendant on the waste (*h*). It would seem that at any time a common appurtenant for a certain number of beasts may be converted to com-

(*a*) *Bunn* v. *Channen*, 5 Taunt. 244.

(*b*) 4 Co. Rep. 37; Plowd. 161. It may not be superfluous to explain the meaning of the terms *appendant* and *appurtenant*. A thing *appendant* is that which beyond the time of legal memory has belonged to another thing more worthy, with which it agrees in its nature and quality; it must therefore be claimed by prescription, and cannot begin at the present day. A thing incorporeal may be appendant or appurtenant to a thing corporeal; therefore common of turbary or estovers may be appendant to a house; but a thing corporeal cannot be appendant to a thing corporeal, therefore land cannot be appendant to land. A thing *appurtenant* is that which commences at this day,—thus, if a man grant common of estovers, of pasture or of turbary, in fee simple, in his manor, and make a feoffment of the manor, the common shall pass to the feoffee: common appurtenant therefore is claimable by an existing grant, or a grant within the legal time of memory, as well as by prescription, which always implies a grant; Co. Litt. 121 b; 1 Roll. 230, 1, 36, 50; 396, 1, 42; F. N. B. 181 (N). And after an unity of possession in the lord of the land, in respect of which the right of common is claimed, with the soil and freehold of the waste; evidence that the lord's tenant had, for fifty years past, enjoyed the right of common on the waste, is evidence for the jury to presume a new grant of common as appurtenant, so as to support a count in an action by the tenant for surcharging the common, declaring upon his *possession* of the messuage and land, with the appurtenances, and that, by reason thereof, he was entitled of right to the common of pasture as belonging and appertaining to his messuage and land; and also to support another count, in substance the same, alleging his possession of the messuage and land, and that by reason thereof he was entitled to common of pasture, &c.; *Cowlam* v. *Slack*, 15 East, 108.

(*c*) *Benson* v. *Chester*, 8 Term Rep. 396.

(*d*) *Scholes* v. *Hargrave*, 5 Term Rep. 46.

(*e*) *Bunn* v. *Channen*, 5 Taunt. 244.

(*f*) *Musgrave* v. *Cave*, Willes, 310.

(*g*) *Sefton* (*Earl*) v. *Court*, 5 Barn. & Cres. 917; 8 Dowl. & Ryl. 741.

(*h*) *Dunraven* (*Earl*) v. *Llewellyn*, 15 Queen's B. Rep. 791.

mon in gross by demising it (*i*). A right of common appurtenant for cattle levant and couchant on the tenement extends to such cattle as the winter eatage of the land, together with the produce of it in summer, is capable of maintaining (*k*).

Common of Pasture by Vicinage.

Common pur cause de vicinage, or common by reason of neighbourhood, is a liberty the tenants of one lord in one town have to enjoy a common of pasture with the tenants of another lord in another town. It is where the tenants of two lords have used, time out of mind, to have common promiscuously in both lordships, lying together and open to one another (*l*); it is therefore necessary that these adjoining lands should both be commonable (*m*). Those who challenge this kind of common, which is usually called intercommoning, may not put their cattle in the common of the other lord, for then they are distrainable, but they may turn them into their own fields, and if they stray into the neighbouring common, they must be suffered to remain (*n*). Every common pur cause de vicinage is a common appendant (*o*). Where one of two adjoining commons, with common of vicinage, was inclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway which led over the one to the other; yet as the separation was not complete, so as to prevent the cattle straying from one to the other by means of the highway, it was held, that the common by vicinage still continued (*p*). Where the plaintiff, being possessed of a house and land in *G.*, had for sixty years exercised rights of common in *W.*, but it appeared that this was done near the boundary of the two commons of *E.* and *W.*, which lay open and uninclosed adjacent to each other; and it also appeared that the parties exercising the right did not at the time know the exact boundaries, and that the plaintiff had on a previous inclosure of the common of *E.* obtained an allotment there in right of his estate; it was held, that the judge was right in leaving it to the jury to say whether the evidence was referable to an exercise of the right in *E.* and a mistake in the boundary, or to an exercise of the right in *W.* (*q*).

Common of Pasture in Common Fields.

There is frequently a mutual right of intercommoning between the owners of the land in open common fields: the extent of this right and the mode of exercising it varies according to the custom which has prevailed among the occupiers of such land. Where, however,

(*i*) *Bunn* v. *Channen*, 5 Taunt. 244.

(*k*) *Whitelock* v. *Hutchinson*, 2 Mood. & Rob. 205.

(*l*) 8 Co. Rep. 78. This is not properly a right of common, but rather an excuse for a trespass, and at most but a permissive right, which was originally allowed for the prevention of suits in neighbourhoods where a boundary could not easily be established.

(*m*) *Heath* v. *Elliott*, 4 Bing. N. C. 388; 6 Scott, 172; 1 Arn. 170. But it seems probable that common pur cause de vicinage may also exist between the proprietors of neighbouring lands, though there are no commons on either side; *Jones* v. *Robin*, 10 Queen's B. Rep. 581, 620.

(*n*) Terms de Ley, 146.

(*o*) 1 Danv. Abr. 799.

(*p*) *Gullett* v. *Lopes* (*Bart.*), 13 East, 348.

(*q*) *Hetherington* v. *Vane*, 4 Barn. & Ald. 428.

there is no custom which has become binding upon the parties, the common law rule appears to be, that those persons only who are owners of land within an open common field are entitled to enjoy the right of intercommoning; and such right can be exercised at those times only when the corn is off the land, that is, after all the corn and grain have been reaped and gathered, and before any more has been sown (*r*). Where *A.* being possessed of a quantity of land in a common field, and having a right of common over the whole field, and *B.* having also a right of common over the whole field, they entered into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenanted to that effect; it was held, that if, during the term, the cattle of *B.* came upon the land of *A.*, he might distrain them, damage feasant (*s*). There are also statutes pointing out the mode of exercising this right of common (*t*). The owners of land in open common fields may by custom mutually inclose against each other (*u*).

Remedies for Disturbance of Common of Pasture.

When the lord is disturbed, he may, as before stated, bring an action of trespass: when the commoner is disturbed in the enjoyment of his right, the more usual remedy is an action on the case, which he may maintain, although the injury sustained by him individually be extremely small: it has accordingly been held, that a commoner may maintain an action on the case for an injury done to the common, by taking away from thence the manure which was dropped on it by the cattle, though his proportion of the damage be found only to the amount of a farthing; at least the smallness of the damage found is no ground for a nonsuit (*x*). It has also been laid down that one commoner, who has surcharged, may nevertheless maintain an action against another for surcharging the common (*y*). Besides this remedy by action, in case of an absolutely stinted common, in point of number, one commoner may distrain the supernumerary cattle of another; but not if an admeasurement be necessary, as where the stint has relation to the quantity of the commoner's land (*z*).

(d) *Common of Turbary.*

Nature of Common of Turbary.

Common of turbary is a license to dig turf upon the ground of another, or in the lord's waste: this common is appendant or appurtenant to a house, but not to lands, for turves are to be burnt in the house. It may, however, be also in gross, but it does not give any right to the land, trees or mines; nor can it exclude the owner of the soil (*a*). An occupier of a messuage and lands, who has common in

(*r*) *Cheeseman* v. *Hardham*, 1 Barn. & Ald. 706; *Musgrave* v. *Cave*, Willes, 319.

(*s*) *Whiteman* v. *King*, 2 H. Black. 4.

(*t*) See 29 Geo. II. c. 36; 13 Geo. III. c. 81.

(*u*) *Hickman* v. *Thorne*, 2 Mod. 105. By statutes 6 & 7 Will. IV. c. 115, and 3 & 4 Vict. c. 31, such fields may be inclosed.

(*x*) *Pindar* v. *Wadsworth*, 2 East, 154.

(*y*) *Hobson* v. *Todd*, 4 Term Rep. 71.

(*z*) *Hall* v. *Harding*, 1 W. Black. 673; 4 Burr. 2426.

(*a*) 4 Co. Rep. 37.

the lord's waste, may set up a custom to cut rushes, as annexed to his right of common (*b*). A custom that all the customary tenants of a manor having gardens, parcels of their customary tenements respectively, have immemorially, by themselves, their tenants and occupiers, dug, taken and carried away from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively for the improvement thereof, such turf covered with grass, fit for the pasture of cattle, as hath been fit and proper to be so used, at all times of the year, as often and in such quantity as occasion hath required, is bad in law, as being indefinite and uncertain, and destructive of the common; and so is a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of and for the hedges and fences of such customary tenements (*c*).

(e) *Common of Piscary.*

Nature of Common of Piscary.

Common of piscary is a liberty of fishing in another man's water. Common of piscary, to the exclusion of the owner of the soil, is contrary to law; though a person by prescription may have a separate right of fishing in such water, and the owner of the soil will be excluded; for a man may grant the water without passing the soil. If one grant a separate fishery, neither the soil nor water pass, but only a right of fishery (*d*). Like other rights of common, it may be appendant, appurtenant, or in gross. It can only exist in streams which are not navigable, for the sea and all navigable rivers are open to all the king's subjects (*e*). A custom for all the inhabitants of a town to fish in a person's river is bad (*f*). So a custom for all the inhabitants in a parish to use a footpath for angling with rods and lines for fish in the daytime, for recreation only, and not profit, is bad, as setting up a custom to take a profit à prendre in alieno solo (*g*).

(f) *Approvement of Common.*

Who are entitled to approve.

The lord of a manor or his grantee may inclose and approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig for sand, &c., if he leave sufficient common of pasture (*h*). And this may be done by an owner pur autre vie of the common (*i*). In pleading

(*b*) *Beam* v. *Bloom*, 3 Wils. 456; 2 W. Black. 926.

(*c*) *Wilson* v. *Willes*, 7 East, 121; 3 Smith, 167. As to the right of one tenant in common to dig turves, see *Wilkinson* v. *Haygarth*, 12 Queen's B. Rep. 837.

(*d*) 7 Inst. 4, 122, 164; 5 Co. Rep. 34.

(*e*) *Warren* v. *Matthews*, 6 Mod. 73; *Bagott* v. *Orr*, 2 Bos. & Pul. 472.

(*f*) *Lloyd* v. *Jones*, 12 Jur. 657.

(*g*) *Bland* v. *Lipscombe*, 3 Com. Law Rep. 261.

(*h*) Stat. 20 Hen. III. (Merton), c. 4; 13 Edw. I. stat. 1 (2 West.), c. 46; 3 & 4 Edw. VI. c. 3; 2 Co. Inst. 87; *Strickland* v. *Fawcett*, Willes, 57; *Shakespeare* v. *Peppin*, 6 Term Rep. 741; and see 1 Wms. Saund. 353 b.

(*i*) *Patrick* v. *Stubbs*, 9 Mees. & Wels. 830.

such a right in a lord, it must be stated that there was sufficiency of *common* left for the commoners (*k*): but the right of the lord may be given in evidence on an issue joined on the right of common over the *locus* in quo, at the time the trespass was committed, and need not be specially pleaded. Besides the lord, any person who is seised in fee of part of a waste within a manor may approve, leaving a sufficiency of common (*l*). The lord, however, has not an unlimited right to inclose parts of a common without the consent of the homage; for an unlimited custom for the lord to inclose parts of a common and grant them in severalty, without the consent of the homage, is bad, being inconsistent with the rights of the commoners (*m*): although a custom for the lord, with the consent of the homage, to grant parts of a common for building is good (*n*): even in exclusion of the commoners (*o*): but a custom for the lord to grant leases of the waste of a manor, without restriction, from the time of the original grant, cannot be presumed, and is bad in point of law (*p*). A custom for one commoner to *inclose* against another is good (*q*): and such a custom does not abridge the common law right of the lord to inclose (*r*). Where a part and not the whole of a common has been inclosed, a commoner, in asserting his right of common, may throw down the whole of the hedge erected on the common; and a plaintiff in trespass cannot recover against him on a new assignment, because he had thrown down more than sufficient to admit his cattle (*s*). If there be a custom within a manor for a lord to grant parcels of the waste by copy of court roll, the premises granted in that mode are well described as copyhold premises, although the date of the grant be modern (*t*).

Against what Rights of Common there may be Approver.

There can be no approver in derogation of a right of common of turbary (*u*); it has, however, been determined in one case, that the lord might inclose parcels of a waste against a right of common of turbary, if he left a sufficiency of common (*x*). The lord, however, has no right, under the statute of Merton, to inclose and approve the waste of a manor, where the tenants of a manor have a right to dig gravel on the waste, or take estovers (*y*). A custom for the owner of a waste to set out, to the owners of certain ancient messuages, portions of the waste to be by them held in severalty for getting turves therein, and when the portions set out are cleared of turves, for the owners of the waste to inclose and approve such portions, to hold at their plea-

(*k*) *Arlett* v. *Ellis*, 7 Barn. & Cres. 346; 9 Dowl. & Ryl. 897.
(*l*) *Glover* v. *Lane*, 3 Term Rep. 445.
(*m*) *Arlett* v. *Ellis*, 7 Barn. & Cres. 346; 9 Dowl. & Ryl. 897.
(*n*) *Folkard* v. *Hemmett*, 5 Term Rep. 417, n.
(*o*) *Boulcot* v. *Winmill*, 2 Camp. 261.
(*p*) *Badger* v. *Ford*, 3 Barn. & Ald. 153.
(*q*) *Barber* v. *Dixon*, 1 Wils. 44.
(*r*) *Duberly* v. *Page*, 2 Term Rep. 392, n.
(*s*) *Arlett* v. *Ellis*, 7 Barn. & Cres. 346; 9 Dowl. & Ryl. 897; and see *S. C.* 9 Barn. & Cres. 671.
(*t*) *Northwick* (*Lord*) v. *Stanway*, 3 Bos. & Pul. 346; *S. C.* not *S. P.* 6 East, 56.
(*u*) *Grant* v. *Gunner*, 1 Taunt. 435.
(*x*) *Arlett* v. *Ellis*, 7 Barn. & Cres. 346; 9 Dowl. & Ryl. 897.
(*y*) *Duberly* v. *Page*, 2 Term Rep. 391.

sure in severalty for ever, freed of all common of turbary and pasture, is good (z).

Encroachment on the Waste.

If an encroachment upon the waste be suffered to remain for twenty years, it gives a title to the land to the party who has made the encroachment; for twenty years adverse possession of a waste inclosed is a bar to the entry of a commoner (a); and it is a great question whether the lord's right of entry for a forfeiture be not barred after twenty years by the Statute of Limitations (b). It has even been held, that an inclosure made from the waste twelve or thirteen years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by license of the lord; and that ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up (c). It has also been held, that if a license be given by a commoner, by parol, to build a cottage on a common, he cannot maintain an action for the encroachment, although no sufficient common remains (d).

For whose Benefit the Encroachment is made.

When a lessee encroaches on the waste during his term, and is suffered to remain in uninterrupted possession for twenty years, it is now settled, that it shall be considered primâ facie that the encroachment was made for the benefit of his lessor, except as against third persons (e), unless it appear clearly by some act done at the time, that the tenant intended the encroachment for his own benefit, and not to hold it as he held the farm to which it was adjacent (f). He is, therefore, bound to deliver up the land taken from the waste to his lessor, at the end of his term, with the rest of the premises demised (g).

(g) *Inclosure of Common.*

Nature and Effect of Inclosure generally.

In the year 1801 a general inclosure act was passed (h), containing all the usual clauses previously inserted in local acts of parliament for the inclosure of particular wastes and commons, to which all subsequent local acts had reference. By the late act 8 & 9 Vict. c. 118 (i),

(z) *Clarkson* v. *Woodhouse*, 5 Term Rep. 412, n.; 3 Dougl. 189; and see *Bateson* v. *Green*, 5 Term Rep. 411; *Place* v. *Jackson*, 4 Dowl. & Ryl. 318.

(a) *Hawke* v. *Bacon*, 2 Taunt. 156.

(b) *Doe* d. *Tarrant* v. *Hellier*, 3 Term Rep. 162; *Whitton* v. *Peacock*, 3 Mylne & Keen, 325; and see stat. 3 & 4 Will. IV. c. 27.

(c) *Doe* d. *Foley* v. *Wilson*, 11 East, 56; and see *Rex* v. *Pensax*, 3 Barn. & Adol. 815.

(d) *Harvey* v. *Reynolds*, 1 Car. & Pay. 141; see also *Perry* v. *Fitzhowe*, 8 Queen's B. Rep. 757.

(e) *Doe* d. *Baddeley* v. *Massey*, 17 Queen's B. Rep. 373; *Doe* d. *Croft* v. *Tidbury*, 14 C. B. 304.

(f) *Doe* d. *Lewis* v. *Rees*, 6 Car. & Pay. 610; *Doe* d. *Dunraven* (*Earl*) v. *Williams*, 7 Car. & Pay. 332; *Doe* d. *Harrison* v. *Murrell*, 8 Car. & Pay. 134. See ante, 522.

(g) See *Doe* d. *Colclough* v. *Mullins*, 1 Esp. 460; *Doe* d. *Challnor* v. *Davies*, 1 Esp. 461; *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208; and *Doe* d. *Watt* v. *Morris*, 2 Bing. N. C. 189; 1 Hodges, 215; 2 Scott, 276; and see ante, 522.

(h) 41 Geo. III. (U. K.), c. 109, amended by 1 & 2 Geo. IV. c. 23. The statutes 6 & 7 Will. IV. c. 115, and 3 & 4 Vict. c. 31, also provide for the inclosure of open and arable fields.

(i) By sect. 11 it is enacted, "that all such lands as are hereinafter mentioned, that is to say, all lands subject to any rights of common whatsoever, and whether such rights may be exercised or enjoyed at all times or may be exercised or enjoyed only during limited times, seasons or periods, or be subject to any suspension or restriction

passed for the purpose, amongst other things, of facilitating the inclosure and improvement of commons, and of providing remedies for improper executions of powers under former inclosure acts, two inclosure commissioners are appointed for England and Wales, and with their assistance inclosures may now in some cases be made without the necessity of applying to parliament.

Decisions previous to 8 & 9 Vict. c. 118.

The award of the commissioners, under an act, has been construed to be in the nature of a parliamentary declaration, rather than of a common law conveyance (*k*); but it has notwithstanding been held, that the legal freehold of the inclosed land does not pass to the party to whom it is allotted until the execution and publication of the award (*l*). The power of the commissioners is not absolutely determined by their award, in cases where they have not fully executed the duty imposed upon them at the time of its proclamation (*m*). Where commissioners, under an inclosure act, made an allotment to *J. S.*, who shortly afterwards conveyed all his lands to trustees for payment of certain debts and incumbrances; it was held, that the allotment passed by the conveyance, although the commissioners did not make their award until three years afterwards (*n*). Where no special provision is made to the contrary, the allotments are freehold (*o*). Where a lease was made of a farm, and also of certain allotments of common, inclosed under an act which contained the usual clauses empowering

whatsoever in respect of the time of the enjoyment thereof, all gated and stinted pastures in which the property of the soil, or of some part thereof, is in the owners of the cattle gates or other gates or stints, or any of them, and also all gated and stinted pastures in which no part of the property of the soil is in the owners of the cattle gates, or other gates or stints, or any of them, all land held, occupied or used in common, either at all times or during any time or season, or periodically, and either for all purposes, or for any limited purpose, and whether the separate parcels of the several owners of the soil shall or shall not be known by metes or bounds, or otherwise distinguishable, all land in which the property or right of or to the vesture or herbage, or any part thereof, during the whole or any part of the year, or the property or right of or to the wood or underwood growing and to grow thereon, is separated from the property of the soil, and all lot meadows and other lands the occupation or enjoyment of the separate lots or parcels of which is subject to interchange among the respective owners in any known course of rotation, or otherwise, shall be land subject to be inclosed under this act." Sect. 12, "Provided always and be it enacted, that no waste land of any manor on which the tenants of such manor have rights of common, nor any land whatsoever subject to rights of common which may be exercised at all times of every year for cattle levant and couchant upon other land, or to any rights of common which may be exercised at all times of every year, and which shall not be limited by number or stints, shall be enclosed under this act without the previous authority of parliament in each particular case as hereinafter provided." The New Forest and the Forest of Dean are excepted from the general provisions of the act, as well as lands within certain distances of all towns containing 10,000 inhabitants, and also town and village greens. This act is amended by 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 15 & 16 Vict. c. 79; and 17 & 18 Vict. c. 97.

(*k*) *Johnson* v. *Hodson*, 8 East, 38.

(*l*) *Farrer* v. *Billing*, 2 Barn. & Ald. 171; see also *Doe* d. *Harris* v. *Saunders*, 5 Ad. & El. 664; 2 Har. & Wol. 350; 1 Nev. & Per. 119. By statute 1 & 2 Geo. IV. c. 23, however, landlords, or persons acting under their orders, may enter upon land allotted which has been demised, and distrain for the rent, notwithstanding the award shall not be executed; and they may also maintain actions for the rent.

(*m*) *Haggerstone* v. *Dugmore*, 1 Barn. & Ald. 82.

(*n*) *Doe* d. *Dixon* v. *Willis*, 3 Moore & Pay. 24.

(*o*) *Revell* v. *Joddrell*, 2 Term Rep. 415; *Doe* d. *Lowe* v. *Davidson*, 2 Maule & Selw. 175.

the commissioners to distrain, or enter and take the rents and profits, on failure of the owner of the land, to whom the allotments were parcelled out, paying his proportion of the expenses of the act; and the question was who should defray such expense, and the expense of fencing such allotments; it was ruled, that such expenses were to be borne by the landlord, Lord Ellenborough, C. J., observing, that "the act gives the commissioners power to oust the tenant from his occupation; and when a power is to oust the tenant of the rents and profits, there the tenant may pay in his own discharge, and for the redemption of the land (*p*)."

Allotments in lieu of Chief Rents, &c.

By the 12 & 13 Vict. c. 83, s. 5, allotments may be made to the lord of the manor in lieu of quit-rents, chief-rents or heriots payable to him.

SECT. 2.—*Right of Way.*

(a) *Private Ways.*

Private Ways by Prescription.

A private right of way may be claimed by prescription and immemorial usage: thus, where the inhabitants of a particular hamlet, the owners and occupiers of a particular close or farm, have immemorially been used to cross a particular piece of land, a right of way is created by the immemorial usage which supposes a grant; and in pleading such a right of way, it is not necessary to describe all the closes intervening between the two termini (*q*).

Private Ways by Grant.

A private right of way may also be grounded on a special permission;—as when the owner of lands grants to another a liberty of passing over his grounds, to go to church, to market, or the like, in which case the gift or grant is particular, and confined to the grantee alone, it dies with the person, and if the grantee quit the country, he cannot assign over his right to any other, nor can he justify taking another person in his company. Under a grant of a way from *A.* to *B.* "through and along" a particular way, the grantee is not justified

(*p*) *Smith* v. *Pearce*, Sitt. at Guildhall after M. T. 43 Geo. III.

(*q*) *Simpson* v. *Lewthwaite*, 3 Barn. & Adol. 226; and see *Rouse* v. *Bardin*, 1 H. Black. 351; and *Jackson* v. *Shillito*, 1 East, 381. By sect. 4, the interruption must have been submitted to, or acquiesced in, for a year by the party interrupted, after notice. See *Flight* v. *Thomas*, 11 Ad. & El. 688; 8 Cl. & Fin. 231; 1 West, 671; 3 Per. & Dav. 442; 7 Dowl. 741; ante, 544; and post, 559. By statute 2 & 3 Will. IV. c. 71, s. 2, it is enacted, that no claim by custom, prescription or grant, to any way or other easement, or to any water-course or the use of any water which has been enjoyed twenty years without interruption shall be defeated by showing the commencement of the right within the time of legal memory; and where the right shall have existed forty years, it shall be absolute and indefeasible, unless it appear to have been enjoyed by license by deed or writing. In order to entitle a party to have the benefit of this enactment, he must prove the enjoyment of the easement as such, and as of right, for a continuous period of twenty years, and therefore unity of possession for part of that time will destroy the right. *Onley* v. *Gardiner*, 4 Mees. & Wels. 496; 2 Horn. & Hurl. 381; *Clayton* v. *Corby*, 8 Queen's B. Rep. 813; 2 Gale & Dav. 174. As to the mode of pleading in such a case see *Pye* v. *Mumford*, 11 Queen's B. Rep. 666. This act applies only to such rights as would before the act have been acquired by the presumption of a grant from long user; *Arkwright* v. *Gell*, 5 Mees. & Wels. 203; 2 Horn. & Hurl. 17.

aking a traverse road across the same (*t*). The owner in fee of land, artly built upon, conveyed to the defendant a house, with a coach-ouse and stable at the back, and a field, together with all ways, &c., the house and a field belonging, or usually enjoyed therewith, with ee liberty of ingress, &c., for the defendant, with cattle and carriages, er the carriage road and footpath leading to the houses, coach-uses and stables in the occupation of *A.* and the defendant. Pre-ous to the time of this conveyance a private road was used for arriages, cattle, &c., from the turnpike road to the defendant's coach-use and stable, and field, from which road there was a gate into the ld. The defendant afterwards pulled down his coach-house and able, and built a wall across the private road, near their former site nclosing a portion of the road which had been conveyed to him in e), and he also opened a gate at the further corner of the field into e private carriage road, which he used instead of the former gate, d drove cattle and carriages along the road into the field and back gain; it was held, that the defendant was liable in trespass, inasmuch the grant of all ways to the field belonging or usually enjoyed there-ith, extended only to the user of the way as it existed at the time f the grant, through the then existing gate, and the express grant as of a right of way to the dwelling-house, coach-house and stable nly (*u*). If a way granted by a lease cannot be used by reason of its assing over the land of a third person, and there is no other way to e lessee's house, he is entitled to a way of necessity to the nearest ghway by the shortest line across the grantor's land (*x*). A right of ay for agricultural purposes is a limited and qualified right of way, nd does not necessarily confer a right to use such a way for general nd commercial purposes (*y*). So a reservation of a right of way on ot and for horses, oxen, cattle and sheep, does not confer a right to se it to lead manure (*z*). A reservation of a right of way "to a stable nd loft over and the space or opening under the loft, and then used r a wood-house," does not authorize the party to use the way to a ottage built on the spot where the loft and space under was, there aving been such an alteration in the substance of the place (*a*). It is o be observed, that in *Henning* v. *Burnet* (*b*), Parke, B., stated that e did not concur to the full extent of the doctrine laid down in *Allan* v. *Gomme*, although the decision itself might be supported by the context. A lease of lands, excepting the mines, with power to work them, "with free ingress, &c., to and from the same, or to or from any other mines, quarries, lands and grounds, on foot, &c., and also all necessary

(*t*) *Senhouse* v. *Christian*, 1 Term Rep. 560.
(*u*) *Henning* v. *Burnet*, 8 Exch. Rep. 187.
(*x*) *Osborn* v. *Wise*, 7 Car. & Pay. 761. See next page.
(*y*) *Jackson* v. *Stacey*, Holt, 455.
(*z*) *Brunton* v. *Hall*, 1 Queen's B. Rep. 792; 1 Gale & Dav. 207.
(*a*) *Allan* v. *Gomme*, 11 Ad. & El. 759; 3 Per. & Dav. 581.
(*b*) 8 Exch. Rep. 187.

ways, privileges and powers whatsoever for the purposes aforesaid, and particularly of laying, making and granting waggon-ways in and over the premises demised," does not give the lessor power to grant wayleaves for all purposes, but only a limited power for getting the excepted minerals (*c*). On a grant of lands, excepting all mines, together with sufficient wayleave to and from the mines, the grantor cannot use the wayleave for conveying minerals got out of adjoining lands, being part of the same mineral field; his right is not confined to such a description of way as was in use at the time of the grant, and therefore may extend to a railway, when the grant was 200 years old (*d*). Under a grant of a free and convenient way for the purpose of conveying coals, among other articles, the grantee has a right to lay a framed waggon-way. If a man, upon a lease for years, reserve a way to himself through the house of the lessee to a back-house, he cannot use it but at seasonable times and on request (*e*). The acquiring a right of way by the public does not destroy a previously-existing private right of way over the same line (*f*). The cesser of the use of a private way for less than twenty years, accompanied by an act clearly indicative of an intention to abandon the right, is sufficient to destroy the easement (*g*).

Private Ways of Necessity.

A right of way may also arise by act and operation of law: for if a man grant a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives a way to come at it: and the grantee may cross the grantor's land for that purpose without being a trespasser. When the law gives anything, it gives impliedly whatsoever is necessary for enjoying the same; therefore when one (even as trustee) conveys land to another, to which there is no access but over the grantor's land, a right of way passes of necessity as incidental to the grant: so also, if the owner of two closes, having no way to one of them, but over the other, part with the latter without reserving the way, it should seem that it will be reserved for him by operation of law (*h*). A lessor demised a messuage, consisting of two parts, separated by intervening reserved land, subjected only to a specific right of way for the lessee to a third building for a specific purpose, which reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserved land in one of two directions, the one by entering it from the residue of the demised premises, the other, and far the more convenient, by entering it from the public street; it was held, that the lessee was entitled to a

(*c*) *Durham and Sunderland Railway Company* v. *Walker*, 2 Queen's B. Rep. 940; 2 Gale & Dav. 326.

(*d*) *Dand* v. *Kingscote*, 6 Mees. & Wels. 174.

(*e*) *Tomlin* v. *Fuller*, 1 Ventr. 48.

(*f*) *Duncan* v. *Louch*, 6 Queen's B. Rep. 904; but see *Reg.* v. *Chorley*, 12 Jur. 822.

(*g*) *Reg.* v. *Chorley*, 12 Jur. 822; see also *Moore* v. *Rawson*, post, 558.

(*h*) *Pomfret* v. *Ricroft*, 1 Wms. Saund. 323; *Clark* v. *Cogge*, Cro. Jac. 170; *Staple* v. *Heydon*, 6 Mod. 1; *Chichester* v. *Lethbridge*, Willes, 72, note; *Howton* v. *Frearson*, 8 Term Rep. 50; but see *Whalley* v. *Tompson*, 1 Bos. & Pul. 371.

way across the reserved land from the public street in that part (*i*). By a lease of a house with all appurtenances, a right of way necessary for the convenient occupation of such house and previously enjoyed by the tenant will pass (*k*). A way of necessity is limited by the necessity which created it, and when such necessity ceases, the right of way also ceases: therefore, if at any subsequent period, the party formerly entitled to such way can approach the place to which it led, by passing over his own land by as direct a course as he would have done by using the old way, the way ceases to exist as of necessity (*l*). If the origin of a way of necessity cannot any longer be traced, but the way has been used without interruption, it must then be claimed as a way either by grant or prescription, according to the circumstances of the case: where the fact is, that there existed at one period an unity of possession, it must then be claimed as a way by grant (*m*); but where there has been no unity of possession, and the way has been used immemorially, it must then be claimed as a way by prescription (*n*). A way of necessity exists after unity of possession of the close to which and the close over which it runs, and after a subsequent severance; therefore, if a person purchase close *A.*, with a way of necessity thereto over close *B.*, a stranger's land, and afterwards purchase close *B.*, and then purchase close *C.*, adjoining to close *A.*, and through which he may enter to close *A.*, and then sells close *B.* without reservation of any way, and then sells close *A.* and *C.*; the purchaser of close *A.* shall nevertheless have the ancient way of necessity to close *A.* over close *B.* (*o*).

(b) *Disturbance of Ways.*

Remedies for Disturbance of Ways.

Disturbance of ways principally happens when a person who has a right of way over another's grounds, by grant or prescription, is obstructed by inclosures or other obstacles, or by ploughing across it; by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done (*p*). Although the erection of an obstruction causes no immediate injury to the plaintiff in his use of a right of way, in consequence of his own laches, yet if its existence puts his title into hazard, and prevents him from exercising his right whenever he thinks fit to resume it, he may maintain an action (*q*). If this be a way annexed to his estate, and the obstruction

(*i*) *Morris* v. *Edgington*, 3 Taunt. 24; and see *Wilson* v. *Bagshaw*, 5 Man. & Ryl. 448; and *Osborn* v. *Wise*, 7 Car. & Pay. 761.

(*k*) *Hinchliffe* v. *Kinnoul* (*Earl*), 5 Bing. N. C. 1; 1 Arn. 342; 6 Scott, 650; see also *Pheysey* v. *Vicary*, 16 Mees. & Wels. 484.

(*l*) *Holmes* v. *Goring*, and *Same* v. *Elliott*, 2 Bing. 76; 9 Moore, 166.

(*m*) Williams' Saund. 323, n. a.

(*n*) Bull. N. P. 74; *Keymer* v. *Summers*, cited in 3 Term Rep. 157.

(*o*) *Buckby* v. *Coles*, 5 Taunt. 311. Where partition was made between the daughters of one in whom the way to a mill had been extinguished by unity of possession, and the mill and way were assigned to one and the land to the other, it was held, that the way was revived; Bro. Abr. *Extinguishment*, pl. 15; 1 Bos. & Pul. 376, n.

(*p*) 3 Black. Com. 341.

(*q*) *Bower* v. *Hill*, 1 Bing. N. C. 549; 1 Hodges, 45; 1 Scott, 527.

be made by the tenant of the land, it is a nuisance for which an assize would formerly lie, and for which an action on the case may now be maintained: but if the right of way, thus obstructed by the tenant, be only in gross, (that is, annexed to a man's person, and unconnected with any lands or tenements,) or if the obstruction of a way belonging to a house or land be made by a stranger, it is then in either case merely a disturbance: for the obstruction of a way in gross is no detriment to any lands or tenements, and therefore does not fall under the legal notion of a nuisance, which must be laid ad nocumentum liberi tenementi; and the obstruction of it by a stranger can never tend to put the *right* of way in dispute. The remedy, therefore, for this description of disturbance always was by an action on the case to recover damages. A right of way, however, is often contested in an action of trespass. For the want of repair of or obstruction to public highways, as that concerns the public, the remedy is by indictment(r).

SECT. 3.—*Other Easements.*

(a) *Ancient Lights.*

Mode of acquiring a Right to Lights.

The right to ancient lights—that is, such as cannot be darkened or obstructed, without subjecting the party to an action for nuisance—is acquired by mere user, and may be forfeited by non-user, though for less than twenty years; unless an intention be manifested, when the non-user commences, to resume the right within a reasonable time (s). If an ancient light has been completely shut up with brick and mortar above twenty years it loses its privilege (t). The ground upon which this privilege arises from user is this, that from the fact of uninterrupted usage, a grant or license is presumed to have been originally given. It has accordingly been held, that twenty years' uninterrupted enjoyment of windows, looking upon the land of another, is sufficient ground for presuming a grant or license to open the windows, in the absence of evidence to the contrary (u). But where lights have been put out and enjoyed without interruption for above twenty years, during the occupation of the opposite premises by a tenant only, it will not conclude the landlord of such opposite premises, without evidence of his knowledge of the fact, which is the foundation of presuming a grant against him; and consequently it will not conclude a succeeding tenant, who was in possession under such landlord, from building up against such encroaching lights (x). Where the access and use of light to and for any dwelling-house, workshop, or other

(r) See post, Book III. Chap. XI. Sect. 8. For the remedy for disturbance of a tenant's right of way during the construction of a railway, see *Collinson* v. *Newcastle and Darlington Railway Company*, 1 Car. & Kir. 516; and Hodges on Railways, 224, &c.

(s) *Moore* v. *Rawson*, 3 Barn. & Cres. 332; 5 Dowl. & Ryl. 234. See also *Reg.* v. *Chorley*, ante, 556.

(t) *Lawrence* v. *Obee*, 3 Camp. 514; 1 Stark. 22.

(u) *Cross* v. *Lewis*, 4 Dow. & Ryl. 234.

(x) *Daniel* v. *North*, 11 East, 372. See also *Rex* v. *Barr*, 4 Camp. 10.

building, shall have been actually enjoyed twenty years without interruption, the right thereto is absolute and indefeasible, notwithstanding any local usage or custom of the country, unless it appears to have been enjoyed by license by deed or writing (*y*); but the interruption must have been submitted and acquiesced in for one year after the party interrupted has had notice of it (*z*): and it has been held, that the right to the easement may accordingly be acquired after enjoyment for nineteen years and a fraction (*a*). It has also been held, that this enactment destroys the custom in the city of London to build on ancient foundations to any height (*b*). The enjoyment under this enactment need not be as of right or adverse, but the right may be gained after use by permission verbally given (*c*). But mere payment of rent by the occupier of a house for the use of lights is not an interruption of the enjoyment within the third section of the 2 & 3 Will. IV. c. 71 (*d*). An user for twenty years will create a right, though interrupted by intervals of suspension, by an unity of possession, such intervals being excluded from the computation (*e*). Where lights had been enjoyed for more than twenty years, adjoining land, which, within that period, had been glebe land, but was conveyed to a purchaser, under the statute of 55 Geo. III. c. 147; it was held, that an action on the case would not lie against such purchaser, for building near, so as to obstruct the light; as the rector, who was tenant for life, could not grant the easement, and consequently no valid grant could be presumed (*f*). The occupier of one of two houses built nearly at the same time, and purchased of the same proprietor, may maintain a special action on the case against the tenant of the other, for obstructing his window lights, by adding to his own building, however short the previous period of enjoyment by the plaintiff (*g*). And where the owner of a house divided it into two tenements, and demised one of them to the defendant; it was held, that he was liable to an action on the case, for obstructing windows existing in the house at the time of the demise, although of recent construction, and though there was no

(*y*) 2 & 3 Will. IV. c. 71, s. 3.

(*z*) Id. sect. 4. Ante, 544, 554, post, 561.

(*a*) *Flight* v. *Thomas* (*in error*), 1 West, 671; 8 Cl. & Fin. 231; *S. C.* 3 Per. & Dav. 442; 11 Ad. & El. 688; 7 Dowl. 741.

(*b*) *The Salters' Company* v. *Jay*, 3 Queen's B. Rep. 109; 2 Gale & Dav. 414.

(*c*) *London* (*Mayor, &c.*) v. *The Pewterers' Company*, 2 Mood. & Rob. 409. A parol license to put a skylight over a yard cannot be recalled at pleasure, after it has been executed at the party's expense; at least not without tendering the expenses he has been put to; *Winter* v. *Brockwell*, 8 East, 308; but see *Cocker* v. *Cowper*, 1 Cromp. M. & Ros. 418; 5 Tyr. 103; post, 560; *Wood* v. *Leadbitter*, 13 Mees. & Wels. 838; and *Perry* v. *Fitzhowe*, 8 Queen's B. Rep. 757. Quære, whether a license to the owner of a house to enjoy an unobstructed access of light and air to his new window from over his neighbour's premises may be given by parol, or is an easement, to be granted under seal; *Bridges* v. *Blanchard*, 1 Ad. & El. 536; 3 Nev. & Man. 691. Supposing that such license may be given by parol, quære, whether it is countermandable? Ibid.

(*d*) *Plasterers' Company* v. *Parish Clerks' Company*, 6 Exch. Rep. 630.

(*e*) *Thomas* v. *Thomas*, 2 Cromp. M. & Ross. 34; 1 Gale, 61; 5 Tyr. 804.

(*f*) *Barker* v. *Richardson*, 4 Barn. & Ald. 579.

(*g*) *Compton* v. *Richards*, 1 Price, 27.

stipulation against the obstruction (*h*). Where *A.*, the owner of two adjoining houses, granted a lease of one of them to *B.*, and afterwards leased the other to *C.*, there then existing in it certain windows; and *B.* afterwards accepted a new lease of his house from *A.*; it was held, that *B.* could not alter his tenement so as to obstruct windows existing in *C.*'s house at the time of *C.*'s lease from *A.*, though the windows were not twenty years old at the time of the alteration (*i*).

(b) *Water-Courses.*

Where of the right to take and use the water of a running stream.

Running water is originally publici juris; and an individual can only acquire a right to it by applying so much of it as he requires for a beneficial purpose, leaving the rest to others, who, if they acquire a right to it by subsequent appropriation, cannot lawfully be disturbed in the enjoyment of it. The right to the use of water is clear. Primâ facie the proprietor of each bank is the proprietor of half the land covered by the stream, but there is no property in the water; every proprietor has an equal right to use the water, and consequently none can have the right of using the water to the prejudice of another, nor can any one of them diminish the quantity which would otherwise descend to those below, nor throw back the water upon those above, unless by grant or license from the parties affected, or by proving an uninterrupted enjoyment of twenty years (*j*). The occupier of a mill may maintain an action for forcing back water and injuring his mill, although he has not enjoyed it precisely in the same state for twenty years; and therefore it was holden to be no defence to such an action that the occupier had within a few years erected in his mill a wheel of different dimensions, but requiring less water than the old one, although the declaration stated the plaintiff to be possessed of a mill, without alleging it to be an ancient mill (*k*). A verbal license is not sufficient to confer an easement of having a drain in the land of another to convey water (*l*); and such license may be revoked, though it has been acted upon (*m*). A person does not acquire, by his use of the water issuing from an artificial water-course, constructed for a particular and temporary purpose (for draining some mines), the circumstances of the use not affording any presumption of a grant by the owners of the mines, such a right to it as to entitle him to maintain an action against

(*h*) *Riviere* v. *Bower*, 1 Ryan &. Mood. 24.

(*i*) *Couts* v. *Gorham*, 1 Mood. & Malk. 396.

(*j*) *Wright* v. *Howard*, 1 Sim. & Stu. 190; *Mogar* v. *Chadwick*, 11 Ad. & El. 571; 3 Per. & Dav. 367; *Acton* v. *Blundell*, 12 Mees. & Wels. 324; *Mason* v. *Hill*, 3 Barn. & Adol. 304; 5 Barn. & Adol. 1; see *S. C.* 2 Nev. & Man. 747; and see *Liggins* v. *Inge*, 7 Bing. 682; 5 Moore and Pay. 712; *Wood* v. *Waud*, 3 Exch. Rep. 748; *Williams* v. *Morland*, 2 Barn. & Cres. 910; 4 Dowl. & Ryl. 583; *Bealey* v. *Shaw*, 6 East, 208; 2 Smith, 321.

(*k*) *Saunders* v. *Newman*, 1 Barn. & Ald. 258; and see *Alder* v. *Savill*, 5 Taunt. 454.

(*l*) *Hewlins* v. *Shippam*, 5 Barn. & Cres. 221; 7 Dow. & Ryl. 783; see also *Wood* v. *Leadbitter*, 13 Mees. & Wels. 838; *Perry* v. *Fitzhowe*, 8 Queen's B. Rep. 757.

(*m*) *Cocker* v. *Cooper*, 1 Cromp. M. & Ros. 418; 5 Tyr. 103; see also ante, 559, note (*c*); and *Greenslade* v. *Halliday*, 6 Bing. 379; 4 Moore & Pay. 71.

persons who divert the water, by the construction of another water-course at a lower level for draining the same mines (*n*). Neither does a party, by the use of a flow of water from an agricultural drain for twenty years, acquire such a right as to preclude the proprietor from altering the level of his drain for the improvement of his land (*o*). If one has anciently pits which are replenished by a rivulet, he may cleanse them, but cannot change or enlarge them to the injury of the water-course (*p*).

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quired.

After twenty years' uninterrupted enjoyment of a spring of water an absolute right to it is gained by the occupier of the close in which it issues above ground, and the owner of an adjoining close cannot lawfully cut a drain, whereby the supply of water to the spring is diminished (*q*). So in the case of a stream of water, a similar drain cannot be cut even into an old ditch which before the twenty years had communicated with the stream: and where the owner of a mill had discontinued a mill wheel requiring a high head of water for twenty years, and has used another requiring a low head of water, he thereby loses his right to the high head of water (*r*). If more than twenty years before an action brought for obstructing a stream of water it had for some time ceased to flow, and within twenty years had again commenced flowing, the plaintiff's right is not thereby destroyed (*s*). The statute 2 & 3 Will. IV. c. 71, for shortening the time of prescription in certain cases (*t*), applies only to such rights as would before that act have been acquired by the presumption of a grant from long user (*u*).

(c) *Custom to grind Corn.*

Validity of a Custom to grind at the Manor Mill.

A custom "that all the tenants, resiants, and inhabitants within a manor, should grind at the lord's mill all their corn and grain, as well growing within the manor as brought from other places, and spent or consumed in a ground state in their respective houses," within the manor, may be a good custom; but it does not extend to restrain the inhabitants who do not grow corn and grain, or who have no corn or grain of their own, from buying or using in such houses ground corn or flour, though it may not have been ground or grown within the manor, but produced from corn ground at other mills (*x*). And where, by a similar custom, the tenants were bound to grind at two ancient mills belonging to the lord, or one of them, at their own option, and

(*n*) *Arkwright* v. *Gell*, 5 Mees. & Wels. 203; 2 Horn. & Hurl. 17; but see *Magor* v. *Chadwick*, 11 Ad. & El. 571; 3 Per. & Dav. 367.
(*o*) *Greatrex* v. *Hayward*, 8 Exch. Rep. 291.
(*p*) *Brown* v. *Best*, 1 Wils. 174.
(*q*) *Balston* v. *Benstead*, 1 Camp. 463.
(*r*) *Drewitt* v. *Sheard*, 7 Car. & Pay. 465.
(*s*) *Hall* v. *Swift*, 4 Bing. N. C. 381; 6 Scott, 167; 1 Arn. 157.
(*t*) See ante, 544, 555, 558.
(*u*) *Arkwright* v. *Gell*, 5 Mees. & Wels. 233; 2 Horn. & Hurl. 32.
(*x*) *Richardson* v. *Walker*, 2 Barn. & Cres. 827; 4 Dowl. & Ryl. 498. And see *Cort* v. *Birkbeck*, 1 Doug. 218.

the lord having pulled down one of the mills, so as to deprive the tenants of their option; it was held, that the custom was suspended (y).

(d) *Miscellaneous Easements.*

Miscellaneous Easements.

An easement is suspended as long as the same person having a term of years in the land a quâ, and a fee-simple in the land in quâ, is in possession of both; but it revives on a cessation of the unity of possession, though the change of possession be not accompanied with an alienation of the whole or either of the estates. A reservation of a right to the use of a yard, for the occupiers of an adjoining messuage, in the same manner as the tenants had been accustomed to use the same, does not authorize the use of the yard by the tenants of a cottage built where a loft and open woodhouse under it, and forming part of the messuage, had stood at the time of the reservation. Proof of a privilege for the tenants of a house to hang lines across a yard adjoining for the purpose of drying the linen of their own families only, does not support a replication of a general right to put lines across and hang linen (z).

Sect. 4.—*Distress Damage Feasant.*

Nature and Propriety of taking a Distress Damage Feasant.

If the land of a tenant be incumbered by the cattle or goods of another person, the former, besides the remedy he has by action, may take the cattle or goods as a distress damage feasant, as it is called. This ground of distress is upon the principle of the law of recompense, which justifies the party in retaining that which occasions an injury to his property, till amends be made by the owner (a). A distress damage feasant, however, is the strictest distress there is, for the thing distrained must be taken in the very act; since, if it be once off the premises, though on fresh pursuit, it cannot be distrained. There is this difference existing between a distress for rent and a distress damage feasant, that in the former case a man may distrain any cattle he finds on the premises, but in the other case they must be actually doing damage, and are only distrainable for the damage they are then doing and continuing: for if they have done damage to-day and have gone off, and come again at another time and are doing damage, and are taken for that, and the owner tenders amends for the latter damage, the party cannot justify keeping them for the first damage. If an

(y) *Richardson* v. *Capes*, 2 Barn. & Cres. 841; 4 Dowl. & Ryl. 512.

(z) *Drewell* v. *Towler*, 3 Barn. & Ad. 735.

(a) If the thing doing damage be not worth the amount of damage done, the party should by no means resort to the remedy by distress, but should bring his action. It must be recollected, that he cannot pursue both remedies, as he has merely an election of the two; and using one of them is an utter waiver of the other, as the election of one cannot but be considered to be an implied rejection of the other; besides, the maxim, nemo debet bis vexari pro eâdem causâ, applies: a distress, therefore, taken damage feasant, as long as it is detained, is a good bar to an action of trespass.

animal has done damage to the freehold, but has ceased doing so, and remains on the land, and it is not necessary to detain it to prevent further damage, it cannot be distrained (*b*). To justify a distress damage feasant, it is sufficient, however, that the distrainer entered the locus in quo whilst the cattle were in it (*c*); but if it appear that the party distraining had not actually got into the locus in quo before the cattle had got out of it, the justification cannot be supported. The distress of things damage feasant being made for the immediate injury sustained by their so doing damage (*d*), the remedy is not confined to the mere owner of the soil upon which they may be found, but extends to all who may receive injury, such as commoners or other persons entitled to the use or produce of the land merely (*e*).

What may be Distrained Damage Feasant.

The cattle or goods of a stranger may of course, in all cases, be distrained damage feasant; and the law appears to have carried the principle much further, and has allowed distresses damage feasant to be made in cases which at first sight would not appear to be properly subject to such a right. Where *A.* demised to *B.* the milk of twenty-two cows to be provided by *A.* and to be fed at *A.*'s expense on certain closes belonging to *A.*; *A.* covenanting that *B.* might turn out a mare, and that no other cattle should be fed there; it was held, that the separate herbage and feeding of those closes passed to *B.*, and that *B.* might distrain other cattle of *A.* doing damage there (*f*). Again, where *A.* being possessed of a quantity of land in a common field, and having a right of common over the whole field, and *B.* having also a right of common over the whole field, they entered into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenanted to that effect; it was held, that if, during the term, the cattle of *B.* came upon the land of *A.*, he might distrain them damage feasant (*g*). But a tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put upon the premises by way of taking possession (*h*). No kind of things which is capable of being damage feasant can be exempted from distress (*i*). A horse cannot, however, be distrained damage feasant, if there be a rider upon him (*k*); but it has been ruled, that the same principle does not apply to a horse which is led at the time (*l*). A horse and cart containing goods in the actual use and possession of a person cannot be distrained (*m*). So a net in a man's hand cannot be

(*b*) *Wormer* v. *Biggs*, 2 Car. & Kir. 31.
(*c*) *Clement* v. *Milner*, 3 Esp. 95.
(*d*) Bradby on Distresses, 136.
(*e*) 1 Roll. Abr. 405. See ante, 543.
(*f*) *Burt* v. *More*, 5 Term Rep. 329.
(*g*) *Whiteman* v. *King*, 2 H. Black. 4.
(*h*) *Taunton* v. *Costar*, 7 Term Rep. 431.
(*i*) Com. Dig. tit. Distress, (B 4); Gilbert on Distress, 55.
(*k*) *Storey* v. *Robinson*, 6 Term Rep. 138.
(*l*) *Wagstaffe* v. *Clack*, Camb. Sum. Assizes, 1826. See also *Bunch* v. *Kennington*, 1 Queen's B. Rep. 679.
(*m*) *Field* v. *Adames*, 12 Ad. & El. 649; 4 Per. & Dav. 504; Arn. & Hod. 17.

and Man- of taking Distress.

distrained (*n*). The owner of the land may, it seems, distrain tithes as damage feasant after a reasonable time (*o*).

For damage feasant any one may distrain in the night, otherwise it may be the beasts will be gone before he can take them. In this respect the distress damage feasant differs from that of rent, or rent-service, which must be in the day-time (*p*). If a sufficient tender be made of damages before the taking, the taking is unlawful; if after the taking, and before the impounding, then although the taking is lawful, the detainer after is unlawful; and then in either case replevin can be maintained (*q*): but tender comes too late after the impounding, to enable the owner to maintain replevin; yet if a sufficient tender be afterwards made it seems detinue may be maintained. The onus of estimating the amount of damage done is cast upon the owner (*r*). Where the cattle distrained were put into a private pound, and the distrainer admitted they were about to be forwarded to a public pound, a tender of amends was held not to be too late; and a tender made to the distrainer's wife, who was in the habit of acting as his agent in such matters, and who made the distress in his absence, was held sufficient (*s*). But a tender to the bailiff of the distrainer is not good (*t*). An action on the case does not lie against one who distrains cattle damage feasant for impounding them, instead of accepting a compensation for the damages, tendered before the cattle were impounded (*u*); nor for detaining them where the tender was made after they had been impounded (*x*); it seems that in the former case the remedy is by trespass or replevin, and in the latter by detinue (*y*). When in trespass for a damage for which cattle had been distrained, the defendant pleaded a tender of sufficient amends; it was held, that the plaintiff should either deny the tender, or traverse the sufficiency, but could not reply generally that the defendant did not tender a sufficient amends (*z*). Still, however, the distrainer may take amends tendered after the impounding, if he chooses, and let the distress out (*a*).

Disposition of the Distress.

A distress damage feasant cannot be sold for the damage done (*b*): by 12 & 13 Vict. c. 92, repealing 5 & 6 Vict. c. 59, parties impounding

(*n*) *Read* v. *Burley*, Cro. Eliz. 550; Co. Lit. 47 a; Hargrave's notes, 12, 13.

(*o*) *Baker* v. *Leathes*, Wightw. 113.

(*p*) Co. Lit. 142; see ante, 376.

(*q*) See *Evans* v. *Elliott*, 5 Ad. & El. 142; 2 Har. & Wol. 231; 6 Nev. & Man. 606; *Gulliver* v. *Cosens*, 1 Com. B. Rep. 788.

(*r*) *Gulliver* v. *Cosens*, 1 Com. B. Rep. 788. See also *West* v. *Nibbs*, 4 Com. B. Rep. 172.

(*s*) *Browne* v. *Powell*, 4 Bing. 230; 12 Moore, 454.

(*t*) *Pilkington's case*, 5 Co. Rep. 76; Cro. Eliz. 813; see ante, 349.

(*u*) *Anscomb* v. *Shore*, 1 Camp. 285; 1 Taunt. 261; and see Bull. N. P. 60.

(*x*) *Sheriff* v. *James*, 1 Bing. 341; 8 Moore, 334.

(*y*) *Six Carpenters' case*, 8 Co. Rep. 147 a; Bradby on Distresses, 177. See 15 & 16 Vict. c. 76, s. 3.

(*z*) *Williams* v. *Price*, 3 Barn. & Adol. 695.

(*a*) See Bullen on Distresses, 235, &c.

(*b*) See *Mason* v. *Newland*, 9 Car. & Pay. 575. The repealed statute did not apply to cattle "confined," unless as a distress: *Machell* v. *Ellis*, 1 Car. & Kir. 682.

cattle are bound under a penalty of 40*s.* to supply them with food and water (*c*). If several animals are distrained, one of them may be sold under this statute for the expenses of all (*d*). If a distress damage feasant escape out of a sufficient pound, or die, without any neglect of the distrainer, he may still have an action of trespass against the owner (*e*). In one case of trespass quare clausum fregit, where the defendant pleaded that the plaintiff distrained his hog damage feasant for the same trespass, and the plaintiff replied that the hog escaped without his consent, and that he was not satisfied for the damage, though it was admitted that if the distress had died the action would revive; it was held, that the escape (unless the contrary be shown) was the fault of the plaintiff (*f*).

Remedies for Rescue and Pound Breach.

The remedy for the rescue of a distress damage feasant is at common law, either by writ of rescous or an action for pound breach (*g*), both which remedies have long ceased to be used; or else by an action on the case (*h*). By stat. 6 & 7 Vict. c. 30, also power is given to two justices, where cattle are distrained, to convict persons releasing or attempting to release them, or breaking the pound, in the penalty of five pounds; and the justices may award any part of the penalty to the person on whose behalf the distress is made. The justices, however, cannot act in any case where any question arises as to the title to lands, or as to any bankruptcy or insolvency, or as to any execution, or as to the obligation to repair any fences.

Sect. 5.—*Tithes.*

(a) *Tithe Commutation Act.*

Commutation of Tithes.

By the late act for the commutation of tithes in England and Wales (*i*), the law with regard to tithes is being gradually materially altered throughout the country. This act gives powers to substitute the payment of an annual sum, by way of rent-charge, in lieu of tithe. The gross sum to be paid to the tithe-owner for the whole parish, after being fixed, is to be apportioned amongst the lands in the parish; and any landowner may, if he pleases, have his proportion specially apportioned on each close, or according to an acreable rate upon lands of different quality; and to the exclusion of some, so that the value of the land is at least three times the value of the rent-charge upon it. Power is given at any time after the first apportionment to

(*c*) See ante, Book II., Chap. II., Sect. 4, (f), 387.
(*d*) *Layton* v. *Hurry*, 8 Queen's B. Rep. 811.
(*e*) *Williams* v. *Price*, 3 Barn. & Adol. 695; *Vaspar* v. *Eddows*, 12 Mod. 658; 1 Lord Raym. 719; 1 Salk. 248; 11 Mod. 21.
(*f*) Bull. N. P. 84.
(*g*) F. N. B. 100 *e*, 101 c.
(*h*) 1 Chit. Plead. 155, 7th ed. See also ante, Chap. II., Sect. 4, (j), p. 394.
(*i*) 6 & 7 Will. IV. c. 71, amended by 7 Will. IV. & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 Vict. c. 7; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; and 14 & 15 Vict. c. 25.

[illegible]

[illegible]

[illegible]

of such tithes and composition, which the tithe-owner would have had if the commutation had not taken place. By section 80 it is enacted, "that any tenant or occupier, at the time of such commutation, who shall have signified his dissent from being bound to pay any such rent-charge as aforesaid, or who shall hold his lands under a lease or agreement providing that the same shall be holden and enjoyed by him free of tithes, and every tenant or occupier who shall occupy any lands by any lease or agreement made subsequently to such commutation, and who shall pay any such rent-charge, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord, and shall be allowed the same in account with the said landlord (*m*)." By this clause, therefore, the rent-charge in lieu of tithes becomes a charge upon the landowners, not the occupiers, and therefore in leases and agreements made after a commutation is effected in any parish, it is necessary for landlords either to demand an increased rent, or specially to stipulate that the tenant shall pay the rent-charge.

Liability of Rent-charge to Rates, &c.

The rent-charge is to be liable to rates, charges, and assessments, as tithes have previously been (*n*); and are to be assessed on the owner of the rent-charge, and may be recovered from the occupiers of the lands out of which the rent-charge issues (*o*); and, in case they are not paid by the owner of the rent-charge, may be recovered from the occupier in the way that poor rates may be, upon giving the occupier twenty-one days' notice in writing previous to any half-yearly day of payment of the rent-charge. But no occupier is to be liable to pay at any one time a greater sum than the rent-charge, payable in respect of the lands occupied by him in the parish, shall amount to for the current half-year in which the notice is given. Any occupier paying them may deduct the amount from his rent; and any landlord or owner in possession who has paid them, or from whom the amount has been so deducted, may deduct the amount from the rent-charge, or may recover it from the owner of the rent-charge. There is no personal liability, however, on the owner of land to pay a tithe commutation rent-charge; and a tenant liable to pay it, who leases property on the land after the expiration of his term, is not entitled to recover damages against his landlord for allowing such property to be distrained for the rent-charge, although not payable until after the expiration of the tenancy (*p*).

The 14 & 15 Vict. c. 50, recites that, by the 3 & 4 Will. IV. c. 90, "it is provided that in levying any rate necessary for the purposes of

(*m*) By 3 & 4 Vict. c. 15, temporary provision is made for payments to be made in lieu of tithes during the time intervening between the fixing of the gross sum to be paid to the tithe-owner, and the confirmation of the apportionment on the different lands of the parish.

(*n*) See ante, Chap. III., Sect. 3, (*e*).

(*o*) By sect. 70, amended by 7 Will. IV. & 1 Vict. c. 69, s. 8, and 2 & 3 Vict. c. 62, s. 3.

(*p*) *Griffenhoofe* v. *Daubus*, 3 Com. Law Rep. 91.

the said act, the owners and occupiers of houses, buildings and property (other than land) rateable to the relief of the poor in any parish, shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of the said act." It then recites that, by the 11 & 12 Vict. c. 63, it is provided "for the purposes of the said last-mentioned act, that the occupier of any land, such as arable, meadow or pasture ground only, shall be assessed in respect of the same in the proportion of one-fourth part only of the net annual value thereof: And whereas it is just that tithes, tithe rent-charges, and other like payments issuing out of land, should be assessed for the purposes of the said acts in the same proportion of their net annual value of such land itself." It then enacts that tithes, tithe rent-charges, moduses, compositions, rent and other payments in lieu of tithe shall be assessed under the firstly recited act, as and in the same proportion of their annual value as land; and under the secondly recited act, as in the same proportion of their annual value as land, and as arable, meadow or pasture ground only (*q*).

(b) *Composition.*

Nature and Effect of a Composition.

Previous to the act for the commutation of tithes, instead of taking the tithes in kind, it was much more usual for the landowner and the proprietor of tithes to make an arrangement for the payment of a certain fixed annual composition in lieu of tithes. This composition is not in the nature of a lease of the tithes, but rather of a bargain and sale of the tenth part of the produce; and may therefore be by parol or in writing merely, and need not be made by deed, as is the case with a lease of tithes. It may be made either for one year only, or for a given number of years. When there is a specific agreement made for one year, and it is suffered to go on without any further arrangement, a sort of continuing contract, somewhat analogous to a tenancy, is created between the parties, upon the terms of the original agreement. This must, however, be understood where the parties to the agreement remain the same, for such parol composition for tithes are merely personal, and cease with the occupation of the tenant; but the compositions paid by the former occupier are primâ facie evidence of the value (*r*). Compositions for tithes cease also on the death of the incumbent with whom they were made, at least as to his successor; but if the successor continue to receive the next payment due after the death of his predecessor, he can only be accountable to the executors for such portion of it as the value of the tithes, if paid in kind, accruing due between the last composition received by the late

(*q*) And see ante, Book II., Chap. III., Sect. 3.

(*r*) *Paynton* v. *Kirkby*, 2 Chit. 405.

incumbent and his death, would have amounted to, and not pro ratâ, according to the time which had run before his death from the last payment (s).

Notice to determine a Composition.

Upon the principle of the analogy just alluded to, a notice to determine a composition for tithes must be given in the same manner as in cases of landlord and tenant, when it is intended to put an end to the arrangement. Such notice must also be a six months' notice, expiring at that period of the year at which the composition commenced. In this respect also tithes are assimilated to land; if, therefore, a composition for tithes be made by *A.* as proprietor, and he leases them to *B.*, whose interest is afterwards put an end to by *A.* before any alteration is made in the composition, *A.* cannot determine it without a six months' notice (t). A composition for tithes from Michaelmas to Michaelmas is not determined by the tenancy of the land expiring at Lady-day, but there must be notice; accordingly, where a tenant continued to hold part of the farm for her away-going crop till Michaelmas following the end of the term, it was held, that a tender of the composition to Lady-day, and setting out of tithe upon the part thus occupied, was no answer to an action for a year's composition (u). Where a composition subsists for tithes from year to year, and such year commences at Michaelmas, a notice given on the 12th of September, to determine the composition at the ensuing Michaelmas, is not sufficient (x). Where there was a composition for tithes from Michaelmas to Michaelmas, a notice that the tenant will pay tithe in kind after the 25th of March, some tithes being payable in May, but indicating no period when the composition was to expire, was held an insufficient notice (y). In an action for not setting out tithes, where the defendant had been under a pecuniary composition with the plaintiff, it was held, that parol evidence of the defendant stating his refusal to pay, and that there was a modus in the parish, and denying the plaintiff's right to take tithes, was sufficient to determine such composition, without any agreement or notice for that purpose (z). Where a composition for tithes had been long paid by the farmer, and two years before an action of debt, brought on the stat. 2 & 3 Edw. VI. c. 13, for not setting out the tithes, the vicar in a conversation with the farmer demanded his tithes vicarial, on which the other tendered him 40*s.* (the annual composition), which the vicar refused to take, but assigned no reason for his refusal; this was held to be no evidence of a notice to determine the composition, which notice ought to be unequivocal: and it was held also, that the

(s) *Williams* v. *Powell*, 10 East, 269.

(t) *Wyburd* v. *Tuck*, 1 Bos. & Pul. 458; see also *Goode* v. *Howells*, 4 Mees. & Wels. 198; 1 Horn. & Hurl. 199.

(u) *Hulme* v. *Pardor*, M'Clel. 393; 1 Car. & Pay. 93.

(x) *Hewitt* v. *Adams*, 7 Bro. Par. Cas. 64; 12 East, 84, n.

(y) *Goode* v. *Howells*, 4 Mees. & Wels. 198; 1 Horn. & Hurl. 199.

(z) *Bower* v. *Major*, 1 Brod. & Bing. 4; 3 Moore, 216; see ante, 285, 286.

farmer not having denied the vicar's right to tithe in kind before the action brought, was not precluded from taking objection to the action at the trial, for want of a proper notice to determine the composition, analogous to a notice to quit land, by putting the vicar to the strict proof of his right to tithe in kind (*a*). If the bargainee of tithes for one year under-let them to the several occupiers of land, no notice to determine the under-letting need be given by another bargainee of the same tithes for the following year (*b*).

(c) *Remedies.*

Remedies to recover the rent-charge, under 6 & 7 Will. IV. c. 71.

By section 81 of the act for the commutation of tithes, 6 & 7 Will. IV. c. 71, if the rent-charge is in arrear for twenty-one days, the person entitled to it, after having given ten days' notice in writing, at the usual or last known residence of the tenant in possession, may distrain for the arrears, being not more than two years' arrears, and may dispose of the distress as if it were a distress for rent (*c*): and by section 82, if the rent-charge is in arrear for forty days, and there is no sufficient distress on the premises, a writ may be issued to the sheriff to summon a jury to assess the arrears, being not more than two years' arrears; after which a writ of haberi facias possessionem may issue, to cause the owner of the rent-charge to have possession of the land, until the arrears of the rent-charge and the expenses are satisfied. By section 85, notwithstanding any apportionment of the rent-charge, every part of the land in the parish which is occupied by the person who is occupier of the land on which the rent-charge in arrear is charged, whether occupied by him as owner, or as tenant under the same landlord under whom he occupies the land on which the rent-charge in arrear is charged, is to be liable to be so distrained or entered upon, for the purpose of satisfying arrears, whether chargeable on the lands on which the distress is taken or entry made, or upon any other part of the lands so occupied and holden (*d*). It is not necessary that the owner of a rent-charge should endeavour to levy by distress for each half-year's payment, but he may recover by the process given by section 82, for any period not exceeding two years, if at the end of that period there is no sufficient distress on the premises (*e*).

(*a*) *Fell* v. *Wilson*, 12 East, 83.

(*b*) *Cox* v. *Brain*, 3 Taunt. 95.

(*c*) Under a local inclosure act, substituting a yearly corn rent in lieu of tithes, with a power of distress, it was held, that the goods of a tenant coming in under the owner of land which had remained several years untenanted, and wholly unprofitable, were liable to be distrained for such corn-rent in arrear; *Newling* v. *Pearse*, 1 Barn. & Cres. 437; 2 Dowl. & Ryl. 607.

If the amount in arrear is under 20*l.*, a person selling the distress by auction need not have an auctioneer's license; 8 & 9 Vict. c. 15, s. 5. As to the sufficiency of a notice of action under the 5 & 6 Vict. c. 54, s. 19, in respect of irregular proceedings under a distress for tithe rent-charge, see *Howard* v. *Remer*, 22 Law Times, Q. B., 99.

(*d*) By statute 7 & 8 Vict. c. 85, s. 22, power is given to distrain for the rent-charge apportioned on land in the occupation of railway companies, or any other land of the company in the same parish or elsewhere.

(*e*) *In re Camberwell Rent-Charge Allotment*, 4 Queen's B. Rep. 151; 3 Gale & Dav. 365.

Remedy of Sequestrators.

By the 12 & 13 Vict. c. 67, s. 1, a sequestrator may bring actions or suits, or levy a distress, or take any other proceeding in his own name as sequestrator for the recovery of tithes, tithe rent-charge, tithe composition or substitution, &c., due to the incumbent.

Summary Remedies previous to the Stat. 6 & 7 Will. IV. c. 71.

Previous to the act for the commutation of tithes taking effect, the recovery of tithes not exceeding 10*l.* in value (*f*), where no prescription, composition, modus, agreement or title is insisted on (*g*), must be, under the statutes 7 & 8 Will. III. c. 6; 53 Geo. III. c. 127; 7 Geo. IV. c. 15; 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, by application to two justices, who may determine the matter, and a distress may be made; an appeal being given to the quarter sessions. For sums not exceeding 10*l.* yearly value, the tithe-owner must proceed before justices, and within two years, under the statute 5 & 6 Will. IV. c. 74, but if the title is disputed vivâ voce before the justices, the owner may then proceed by suit in equity, and recover six years' arrears (*h*). In the case of Quakers in the same way, by statutes 7 & 8 Will. III. c. 34, s. 4; 53 Geo. III. c. 127; 5 & 6 Will. IV. c. 74; and 4 & 5 Vict. c. 36, proceedings may be taken against them for tithes to the extent of 50*l.* value (*i*). By statute 14 & 15 Vict. c. 25, s. 4, "if any occupying tenant of land shall quit, leaving unpaid any tithe rent-charge for or charged upon such land which he was by the terms of his tenancy or holding legally or equitably liable to pay, and the tithe owner shall give or have given notice of proceeding by distress upon the land for recovery thereof, it shall be lawful for the landlord or the succeeding tenant or occupier to pay such tithe rent-charge and any expenses incident thereto, and to recover the amount or sum of money which he may so pay over against such first-named tenant or occupier, or his legal representatives in the same manner, as if the same were a debt by simple contract due from such first-named tenant or occupier to the landlord or tenant making such payment."

Actions previous to the Stat. 6 & 7 Will. IV. c. 71.

Where a composition for tithes exists, as the sum claimed is due upon a contract between the parties, the proper remedy is an action of assumpsit or debt. Where no such arrangement has been made, and the landowner has omitted to set out the tithes, and the annual value exceeds 10*l.* (*j*), the tithe owner is entitled to bring an action of debt on the statute 2 & 3 Edw. VI. c. 13, for treble the value of the tithes not set out. As, however, it is sometimes questionable whether an actual contract for composition exists, it is usual to declare in an action of debt, containing counts both for not setting out the tithes, and for tithes bargained and sold. It should be observed, that, in the

(*f*) *Peyton* v. *Watson*, 3 Queen's B. Rep. 658.

(*g*) *Rex* v. *Wrottesley*, 1 Barn. & Adol. 648; and *Rex* v. *Milnrow* (*Chapelwardens*), 5 Maule & Selw. 248; ante, Book II., Chap. II., Sect. 8.

(*h*) *Robinson* v. *Purday*, 16 Mees. & Wels. 11.

(*i*) See Burn's Justice, tit. *Tithes*.

(*j*) *Peyton* v. *Watson*, 3 Queen's B. Rep. 658.

action for a composition, damages are recovered to the amount proved, and of course costs as in ordinary actions; whilst in the latter action, for not setting out, the plaintiff recovers no costs, but instead thereof treble the value of the tithes not set out. The Limitation Act, 3 & 4 Will. IV. c. 27, ss. 1, 2, does not prevent the tithe-owner from recovering under the 2 & 3 Edw. VI. c. 13, from the occupier, though the tithes have not been set out for twenty years (*k*). In an action on the statute 2 & 3 Edw. VI. c. 13, the plaintiff is entitled to recover, though the witnesses on both sides give some evidence of a custom to take less than one-tenth, and of other varying modes of payment, if that evidence is not conclusive as to some custom (*l*). Upon a general agreement for the retaining of tithes for so much per annum, where no time is specified for the payment, interest cannot be demanded (*m*). The remedy which the landowner has against the tithe proprietor for not taking away the tithes in a reasonable time, is either a distress damage feasant, or an action on the case for the injury sustained by the non-removal of the tithes (*n*).

What Evidence of Title is necessary.

Whenever the tithe owner, whether parson or layman, has received tithes from a defendant at any previous time, it amounts to an admission on the part of the latter of the title of the former, who need not therefore give any evidence of his title to the tithes: thus it has been held, that a layman, lessee of the tithes of certain closes, which the rector lets by auction in separate lots every year, proves a sufficient title to enable him to recover on the statute 2 & 3 Edw. VI. for not setting out tithes, if he proves that he received payment for tithes in a former year (*o*). But evidence that the parishioners have treated with a proprietor for composition, is not alone sufficient to establish his possession of tithes in an action on the statute (*p*). A parishioner, however, who has compounded with the parson one year for his tithes, and has not determined the composition, cannot set up as a defence to an action for the next year's composition money, that the plaintiff is simoniacus (*q*). Where no such admission has been made by the landowner, the tithe proprietor must give strict evidence of his title to the tithes; as, if he be the parson, by showing his presentation and induction; if he be a lay proprietor, by showing his title in the ordinary way; or if he be a lessee, by proving, in addition to his lessor's title, his own right as lessee.

SECT. 6.—*Game and Fishing.*

Right to kill Game.

All the previous statutes relating to game were by 1 & 2 Will. IV. c. 32, repealed, and the qualifications which were formerly required to

(*k*) *Ely* (*Dean and Chapter*) v. *Cash*, 15 Mees. & Wels. 617; see *Bunbury* v. *Fuller*, 9 Exch. Rep. 128.

(*l*) *Blundell* v. *Maudsley*, 15 East, 641.

(*m*) *Shipley* v. *Hammond*, 5 Esp. 114.

(*n*) *Baker* v. *Leathes*, Wightw. 113.

(*o*) *Ganson* v. *Wells*, 8 Taunt. 542.

(*p*) *Wybird* v. *Tuck*, 1 Bos. & Pul. 458.

(*q*) *Brookesby* v. *Watts*, 6 Taunt. 333; 2 Marsh. 38.

kill game are now no longer necessary, and every certificated person may kill game (*t*). By the same act it is unlawful to lay poison to kill game.

Hares, 11 & 12 Vict. c. 29.

By the late act, 11 & 12 Vict. c. 29, any person in the actual occupation of inclosed lands, or any owner who has the right to kill game thereon, may by himself, or any person authorized by him in writing in a given form (*u*), or to the like effect, take, kill or destroy hares on such lands without paying any duty.

Rights of Lessors.

Where leases or agreements, made previously to the statute 1 & 2 Will. IV. c. 32 (5th October, 1831), exist, the landlord has the right of entering on the land himself to kill game, or of authorizing certificated persons to do so; and no lessee has the right, except when it has been expressly allowed by such lease or agreement, where a fine has been taken on the lease, or the lease itself exceeds twenty-one years: provided that nothing in the act is to authorize any person to take game where by either previous or subsequent contracts, &c., the right is reserved to landlords and other persons, or to prejudice the rights of owners of forests, chases or warrens, or the lords of manors: and where the landlord has the right to kill game to the exclusion of the occupier, either by the act or by reservation, he may authorize other certificated persons to do so: and the occupier who is excluded is liable to a penalty for killing or pursuing game without the landlord's authority (*x*).

Warren.

Where there was a covenant in a lease of, amongst other things, a rabbit warren, that the lessee would at the expiration of the term leave on the warren 10,000 rabbits, the lessor paying for them so much per thousand; it was held, that parol evidence was admissible to show that by the custom of the country the word "thousand," as applied to rabbits, denoted 1,200 (*y*).

Right to fish.

Where by written agreement a party has let to the defendant, at a yearly rent, the right of fishing in a river with rod and line, and the fishery has been so used, the rent may be recovered under an indebitatus count for use and occupation of the fishery, and the plaintiff's claim may be so described in the particulars of demand (*z*).

SECT. 7.—*Building Act.*

The Building Act, 7 & 8 Vict. c. 84.

In order as much as possible to prevent the damage consequent upon fires happening in crowded streets, an act of parliament (*a*),

(*t*) As to exceptions in leases of the right to enter and kill game, see ante, Book I., Chap. IV., Sect. 7, p. 102; see also post, Sect. 9.

(*u*) The following is the form: "I, *A. B.*, do authorize *C. D.* to kill hares on [my lands, or the lands occupied by me, *as the case may be*], within the —— of —— [*here insert the name of the parish or other place, as the case may be*]. Dated this —— day of —— [*here insert the day, month and year*]. Witness ——. *A. B.*"

(*x*) 1 & 2 Will. IV. c. 32, ss. 7, 8, 11, 12.

(*y*) *Smith* v. *Nelson*, 3 Barn. & Adol. 728.

(*z*) *Holford* v. *Pritchard*, 3 Exch. Rep. 793.

(*a*) Stat. 14 Geo. III. c. 78, amended by 25 Geo. III. c. 77, and 50 Geo. III. c. 75.

usually called the Building Act, was passed in the beginning of the reign of his late Majesty King George the Third. This statute, however, is now repealed, as to the construction of buildings, by the new Building Act, 7 & 8 Vict. c. 84 (*b*), which came into operation on the 1st January, 1845. It has a more extensive operation than the former statute, but is still confined to London and a certain district immediately surrounding it. It contains minute directions for the construction of all buildings within the district (*c*), for the building and rebuilding of party-walls (*d*), for stopping openings in external walls (*e*), for repairing and rebuilding ruinous buildings (*f*), as to the construction of cellars used for dwellings (*g*), and as to the carrying on dangerous or noxious trades (*h*); as, however, it is very voluminous, the reader must be referred, for more specific information, to the act itself (*i*).

Who are Liable under the Act 7 & 8 Vict. c. 84, as regards Party Structures.

The new Building Act, 7 & 8 Vict. c. 84, enables the owner of a building who has incurred expenses in respect of a party structure, built as required by the act, to recover from the person entitled to the immediate possession of the adjoining building or ground, or who is in the immediate occupation thereof (*k*), certain compensation; and until such expenses are paid, the builder is to have the sole possession of the party structure, and of the ground on which it stands. An account is to be delivered (*l*) by the person building, to the "owner" of the adjoining premises of the expenses of the work; this "owner" being defined to be (*m*) "every person in possession or receipt either of the whole or of any part of the rents or profits of any ground or tenement, or in the occupation of such ground or tenement, other than as a tenant from year to year, or for any less term, or a tenant at will." If this owner does not appeal against the proportion of the expenses charged on him, or after an appeal does not pay the amount fixed (*n*), then the person building may recover the amount by summary process, before two justices or a police magistrate (*o*). The persons entitled to the immediate possession, or the occupiers of premises, must in the first instance bear the expenses imposed on the "owner," subject to his right to be indemnified according to the terms under which they hold (*p*). Occupiers may, unless there be any covenant or agreement to the contrary between the parties, deduct from the rents payable to their landlord expenses they have so paid through the default of their landlord (*q*). When the expenses have been paid by the "owner,"

(*b*) Amended by 9 & 10 Vict. c. 5. Held to be of "a local and personal nature;" *Richards* v. *Easto*, 15 Mees. & Wels. 244; 3 Dow. & Low. 515.

(*c*) Sects. 5, &c.

(*d*) Sects. 20, &c.

(*e*) Sect. 37.

(*f*) Sects. 40, &c.

(*g*) Sect. 53.

(*h*) Sects. 54 and 55.

(*i*) The general Towns Improvement Clauses Act, 10 & 11 Vict. c. 34, contains many provisions on the same subjects, as well as on other points which may become applicable to other towns. See also the act 11 & 12 Vict. c. 63, for promoting public health.

(*k*) Sects. 46 and 111.

(*l*) Sect. 47.

(*m*) Sect. 2.

(*n*) Sect. 47.

(*o*) Sect. 102.

(*p*) Sects. 46 and 111.

(*q*) Sect. 48.

upon whom the payment of them has first fallen, then as to any building held under any lease or agreement made before the 1st January, 1845, he may recover over against any other person liable under the previously existing law (r), and the official referees shall determine who are so liable; but if held under any lease or agreement made after the 1st January, 1845, except a lease renewable for ever on a fixed fine, the expenses shall be charged upon the lessor, subject, however, to any express covenant or agreement (s) in that behalf (t). Persons on whom the expenses first fall may also obtain contribution from other owners, according to their amount of interest, which shall be settled by the official referees (u).

Rights as between Landlord and Tenant, under the old Building Act, in respect of Contribution towards Party-walls.

The effect of covenants to repair, when taken in connection with the provisions of the old Building Act, has not been very clearly decided. In one case the question was raised, whether a general covenant by the tenant to repair, did not compel him to pay for the rebuilding of a party-wall under the act; but the court merely decided, that in an action against the tenant on such a covenant a plea of performance, except as to the repairs of a party-wall, which were done under the act, and which did not become necessary by any act or neglect of the defendant, was sufficient (x). This decision proceeds on the ground that the statute intended to render the owner of the *improved rent* liable to the burden in question: and, therefore, the lessor of a house at rack-rent (there being no other person entitled to *any* kind of rent), is liable to contribute, although the lessee may have improved the premises (y), and so the assignee of the lessee of premises at a fixed rent, which premises he has considerably improved, and consequently rendered of greater annual value, is not liable to be called upon for contribution under the statute as the owner of the improved rent (z). In two other cases, where the tenants held under general covenants to repair, it was held that they could not recover, against their landlords, expenses they had been put to in rebuilding party-walls; but in both cases the tenants had not pursued the course pointed out by the statute (a). In another case it was held, that the tenant, who had covenanted to repair generally, might deduct the amount he had been compelled to pay for similar repairs in the first instance from his rent, under the provisions of the statute, even though he might thereby become liable to his lessor under the covenant (b). Where a tenant

(r) By the old Building Act, 14 Geo. III. c. 78, s. 41, this liability is cast on the "owner of the improved rent;" as to the construction of which expression the reader must be referred to the different treatises on the subject.

(s) It would be as well in all leases or agreements for leases of property within the limits of the act, that an *express* contract should be inserted as to party atructures. See a form, post, Book III., Chap. I., Sect. 2 and Sect. 9, (b).

(t) Sect. 49.

(u) Sect. 50.

(x) *Stone* v. *Greenwell*, cited 3 Term Rep. 461; *Moore* v. *Clark*, 5 Taunt. 90.

(y) *Beardmore* v. *Fox*, 8 Term Rep. 214.

(z) *Lambe* v. *Hemans*, 2 Barn. & Ald. 467.

(a) *Robinson* v. *Lewis*, 10 East, 227; *Pizey* v. *Rogers*, Ry. & Mood. 357.

(b) *Sangster* v. *Birkhead*, 1 Bos. & Pul. 303.

covenanted to pay "all taxes, rates, duties, assessments and impositions," "it being the true intent and meaning of these presents, that the lessor should have the said yearly rent of 60*l.* hereby reserved in net money, without any deduction, defalcation or allowance out of the same, on any account whatsoever;" and there was also a general covenant by the tenant to repair, and also that he would "bear, pay and allow a reasonable share and proportion of or for and towards supporting, repairing, amending and cleansing all party-walls, &c.;" it was held, that he could not compel his lessor to contribute to the expenses of entirely rebuilding a party-wall (*c*). But where the covenant by the tenant was to pay "the land tax and all other taxes, rates, assessments and impositions whatever," it was held, that the tenant was not bound to contribute to such expenses (*d*). Where the owner of a house demised some adjoining land to a person who covenanted to build, and in so doing used the wall of his lessor's house as a party-wall, it was held, that the act did not apply so as to allow the lessor to ask for contribution for the use of the wall (*e*). In a case in which a tenant, after the expiration of a beneficial lease, rebuilt a house, which subsequently to the determination of his lease was consumed by fire, and in so doing made use of the party-wall of the adjoining house; after which the ground landlord granted him a new lease, in consideration of the expense incurred in rebuilding, at a rent of seven guineas, the house being worth 60*l.* per annum, to hold from a day then past; the Court of Common Pleas thought the lessee could not be considered as the owner of the improved rent; and that no previous agreement for a new lease could be presumed from the retrospective habendum in the lease, so as to bring the case within *Peck* v. *Wood*, and therefore it was held, that the owner of the adjoining house could not recover as against him a moiety of the expense of building the party-wall (*f*).

Property in Party-walls.

In cases where the old Building Act applied, if two persons had a party-wall, one half of the thickness of which stood on the land of each, they were not therefore tenants in common of the wall, or of the land on which it stood, although the wall was erected at the joint expense of the two proprietors (*g*). That act did not make party-walls common property; and if one proprietor added to the height of such a party-wall, and the other pulled down the addition, the first might maintain an action of trespass for pulling down so much of it as stood on the half of the wall which was erected on the plaintiff's soil (*h*).

Other Decisions on the old Building Act.

An administrator of a lessor was held liable under the old Building

(*c*) *Barrett* v. *Bedford* (*Duke*), 8 Term Rep. 603.

(*d*) *Southall* v. *Leadbetter*, 3 Term Rep. 458; see also *Beardmore* v. *Fox*, 8 Term Rep. 214.

(*e*) *Williams* v. *Pocklington*, 2 Barn. & Adol. 878.

(*f*) *Taylor* v. *Reed*, 6 Taunt. 249.

(*g*) *Matts* v. *Hawkins*, 5 Taunt. 20; see also *Cubitt* v. *Porter*, 8 Barn. & Cres. 257; 2 Man. & Ryl. 267; and ante, Chap. IV., Sect. 5, p. 454.

(*h*) Ibid.

Act as owner, to contribute towards the rebuilding of a party-wall (*i*). Where the wall of a house already built was made use of in the construction of a house adjoining, it was held, that the notice required by the 14 Geo. III. c. 78, s. 14, for obtaining contribution towards the expense of the wall so used, might be given within a reasonable time after the adjoining house was built, and that six years was not an unreasonable time, the parties having been endeavouring to keep the circumstances of the case secret (*k*). The old Building Act did not destroy the right to lateral windows, which existed before that act (*l*); therefore the owner of windows in an edifice, carried up above a party-wall, contrary to the provisions of the act, could nevertheless recover against the owner of the adjoining land who contributed to the wall, for darkening the lights. An edifice built not conformably to that act, in respect whereof no conviction was had within three months, was nevertheless not rendered legal by the lapse of that time, but might be afterwards proceeded against under the act (*m*). The penalty given by that statute was recoverable against the master-builder, and not against the master of the premises (*n*). A lease made for the express purpose of the premises being used to boil oil and tar, which is contrary to the provisions of the 25 Geo. III. c. 77 (*o*), would, it seems, be probably held to be void (*p*). Before an action could be brought to recover a proportion of the expenses of building a party-wall, the accounts prescribed by sect. 41 of the statute had to be delivered, whether the house be occupied by the owner or by a tenant; and a formal demand of the money had to be made twenty-one days before action brought (*q*). The three months' notice required by sect. 38 was only necessary where the person, who at the time when it was necessary to build, &c., was liable to pay, could not agree with the owner of the adjoining house (*r*). A house occupied by a tenant under a lease for twenty-one years was during the term accidentally burnt, and being ruinous was pulled down under the provisions of the 7 & 8 Vict. c. 84, and expenses thereby incurred; by the lease the tenant was exempted from paying rent for the time that the house was untenantable by reason of an accidental fire; it was held, that the expenses incurred could not be recovered from the landlord, a tenant for life of the reversion, under sect. 42 of the act, which throws the burden upon "the owner of every such building, being the person entitled to the immediate possession thereof (*s*)."

(*i*) *Thacker* v. *Wilson*, 3 Ad. & El. 142; 4 Nev. & Man. 658; 1 Har. & Wol. 131.

(*k*) *Collins* v. *Wilson*, 4 Bing. 551; 1 Moore & Pay. 454.

(*l*) *Titterton* v. *Conyers*, 5 Taunt. 465; 1 Marsh. 140.

(*m*) Ibid.

(*n*) *Meymot* v. *Southgate*, 3 Esp. 223.

(*o*) This statute is not repealed by the new act, 7 & 8 Vict. c. 84.

(*p*) *Gas Light Company* v. *Turner*, 5 Bing. N. C. 666; 6 Bing. N. C. 324; 7 Scott, 779; 8 Scott, 609.

(*q*) *Philip* v. *Donati*, 2 Taunt. 62. As to any remedy by mandamus, see *Reg.* v. *Ponsford*, 1 Dowl. & Low. 116; and *Reading* v. *Barnard*, Mood. & Malk. 71.

(*r*) *Peck* v. *Wood*, 5 Term Rep. 130.

(*s*) *Saffron Hill Overseers* (*Ex parte*), 24 Law J., M. C., 56.

BOOK III.

JUDICIAL PROCEDURE.

CHAPTER I.

ACTION OF COVENANT.

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SECT. 1.—*When and for what maintainable.*

Nature of the Action of Covenant.

THE action of covenant lies for the recovery of damages, for the breach of any agreement entered into by deed, whether it be by indenture or deed-poll; and whether the covenant be implied in law, or expressed in fact. It is, therefore, the proper form of action to be resorted to in all cases of dispute between landlord and tenant, when the contract between them has been by deed. A defence to a writ of summons and plaint complaining of a breach of contract for non-payment of rent, stating that defendant had agreed for a certain consideration to accept and had accepted an abated rent, and that the sum demanded was a violation of the agreement; and further pleading that the only sum due was 60*l.*, which defendant brought into court; was held bad, because it did not allege whether or not the agreement was under seal (*a*).

[illegible] is a sufficient Signature to maintain Covenant.

It appears to be essential that the covenantee should be a party to the indenture, for the action only lies upon a deed inter partes, between the parties thereto: thus, where by a lease rent was reserved to a person who was not a party to the lease, and the lessees covenanted with him and the lessors to pay rent; it was held, that covenant would not lie at the suit of him and the lessors (*b*). Again, where in covenant upon an indenture of lease, it appeared that the landlord, by writing *not under seal*, authorized his attorney to execute a lease for him and on his behalf, and the attorney signed and sealed the lease in his own name; it was held, that the landlord could not maintain covenant against the tenant upon the indenture, although the covenants

(*a*) *Neville* v. *Hyland*, 3 Ir. Law Rep., N. S., 238.

(*b*) *Southampton* (*Lord*) v. *Brown*, 6 Barn. & Cres. 718.

were expressly stated to have been made by the tenant to and with the landlord (c). In a late case, where *B.* assigned the lease of a house to *A.* by deed, subject to certain covenants, and *A.* took possession, it was doubted whether *B.*'s remedy for a breach of the covenants was not by an action of covenant, although *A.* never executed the deed (d).

When Covenant may be maintained on a void or [illegible]able D[illegible]

Where the deed which contains the covenant is absolutely void, of course the covenant is also avoided, and no action can be maintained for its infraction; but if the deed be merely voidable, an action may be maintained for a breach of covenant which happened before the deed became void; thus upon the statute 13 Eliz. c. 20, (since repealed,) respecting leases made by parsons, which enacts, that upon non-residency for eighty days the lease shall be void, it has been adjudged, that an action of covenant may be maintained upon a lease by a parson by indenture, after the lease became void by non-residency, for a covenant broken before (e). Covenant cannot be maintained for breaches committed by a lessee subsequent to the service of a writ in ejectment for a forfeiture, on a clause that for any breach of covenant the lease should determine and be utterly void (f).

Effect of a Condition precedent.

Wherever the right to maintain an action of covenant depends upon the performance of any matter which is a condition precedent, it must be shown that the plaintiff has put himself in a situation to maintain his action by the performance of the precedent matter (g). When, however, the defendant has prevented the performance by his own neglect or default, it is equivalent to a performance by the plaintiff (h). Where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part (i). If the one party disable himself from performing his part, the other party is not obliged to offer performance of his part, but may have an action immediately (k): thus, where the lessor covenanted with the lessee to make him a new lease, on surrender of the old one within twenty years, and before the twenty years expired the lessor aliened the land to another by fine; it was held, that as he had disabled himself from accepting a surrender, and consequently making a new lease, an action of covenant might be immediately maintained (l). If, however, a man have lands for a term of years, and covenant to leave them in as good

(c) *Berkeley* v. *Hardy*, 5 Barn. & Cres. 355; 8 Dowl. & Ryl. 102.

(d) *Hawkins* v. *Sherman*, 3 Car. & Pay. 459.

(e) *Nunns* v. *Gee*, Cro. Eliz. 78.

(f) *Jones* v. *Carter*, 15 Mees. & Wels. 718.

(g) Ante, Book I., Chap. IV., Sect. 5, (c), p. 92.

(h) *Hotham* v. *East India Company*, 1 Term Rep. 638.

(i) *Jones* v. *Barkley*, 2 Dougl. 684; and see *Laird* v. *Pim*, 7 Mees. & Wels. 474; Hurl. & Walm. 11; *De Medina* v. *Norman*, 9 Mees. & Wels. 820; 2 Dowl., N. S., 239.

(k) 1 Esp. N. P. 285.

(l) *Scott* v. *Mayn*, Cro. Eliz. 450.

a plight as he found them, although he pull down the houses, the lessor shall not have an action of covenant before the end of the term; for the covenant has relation thereto, and he may rebuild them: but if he do waste in a wood, covenant lies; for he cannot repair it (*m*).

When Covenant lies respecting Exceptions in Lease.

An action of covenant does not lie upon an implied covenant—as for quiet enjoyment—for a disturbance in a part of the premises expressly excepted out of the demise; because, as there is no demise as to the excepted premises, no implied covenant can arise by intendment of law. It has accordingly been held, that if a man let a house, excepting two rooms, and is disturbed therein, covenant does not lie: although if he had excepted a passage thereto, and had been disturbed in that, it might have been maintained; for it lies for a thing which the lessee agrees to let the lessor have out of the demised premises (*n*).

SECT. 2.—*Between the Contracting Parties.*

By or against whom the Action may be maintained generally.

The action of covenant may in all cases be maintained by or against the parties to the contract, or their personal representatives, whether the covenant be such as runs with the land, or is merely of a personal nature. Besides this right,—which is founded on the privity of contract,—in every case of a covenant running with the land, the action may be maintained by or against parties to whom the interest in the land, whether it be the reversion or the term, has come, although they are no parties to the contract; this again is founded upon the privity of estate, and continues only during the period such privity exists. A lessee, on the other hand, has, from his covenant, both a privity of contract and of estate; and though he assigns, and thereby destroys the privity of estate, yet the privity of contract continues, and he, or his personal representatives, is liable in covenant notwithstanding the assignment. If the tenant for a term convey the term by way of mortgage, and then join with the mortgagee in an under-lease, in which the covenants for rent and repairs are only with the mortgagor and his assigns, and the interests of the mortgagor and mortgagee become extinguished by being united to the reversion, still the mortgagor may maintain covenant against the under-lessee, the covenants being in gross (*o*). In cases where the privity of estate exists, the action lies either against the assignee of the term at common law, because the covenant runs with the land, or against the lessee on his contract, at the election of the lessor. Indeed, the latter may charge both, but he can take out execution against one only; for if he takes both in execution, he who is last taken may have an audita querela.

(*m*) F. N. B. 145, (K). Performance of conditions precedent may be averred generally in pleading; see 15 & 16 Vict. c. 76, s. 57.

(*n*) *Cole's case*, 1 Salk. 196.

(*o*) *Stokes* v. *Russel*, 3 Term Rep. 678; *Webb* v. *Russel*, ibid. 393.

Proper Parties in case of joint Covenants.

When the parties to the deed are single, and alive at the time of action brought, of course no difficulty arises, for the action may be brought by the covenantee against the covenantor. Where, however, either of the parties have a joint interest, considerable nicety is found (*p*). The rule as to the propriety of the joinder or non-joinder of parties, in an action of covenant for breaches, has been thus laid down: where the words of a covenant are expressly and positively joint, it will be so construed, although the interest may be several, and vice versâ; but where the words are ambiguous in this respect, they may be construed to be joint or several, according to the interest (*q*). But the legal niceties to be found in the decisions are now of less importance than they formerly were, the non-joinder and mis-joinder of plaintiffs being amendable before and at the trial, and after notice on a plea of non-joinder, and the mis-joinder of defendants being also amendable before and at the trial under the 15 & 16 Vict. c. 76. ss. 34, 35, 36 and 37 (*r*).

In a lease of a colliery the two lessees covenanted "jointly and severally" with the lessor "in manner following," viz., &c.; then followed several other covenants, after which was a covenant that monies due should be accounted for and paid by the lessees, their executors, &c., not saying and each of them: this and the former covenants were held to be several as well as joint (*s*). A joint action of covenant is not maintainable against two on an implied covenant, if it appear on production of the lease that one only demised, and the other, who had merely an equitable interest, confirmed (*t*). Tenants in common ought to join in the action of covenant for rent (*u*). Upon a lease by tenants in common, the survivor may sue for the whole rent; although the reservation be to the lessors according to their respective interests (*x*).

(*p*) An indenture of lease recited that the lessee had agreed to take the premises, and that a third person had agreed to enter into the covenant after mentioned for securing payment of the rent; the lessee and surety then covenanted to pay the lessor the rent; and further, that the lessee should keep the premises in repair; there were also other covenants similarly framed for matters to be performed by the lessee; it was held, that the surety was jointly bound with the lessee by the covenant to repair as well as the covenant to pay rent; *Copland* v. *Laporte*, 3 Ad. & El. 517.

(*q*) *Sorsbie* v. *Park*, 12 Mees. & Wels. 146; Shep. Touch. Preston's edit. 166, citing *James* v. *Emery*, 5 Price, 529; 2 Moore, 195; *Mills* v. *Ladbrooke*, 7 Man. & Gran. 218; 7 Scott, N. R. 1005; *Bradburne* v. *Botfield*, 14 Mees. & Wels. 559; *Hopkinson* v. *Lee*, 6 Queen's B. Rep. 964; and see *Wakefield* v. *Brown*, 9 Queen's B. Rep. 209; *Foley* v. *Addenbrooke*, 4 Queen's B. Rep. 197; 3 Gale & Dav. 64; *Harrold* v. *Whittaker*, 11 Queen's B. Rep. 147; *Magnay* v. *Edwards*. 13 C. B. 479.

(*r*) See also ss. 38, 39, 60.

(*s*) *Northumberland* (*Duke*) v. *Errington*, 5 Term Rep. 522.

(*t*) *Smith* v. *Pocklington*, 1 Cromp. & Jerv. 445; 1 Tyr. 309.

(*u*) Bull. N. P. 158.

(*x*) *Wallace* v. *M'Laren*, 1 Man. & Ryl. 516. See also as to distresses by tenants in common, ante, 357.

SECT. 3.—*Between Derivative Parties.*

(a) *Personal Representatives.*

When the Suit is for Breaches arising in the Testator's Lifetime.

For a covenant broken in the lifetime of the testator, the executor, and not the heir or assignee, shall have the action of covenant, although upon a real covenant which runs with the land; and the damages shall be recovered by the executor, though not named, as he personally represents the testator (*y*). But where there is a continuing breach in the life both of the ancestor and heir, as where the premises covenanted to be repaired by the lessee are out of repair both in the lifetime of the ancestor and after his death, the heir is entitled to bring an action (*z*). An executor of a lessor may sue the lessee for breach of a covenant not to fell, stub up, lop or top timber trees excepted out of the demise, the breach having been committed in the lifetime of the lessor (*a*). So the executor of a tenant for life may sue for breach of a covenant to repair, committed in the lifetime of the testator (*b*).

When the Action is for Breach of Covenants afterwards.

Executors or administrators may maintain an action of covenant on personal covenants made to the persons they represent. Yet, according to a learned writer, where the covenant is but personal, the executor or administrator of the covenantor shall not be charged (*c*). An action will lie on an express covenant against an executor, but not on a covenant in law; and it will lie by an executor of an assignee of a lessee on a covenant for quiet enjoyment, and for a breach after the death of the lessor (*d*). If a lessor covenant with the lessee to make him a new lease at the end of his term, and the lessee dies, his executor may have an action of covenant on this, though not named (*e*).

When the Action is for Breach of real Covenants afterwards.

Where there has been any breach of such of the lessee's covenants as run with the land, after the death of the covenantor, and his executors or administrators have entered into possession of the premises, and created a privity of estate, the lessor has his election to charge them either as executors—in which case the judgment must be de bonis testatoris—or assignees, without naming their representative character, but stating generally in the declaration, that the estate of the lessee in the premises lawfully came to the defendants,—in which case the judgment shall be de bonis propriis. The executor of a lessee is liable to the grantee of the reversion on such a covenant; though

(*y*) Esp. N. P. 295. As to the rights and liabilities of executors and administrators in case of the death of plaintiffs and defendants, see 15 & 16 Vict. c. 76, ss. 136 to 140, &c.

(*z*) *Vivian* v. *Champion*, 2 Raym. 1125; 2 Lev. 92; 1 Salk. 141.

(*a*) *Raymond* v. *Fitch*, 2 Cromp. M. & Ros. 588; 1 Gale, 337; 5 Tyr. 985.

(*b*) *Rickets* v. *Weaver*, 12 Mees. & Wels. 718.

(*c*) Fitz. Nat. Brev. 145, (D); Bro. tit. *Covenant*, 12; Shep. Touch. 482.

(*d*) Shep. Touch. 178; *Williams* v. *Burrell*, 1 Com. B. Rep. 402; *Adams* v. *Gibney*, 6 Bing. 656; 4 Moore & Pay. 491.

(*e*) Plowd. Com. 286.

the lessee may have assigned his term, and the grantee have accepted rent of the assignee (*f*); for the personal representative of a lessee for years is his assignee. An action of covenant lies by the lessor against the administrator of the assignee of the lessee, against whom he declares as assignee, for a breach of covenant which runs with the land (*g*). So if the lessee assign over, and the assignee die intestate, the lessor may have covenant against the administrator of the assignee, and declare against him as assignee; for such covenants bind those who come in by act of law, as well as by act of the parties (*h*). Though all the estate of the lessee is assigned by act of parliament, if there are no words of discharge, the lessee's executor is still liable on the covenant for the rent (*i*). It must be borne in mind, that personal representatives can be charged as assignees only when they have taken possession, and created a privity of estate: therefore, when that is not the case, they can be sued in their representative character only upon the privity of contract. When they are sued as assignees, they are chargeable for such part of the rent as the occupation of the premises is worth (*k*).

(b) *Assignees.*

On what Covenants the Action is maintainable against Assignees.

The assignee of a term is bound to perform all the covenants annexed to the estate, whether named in the deed or not: he may, therefore, be sued in covenant on all the covenants which run with the land and are annexed to the realty (*l*). He is not, however, in any case liable on a mere collateral or personal covenant (*m*). The assignee of the lessor is, by statute 32 Hen. VIII. c. 34, liable in the same way that the lessor himself is on covenants running with the land (*n*).

For what Period the Action is maintainable.

In the case of an assignee, there is privity of estate only and he is liable only while he continues to be legal assignee; that is, while in possession under the assignment; except, indeed, in the case of rent, for which, though he assign over, he is, notwithstanding, liable as to the arrears incurred before, as well as during his enjoyment (*o*). An assignee, being only liable while in possession, if he assign over before a breach, is not liable in an action of covenant, though his assignee has not taken possession (*p*). Where the defendant was the assignee of the original lessee, and an action of covenant having been brought against him for rent reserved on the lease, he pleaded that before the rent became due, he had assigned all his interest in the premises to one Rigg, who by virtue of such assignment entered and was possessed; and the plaintiff replied, that at the time when the rent became due,

(*f*) *Adams* v. *Tapling*, 4 Mod. 88; *S. P. Brett* v. *Cumberland*, Cro. Jac. 521.
(*g*) Bull. N. P. 159.
(*h*) Esp. N. P. 290.
(*i*) Bac. Abr. tit. *Covenant*, (E 4, n.).
(*k*) *Rubery* v. *Stevens*, 4 Barn. & Adol. 241; 1 Nev. & Man. 182; see ante, 238.
(*l*) See ante, Book I., Chap. IV., Sect. 5, (b), p. 88.
(*m*) *Mayho* v. *Backhurst*, Cro. Jac. 438.
(*n*) Chit. Plead. vol. i. p. 131, 7th edit. See also *Williams* v. *Burrell*, 1 Com. B. Rep. 402.
(*o*) Bac. Abr. tit. *Covenant*, (E 4). See also ante, 87, 88, 214, 216.
(*p*) *Taylor* v. *Shum*, 1 Bos. & Pul. 21.

the defendant remained and continued in possession, and denied that Rigg had entered; on demurrer, it was held, that the assignment being admitted, the actual possession was not sufficient to charge the first assignee, the possession in law being in the second assignee by virtue of the assignment (*q*).

Liability of Assignees.

As to the question how far actual possession of the assignee is necessary in order to enable the lessor to maintain covenant against him, it has been decided, that by the assignment, the title and possessory right pass, and the assignee becomes possessed in law: and it is immaterial whether it be an assignment of the usual kind, or by way of mortgage; for the principle upon which the assignee is liable is in respect of his having the legal estate (*r*). A mortgagee, though out of possession, was held by Lord Kenyon liable as assignee notwithstanding; and in a still more recent case it was held, that covenant for non-payment of rent lies against an assignee of a lease, to whom an assignment is made by way of mortgage security, although he has never entered, or taken actual possession (*s*). The devisee of the equity of redemption (the legal fee being in a mortgagee) is, however, not liable in covenant as assignee of all the estate, right, title and interest of the original covenantor (*t*). When a trustee, to whom two leases were assigned in trust for securing an annuity, said to the occupier of one of the demised houses, "You must pay the rent to me; I am become landlord for my client who has the annuity, and you must pay the ground-rents for me;" it was held, that he was liable in covenant to the lessor, as assignee of both leases, for non-payment of rent and not repairing (*u*). Where a lessee died intestate and his widow entered on the premises, and afterwards her son-in-law, with the assent of the landlord, took the premises and paid rent, it was held, that he had not made himself executor de son tort, so as to be chargeable as assignee (*x*). An action of covenant cannot be maintained against an under-lessee; for it is clearly stated, and is agreeable to the text of Littleton, that the action cannot be maintained unless against an assignee of the whole term (*y*): but, if *A.* demise to *B.* several parcels of land, and the lessee covenant for him and his assigns to repair, &c., and after the lessee assigns to *D.* all his estate in parcel of the land demised, and *D.* does not repair that to him assigned, the lessor may have an action of covenant against *D.* the assignee (*z*). Where there was a general covenant to repair and keep in repair, and the lessee assigned over, subject to the performance by the assignee of the cove-

(*q*) *Walker* v. *Reeves*, 2 Dougl. 461, n.; *S. C.* better reported, 3 Dougl. 19.

(*r*) *Stone* v. *Evans*, MS. overruling *Eaton* v. *Jacques*, 2 Dougl. 455; see also *Flight* v. *Bentley*, 7 Sim. 149.

(*s*) *Williams* v. *Bosanquet*, 1 Brod. & Bing. 238; 3 Moore, 500.

(*t*) *Carlisle* (*Mayor, &c.*) v. *Blamire*, 8 East, 487.

(*u*) *Gretton* v. *Diggles*, 4 Taunt. 766.

(*x*) *Paull* v. *Simpson*, 9 Queen's B. Rep. 365.

(*y*) *Stone* v. *Evans*, MS.; *S. P. Halford* v. *Hatch*, 1 Dougl. 183.

(*z*) Bac. Abr. tit. *Covenant*, (E 3).

nants in the lease from the day of assignment, and afterwards the lessor recovered against the lessee for breach of the covenant to repair; it was held, that the lessee could recover over against the assignee for such dilapidations only as there had been after the assignment (*a*). An assignee of a lessor may be liable to the covenants of the lease, though good by estoppel only (*b*).

Actions by Assignees.

The statute 32 Hen. VIII. c. 34, gives to the grantees and assignees of reversions of lands, tenements and other hereditaments, the like advantage against lessees by action for not performing conditions, covenants or agreements contained in the indentures of lessees, as the lessors or grantors themselves might have (*c*). This statute does not apply to assignees of a lessor, where the demise is not by deed (*d*). The surrenderee of a copyhold reversion may bring covenant against the lessee within the equity of this statute, for it is a remedial law, and no prejudice can arise to the lord (*e*), even although the assignee had assigned the term before the surrender. An assignee is not entitled under this act to arrears of rent which became due prior to the assignment (*f*). To enable the assignee of a reversioner to sue on the covenants in a lease, he must be seised of the same reversion to which the covenants were originally annexed; therefore, where there was a lease for years, under which the tenant entered, but which was never executed by the lessor, who died and devised the property, it was held, that the devisee could not sue as assignee of the reversion for breaches of covenants in the lease (*g*). A lease was made by *A.* and *B.* his wife, who were seised of an undivided moiety in right of the wife, and also by *C.*, who was seised of the other undivided moiety, and it contained a covenant by the lessee, with *A.* and *C.* only, to repair; semble, that this was not a covenant running with the land on which the assignee of the reversion could sue (*h*). If a mortgagor and mortgagee of a term make an under-lease in which the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, and therefore do not run with it; but the mortgagor himself may, the covenants being in gross (*i*). Where a mortgagor made a lease for a term, reciting the mortgage, and the lessee covenanted to pay a certain sum annually in part of the interest on the mortgage at a certain place,

(*a*) *Hawkins* v. *Sherman*, 3 Car. & Pay. 459.

(*b*) *Sturgeon* v. *Wingfield*, 15 Mees. & Wels. 224; see ante, 171.

(*c*) See ante, Book I., Chap. VII., Sect. 5, (c), p. 273.

(*d*) *Standen* v. *Christmas*, 10 Queen's B. Rep. 135; post, Chap. VI., Sect. 1.

(*e*) *Glover* v. *Cope*, 1 Salk. 185; 4 Mod. 81; *Whitton* v. *Peacock*, 3 Myl. & Keen, 325.

(*f*) *Flight* v. *Bentley*, 7 Sim. 149.

(*g*) *Cardwell* v. *Lucas*, 2 Mees. & Wels. 111; 2 Gale, 203; and see *Cooch* v. *Goodman*, 2 Gale & Dav. 159; 2 Queen's B. Rep. 580.

(*h*) *Wootton* v. *Steffenoni*, 12 Mees. & Wels. 129.

(*i*) *Stokes* v. *Russel*, 3 Term Rep. 678.

it was held a covenant in gross, not running with the land (*k*). An assignee of a reversion in fee of a house by one deed, and of a lease for years of land by another deed, may bring covenant on a lease made by the assignor by which both the house and lands were demised, although he so derives his right under different deeds (*l*). An action will lie by the assignee of a reversion for years against an under-lessee on a covenant to leave the premises in repair: upon such a covenant, tenants in common may sue a lessee of a house, who, after the demise, but before the breach alleged, became a co-tenant of the plaintiffs in the same house (*m*). It has been questioned whether the assignee of a reversion can take advantage under this statute of a proviso in a lease for lives, that if the lessee, his heirs, &c., became insolvent and unable in circumstances to go on with the management of the farm, the demise should cease (*n*). The assignee of a lease, which appears to be good only by estoppel, cannot maintain an action on the covenants (*o*): but where a person who was in fact tenant from year to year, as he held under a lease for years which was voidable, underlet for a term, and the under-lessee again underlet for a less term; it was held, that this under-lessee had a reversion on which his assignee could maintain an action of covenant (*p*). It seems an action of covenant will not lie by an assignor against an assignee, for he has no residuary interest (*q*). An action of covenant will lie by the assignee of the reversion of part of the demised premises, against the lessee for not repairing (*r*): but such an assignee of part cannot take advantage of a condition broken, though an assignee of part only of the reversion, but of the whole property, may (*s*). Where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor and the owners of the other two-thirds for pulling down an old smelting-mill, and building another of larger dimensions, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build; it was held, that the assignee of the lessor of the one-third might sue in respect of his interest (*t*). The assignee of a reversion has no right of action for breaches of a covenant as to repairs committed before the assignment of the reversion (*u*). A copyholder devised an estate to another without surrendering to the use of his will. The devisee of the

(*k*) *Pargeter* v. *Harris*, 7 Queen's B. Rep. 708.

(*l*) *Pyot* v. *St. John* (*Lady*), Cro. Jac. 329.

(*m*) *Yates* or *Gates* v. *Cole*, 2 Brod. & Bing. 660; 5 Moore, 554.

(*n*) *Doe* d. *Evans* or *Griffiths* v. *Pritchard*, 5 Barn. & Adol. 765; 2 Nev. & Man. 489.

(*o*) *Noke* v. *Awder*, Cro. Eliz. 373, 437; and see *Carvick* v. *Blagrave*, 1 Brod. & Bing. 531; 4 Moore, 303.

(*p*) *Oxley* v. *James*, 13 Mees. & Wels. 209.

(*q*) *Hicks* v. *Downing*, 1 Lord Raym. 99; 2 Salk. 10.

(*r*) *Twynam* v. *Pickard*, 2 Barn. & Ald. 105.

(*s*) *Wright* v. *Burroughs*, 3 Com. B. Rep. 685; 4 Dow. & Low. 438.

(*t*) *Sampson* v. *Easterby*, 9 Barn. & Cres. 505; 4 Man. & Ryl. 422; *S. C.* nom. *Easterby* v. *Sampson*, 4 Moore & Pay. 601; 6 Bing. 644; 1 Cromp. & Jerv. 105.

(*u*) *Johnson* v. *St. Peter's, Hereford*, 4 Ad. & El. 520; 6 Nev. & Man. 106; 1 Har. & Wol. 720.

devisee, having consequently no estate at all either legal or equitable, demised part of the copyhold by deed, and the lessor covenanted to pay rent, and assigned the lease. The heir-at-law of the devisor afterwards surrendered to the use of the second devisee, who afterwards demised another part of the copyhold to the same lessee, and instead of granting a fresh lease to the lessor of the part before demised, took a covenant from him to perform the covenants in that lease. The lessor afterwards surrendered the copyhold to another; and the question being, whether the surrenderee could maintain an action on these covenants against the assignee of the lessee; the court held, that no such action would lie, on the ground that the reversion by estoppel on the first lease was not a copyhold transferable by surrender and admittance (*v*). But where a mortgagor of a term of years made an under-lease by indenture, it seems that this, though at first a lease by estoppel, is convertible into a lease in interest by a reconveyance by the mortgagees, so as to give a right of action to the assignees of the lessee on the covenants in the under-lease (*x*).

SECT. 4.—*Declaration* (*y*).

Venue in Actions of Covenant.

Whenever the action is founded upon privity of contract the venue is transitory, and may be laid in any county at the option of the plaintiff; where, on the other hand, the party is liable by reason of a privity of estate, the venue is local, and must be laid in the county where the lands are situated (*z*). The venue is therefore transitory in actions on leases between the original parties and their personal representatives; or between the grantee or assignee of the reversion against the lessee. It is local in actions between the lessor or his personal representatives or devisee, or the grantee of the reversion against the assignee of the lessee (*a*); and between the assignee of the lessee against the lessor or his assignee of the reversion (*b*). However, in an action where the venue was local, and it was laid in the wrong county, the Court refused to nonsuit the plaintiff, the locality of the premises not appearing on the record (*c*). In cases where a local venue is necessary, if there are several facts material to the plaintiff's action

(*v*) *Whitton* v. *Peacock*, 2 Bing. N. C. 414; 2 Scott, 630; 1 Hodges, 376; 2 Myl. & Keen, 325, as explained by Parke, B., in delivering the judgment of the court in *Goulds-worth* v. *Knights*, 11 Mees. & Wels. 343.

(*x*) *Webb* v. *Austin*, 7 Man. & Gran. 701; 8 Scott, N. R. 419. But the assignee of the mortgagee, where the mortgagor joined in the assignment, may maintain an action for use and occupation, not being estopped by the mortgagor's lease; *Down* (*Lord*) v. *Thompson*, 11 Jurist, 1008.

(*y*) The 15 & 16 Vict. c. 76, Sched. (B.), gives the following form of declaration on a covenant to repair:—

24. "That the plaintiff by deed let to the defendant a house, No. 401, Piccadilly, to hold for seven years from the —— day of ——, A. D. ——; and the defendant by the said deed covenanted with the plaintiff well and substantially to repair the said house during the said term [*according to the covenant*]; yet the said house was during the said term out of good and substantial repair."

(*z*) See 15 & 16 Vict. s. 41.

(*a*) 1 Saund. 238.

(*b*) *Berwick* (*Mayor*) v. *Shanks*, 11 Moore, 372.

(*c*) *Boyes* v. *Hewetson*, 2 Scott, 831; 2 Bing. N. C. 575.

arising in different counties, the plaintiff may bring his action of covenant in either (*d*). In an action of covenant the Court will not change the venue before plea (*e*).

How much of the Deed should be set forth.

In covenant on a lease it is sufficient if the declaration sets out the legal operation and effect of the demise (*f*). The proper mode is to set out, that, by indenture, certain premises therein mentioned were demised, without stating them particularly, subject, among other things, to a proviso, setting out the substance of the covenant, and the breach (*g*). Where the action is against the original lessee, the breach need not extend to assigns, for the Court will not presume an assignment (*h*).

What amounts to a Variance generally.

Before considering the subject of variances it may be observed, that an accumulation of decisions, commencing at an early period and requiring very strict proof of statements in pleadings, had infused into our law a narrow and technical spirit, so that justice was often defeated on points quite immaterial to the merits of the case. The legislature has repeatedly combated this tendency of courts of justice to decide cases upon mere matters of form; and for this purpose has passed various statutes, authorizing amendments to be made in order to ensure the trial of cases upon their merits. In the two last enactments on this subject the language of the legislature is more decisive than any previously used, and renders compulsory the making of all such amendments as may be necessary to determine the real question in controversy (*i*). It has been thought better, on the whole, to retain most of the decisions on the subject of variance, although it is hoped that many of them will serve as precedents to be avoided rather than followed. A declaration which states that the deed was indented, made and concluded, on a day subsequent to the day on which the deed itself is stated on the face of it to have been indented, made and concluded, is not bad for the variance (*k*); and it would appear that it is not a misdescription of a lease to state it as commencing on a particular day, when the habendum is from that day (*l*). Where in

(*d*) *London* (*Mayor*) v. *Cole*, 7 Term Rep. 583; and see 15 & 16 Vict. c. 76, s. 41.

(*e*) *Bohrs* or *Maude* or *Rohrs* v. *Sessions*, 1 Cromp. M. & Ros. 86; 2 Dowl. 699; 4 Tyr. 275; *S. P. Weatherby* v. *Goring*, 3 Barn. & Cres. 552; 5 Dowl. & Ryl. 541; see also *Arden* v. *Mornington*, 4 Tyr. 56.

(*f*) *Wilson* (*Knt.*) v. *Bramhall*, 1 You. & Jer. 2.

(*g*) *Dundas* v. *Weymouth*, Cowp. 665; and see *Price* v. *Fleetwood*, Cowp. 727.

(*h*) *London* (*Mayor*) v. *Tench*, Bull. N. P. 164.

(*i*) The 222nd section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, enacts, that "it shall be lawful for the superior courts of common law and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs and upon such terms as to the court or judge may seem fit, and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made." And the second Common Law Procedure Act, 17 & 18 Vict. c. 125, s. 96, contains a similar enactment as to amending proceedings under that act.

(*k*) *Hall* v. *Cazenove*, 4 East, 477; 1 Smith, 272.

(*l*) *Welsh* v. *Fisher*, 2 Moore, 378.

setting out the deed the declaration stated, that "it was witnessed, among other things, that as well in consideration of, &c.," and there was no word in the declaration to answer to the phrase "as well," and *only* part of the consideration was stated; it was held, that this was a fatal variance (*m*); but stating a lease to be for twenty-one years, and *proving* it to have been granted for that term determinable at the option of either party at the end of seven or fourteen years, was not a *variance* (*n*). If the covenant to repair contain an exception of "casualties by fire," it has been held fatal on non est factum to state in the declaration as a general covenant to repair, omitting the exception (*o*). Where the plaintiff treated a covenant by the lessee to repair the premises at all times (as often as need or occasion should require), "and at furthest within three months after notice," as an absolute covenant to repair, and omitted the latter part of the clause containing the notice; it was held, that the variance was fatal (*p*). Where the defendant covenanted to grant a lease which should contain a covenant for him to repair, and that until granted the plaintiff should hold subject to the terms and conditions before specified; the lease not having been granted, it was held no variance to allege that the defendant covenanted to repair (*q*). Where the declaration alleged a general covenant to pay money, and on setting out the deed on oyer, the covenant appeared to be to pay at a particular place, it was held to be no ground of demurrer (*r*).

What amounts to a Variance in the Parties.

In an action of covenant against a mortgagor, a statement that the defendant bound himself, his heirs, executors, &c., was no variance, though the word "heir" be not mentioned in the covenant (*s*). Where, in covenant on a lease, the instrument was described in the declaration to be made by the plaintiff of the one part, and the defendant of the other; and on the production of the lease it appeared to have been made by the plaintiff and his wife of the one part, and the defendant of the other; it was held, that this was no variance, although the premises demised were the property of the wife before marriage (*t*).

What is a Variance in the Premises.

In covenant on a lease, a mistake in the name of a person stated in the demise as the late tenant of the premises, was a fatal variance (*u*). Where the plaintiff declared on a demise of "lands," and the demise was of all that piece or parcel of ground and premises, containing by estimate one acre; it was held, that this was not a variance, for one

(*m*) *Swallow* v. *Beaumont*, 2 Barn. & Ald. 765; 1 Chit. 518.

(*n*) *Hill* v. *Saunders*, 1 Car. & Pay. 80.

(*o*) *Brown* v. *Knill*, 2 Brod. & Bing. 395; 5 Moore, 164; *S. P. Tempany* v. *Burnand*, 4 Camp. 20; see also *Beech* v. *White*, 12 Ad. & El. 668; Arn. & Hod. 111; 4 Per. & Dav. 399.

(*p*) *Horsefall* v. *Testar*, 1 Moore, 89.

(*q*) *Price* v. *Birch*, 4 Man. & Gran. 1.

(*r*) *Paine* v. *Emery*, 1 Gale, 236; 4 Dowl. 191. And see as to variance and amendment under 3 & 4 Will. IV. c. 42, s. 23, *Brashier* v. *Jackson*, 8 Dowl. 784; and *Bowers* v. *Nixon*, 12 Queen's B. Rep. 546; 2 Car. & Kir. 372, *S. C.*

(*s*) *Hamborough* v. *Wilkie*, 1 Chit. 518; 4 Maule & Selw. 474, n.

(*t*) *Arnold* v. *Revoult*, 1 Brod. & Bing. 433; 4 Moore, 66.

(*u*) *Bowditch* v. *Mawley*, 1 Camp. 195.

piece would satisfy the term "lands" (*x*). A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz., the Cellar-beer field, instead of the Aller-beer field, being considered as part of the description of the deed declared on, though the plaintiff waived going for damages on the breach of that covenant, was fatal (*y*). Where the plaintiff declared that the defendant demised to him a wharf and storehouses, &c., the word in the deed being storehouse; it was held to be a fatal variance, although no breach was assigned upon the demise of the storehouse, but only upon a covenant by the defendant not to suffer a wharf to be erected on his estate to the injury of the said wharf, per quod plaintiff was deprived of certain gains which would otherwise have arisen from wharfage dues, storerooms, &c. (*z*). In an action on a lease "of the veins of coal under certain farms and lands therein described, situate in the parishes of B. and M., then in the several occupations of *A.*, *B.* and *C.*, with liberty to dig any pits, shafts, levels, soughs," &c., the declaration varied from the deed; first, in stating that the land was set out by admeasurement instead of by reputation; secondly, by changing the word "soughs" to "sloughs;" thirdly, in stating the lands to be situate in the parish of B. and M., instead of the parishes of B. and M.; and fourthly, in stating them to be in the occupation of *A.*, *B.* and *C.*, instead of in the several occupations of *A.*, *B.* and *C.*; it was held, that the first and third variances were fatal, but that the second and fourth were immaterial (*a*).

Effect of a Variance, and Mode of taking Advantage of it.

The effect of a material variance in setting out a deed is to nonsuit the plaintiff, even though the defendant has admitted the due execution of the instrument stated in the declaration (*b*); but now by the recent statutes (*c*), as we have before observed, variances may be amended by the judge at the trial.

Statement of the Title of the Plaintiff.

A declaration in covenant at the suit of the executor of a termor, for a breach of covenant after death of the termor, should state the interest and title of the latter in the premises: where, therefore, a declaration stated that *A. B.* demised premises to the testator of the plaintiff (viz. the termor, without stating that *A. B.* was seised in fee, or of any other estate), and that the plaintiff's testator demised them to *C. D.*, and stated a breach of covenant after the death of the plaintiff's testator, it was held bad (*d*). Where the assignee of the reversion, who sued the defendant in covenant, alleged that the

(*x*) *Birch* v. *Gibbs*, 6 Maule & Selw. 115.
(*y*) *Pitt* v. *Green*, 9 East, 188.
(*z*) *Hoar* v. *Mill*, 4 Maule & Selw. 470.
(*a*) *Morgan* v. *Edwards*, 2 Marsh. 96; 6 Taunt. 394.
(*b*) *Goldie* v. *Shuttleworth*, 1 Camp. 70.
(*c*) 9 Geo. IV. c. 15, and 3 & 4 Will. IV. c. 42, s. 23; 15 & 16 Vict. c. 76, s. 222; and 17 & 18 Vict. c. 125, s. 96; post, Chap. VI., Sect. 5.
(*d*) If the declaration unnecessarily states the plaintiff's title to property demised, it seems this does not enable the defendant, the lessee, to deny that title, he being estopped by his deed; *Beckett* v. *Bradley*, 7 Man. & Gran. 994; 8 Scott, N. R. 843; 2 Dowl. & Low. 586; *Mackay* v. *Mackreth*, 2 Chit. 461; 4 Dougl. 213.

lessor was seised (without stating of what estate), and being so seised, *devised* to the plaintiff in fee; it was held a sufficient allegation of title after verdict (*e*). A declaration for rent by the assignee of a *reversion* for the life of another, omitting to state that the cestui que vie was living when the rent accrued, was held bad; and the fault was *not* cured by a statement in the breach, that after the plaintiff became so seised the rent became due and still was in arrear to the plaintiff (*f*). In an action by the husband of the tenant in fee, he ought to have declared on a seisin in fee in himself and his wife, in right of his wife; if he stated that he was seised in his demesne as of freehold in right of his wife, it was bad on special demurrer (*g*): but on an assignment of land by husband and wife, where they were seised to them and the heirs of the husband, it was sufficient to declare as assignee of the husband (*h*). A declaration on a lease, which stated that the plaintiffs derived their title from two lessors only, and that two other lessors, who were also parties to the demise, had no interest therein, was held to be supported by the production of the lease, which appeared to be a demise by the four (*i*). Where a plaintiff declared as *heir* at law, upon a lease granted by his ancestor, he had to show how he was heir at law; a general averment that the demised premises *descended* to him as cousin and heir at law, was not sufficient (*k*). An assignee, however, need not name himself assignee, where he showed a *legal* assignment: nor need he show the deed of assignment, provided the subject in dispute might be assigned without deed; although the covenant on which the action was brought ought to be by deed (*l*).

Statement of derivative Title of Defendant.

Where the action is against the assignee of the lessee, the plaintiff need not set out the several mesne assignments to the defendant, for they do not lie within his knowledge; but it is sufficient for him to set forth the original demise to the lessee, and to state that all the estate and interest have, by several mesne assignments, come to the defendant (*m*). This is the case even though the plaintiff himself be an assignee. It must, however, be shown that the defendant is the assignee of the term as well as of the premises, for otherwise it might be an assignment of another estate than the term of the lessee; and there must always be an allegation of entry and possession by the defendant.

How the Breach of Covenant should be alleged generally.

The plaintiff should be careful not to qualify the negative words of his breach by adding affirmatively other matter of breach: thus it has been held, that if the breach of a covenant be assigned thus—"that

(*e*) *Harris* v. *Beavan*, 4 Bing. 646; 1 Moore & Pay. 633.

(*f*) *Fryer* v. *Coombs*, 11 Ad. & El. 403; 4 Per. & Dav. 119, n.

(*g*) *Polyblank* v. *Hawkins*, 1 Dougl. 329.

(*h*) *Major* v. *Talbot*, Cro. Car. 285.

(*i*) *Wood* v. *Day*, 1 Moore, 389.

(*k*) *Lidgbert* v. *Judd*, 7 Dowl. & Ryl. 517.

(*l*) *Noke* v. *Awder*, Cro. Eliz. 373, 436.

(*m*) The usual form is, "all the estate, right, title and interest of the said *B.* (the lessee) of, in and to the said demised premises, afterwards, to wit, on, &c., in the year of our Lord, &c., by assignment came to the said defendant."

the defendant has not used the farm in a husbandman-like manner, but on the contrary has committed waste," the plaintiff cannot give evidence of the defendant's using the farm in an unhusbandman-like manner, if it do not amount to waste: on the former words of the breach, had they stood alone, such evidence might have been given(n). So in an action for breach of covenant to repair, and yield up in repair, where the breach negatived the covenant, but added, "and on the contrary thereof, suffered and permitted the premises to be ruinous for want of needful repair," it was held, that the plaintiff could not prove voluntary waste (o). In covenant, the plaintiff may assign as many breaches as he will.

Allegation of Breach of the Covenant for Quiet Enjoyment.

It is necessary, in a breach of covenant for quiet enjoyment, to allege or show that the party who evicted the plaintiff had a lawful title, and was therefore not a mere trespasser. The plaintiff may, however, state generally, that the evictor lawfully claiming title, entered by virtue of such title, without setting forth the particulars of the title (p): for in assigning such a breach of covenant, it is sufficient to allege that at the time of the demise to the plaintiff, *A. B.* had lawful right and title to the premises, and having such lawful right and title, entered, &c. and evicted him, &c., without showing what title *A. B.* had or that he evicted the plaintiff by legal process, &c. (q). But it must not be left as a matter of doubt whether the evictor might not have come in under title from the plaintiff himself(r). The breach need not expressly allege that he entered "claiming title," if the disturbance complained of be such as clearly appears to be an assertion of right (s). A declaration in an action for quiet enjoyment having set out an indenture from *A.* to *B.*, in which it was recited that *J. S.* demised the premises to *A.* by indenture, and having afterwards stated that *J. S.* had entered and ejected *C.* from the premises for a forfeiture; it was held, that the Court might, after verdict, presume that *J. S.* had a title to the premises, although there was no express allegation of that fact; and although part of the special damage laid in the declaration did not fall strictly within the covenant alleged to be broken, as it must be presumed, after verdict, that the jury were directed at the trial not to take that part into their consideration (t). A lease was to commence on a future day, and the lessee was to be allowed to enter on certain lands for sowing wheat on a previous day, which he did: but when the day arrived for the lease to commence, the lessor refused to give possession to the lessee; in an action of covenant for this refusal, a breach that the lessee entered on

(n) *Harris* v. *Mantle*, 3 Term Rep. 307.

(o) *Edge* v. *Pemberton*, 12 Mees. & Wels. 187; 1 Dow. & Low. 467.

(p) *Hodgson* v. *East India Company*, 8 Term Rep. 278.

(q) *Foster* v. *Pierson*, 4 Term Rep. 617.

(r) *Brookes* v. *Humphreys*, 5 Bing. N. C. 55; 1 Arn. 379; 7 Dowl. 118; 6 Scott, 756.

(s) *Lloyd* v. *Tomkins*, 1 Term Rep. 671.

(t) *Campbell* v. *Lewis* (*in error*), 3 Barn. & Ald. 392; *S. C. Lewis* v. *Campbell*, 3 Moore, 35; 8 Taunt. 715.

the premises and became possessed of them for the term, and that the lessor afterwards entered on his possession and expelled him, is not properly stated (*u*).

SECT. 5.—*Pleadings.*

What Pleas may be pleaded generally.

In covenant there never was, properly speaking, any general issue; for though the defendant might plead non est factum, yet that only put the execution of the deed in issue, and not the breach of covenant; and non infregit conventionem, to a negative covenant, has been holden to be a bad plea. The defendant, therefore, must specially controvert the deed; or show that he has *performed* the covenant, or is legally *excused* from the performance of it; or, admitting the breach, that he is *discharged* by matter ex post facto, as a release, &c. The pleas, therefore, to the action for breach of covenant for payment of rent, are, 1. Non est factum. 2. Performance. 3. Other covenants in bar. 4. Entry and eviction. 5. A release. 6. Accord and satisfaction. 7. Tender and refusal. 8. Reins en arrere, or payment at the day. 9. Infancy and bankruptcy. And 10. Payment of money into Court. The defendant may have leave to plead several matters in this action; but leave has been refused when the pleas were inconsistent (*x*).

Non est factum.

On the plea of non est factum, the issue is, that there is no such deed as that stated in the declaration: the lessor's title, therefore, cannot on such plea be controverted. As to the plea of nil habuit in tenementis, the general rule is, that a tenant cannot be permitted to controvert the title of his landlord; and it is founded on good sense: for so long as the lessee continues to enjoy the land demised, it would be unjust that he should be permitted to deny the title under which he holds possession. Therefore, in an action of covenant for rent on an indenture, brought by the assignees of the lessor (a bankrupt), the lessee cannot plead that the lessor nil habuit in tenementis (*y*). To an action by a lessor for a breach of covenant, the lessee cannot plead in bar, that the lessor had only an equitable estate in the premises; for that is tantamount to a plea of nil habuit in tenementis (*z*).

Plea of other Covenants in Bar, and Set-off.

It was at one time held, that another covenant may be pleaded in bar, when both covenants are in the same deed, for the meaning of the parties is to be collected from the whole of the deed: thus, in covenant for rent, the defendant was permitted to plead another covenant in the same indenture, that he, as lessee, might retain as much of the rent as was necessary for repairs and charges (*a*). In covenant, unliquidated damages, arising from the breach of other cove-

(*u*) *Hawkes* v. *Orton*, 5 Ad. & El. 367; 6 Nev. & Man. 842.
(*x*) Gilb. Rep. 123; *Whale* v. *Lenny*, 2 Moore & Payne, 19.
(*y*) *Parker* v. *Manning*, 7 Term Rep. 537.
(*z*) *Blake* v. *Foster*, 8 Term Rep. 487.
(*a*) *Johnson* v. *Carr*, 1 Lev. 152.

nants to be performed by the plaintiff, cannot be pleaded by way of set-off (*b*): therefore, to an action of covenant for rent by a landlord, the defendant cannot set-off any uncertain damages that he may be entitled to recover against the landlord, on any of the other covenants in the lease (*c*). The covenant to pay rent is absolute, and if the tenant sustains any injury from the act of his landlord, he may have his remedy by cross action. In an action of covenant for not indemnifying a person against taxes, no plea of set-off can be sustained (*d*).

When a Set-off is available.

A set-off is allowable, however, by the statutes of set-off in an action of covenant for non-payment of money, as for rent; but the demand intended to be set-off must be such as might have been the subject of an action either of debt, covenant, or assumpsit. A set-off must be specially pleaded (*e*).

Plea of Entry and Eviction.

Entry and eviction is a good plea to an action for rent, for the rent is suspended by entry into the whole or any part; but the eviction must be tortious, and such as ousts the defendant of his possession, for a mere trespass will not suffice (*f*). The reason of this is, that when the lessee has been evicted, he has a right to show that he does not enjoy that which was the consideration for his covenant to pay the rent, notwithstanding he has bound himself by the covenant; if, therefore, the defendant has been evicted, he cannot be compelled to pay rent, and he may plead that fact in answer to the plaintiff's demand. Where, in covenant for non-payment of rent, the plaintiff declared that he was seised of tithes, and by indenture demised them to the defendant rendering rent, and that the defendant covenanted to pay it, and assigned the breach in non-payment of so much; and the defendant having pleaded eviction, the plaintiff demurred; judgment was given for the defendant, because it is a rent, and the eviction is a suspension of it, and therefore a good plea (*g*). But entry and eviction by authority of the lessor on part of the premises is no defence to an action on a covenant for assigning the premises without license, and it is not a good defence to an action for the breach of any covenant, except that for the payment of the rent (*h*). Entry and eviction, either by the landlord or a stranger, must in covenant be pleaded specially; and where an eviction by a stranger is pleaded, the defendant must show that the stranger had a right to evict him, and set out the stranger's title at length (*i*). To a plea of eviction, the plaintiff may reply an entry by virtue of a power, and traverse the eviction. Where, in covenant by a lessee against his lessor, a breach was assigned on the covenant for quiet enjoyment, for that the lessor ousted him; and the

(*b*) *Howlett* v. *Strickland*, Cowp. 56.
(*c*) *Weigall* v. *Waters*, 6 Term Rep. 488.
(*d*) *Cooper* v. *Robinson*, 2 Chit. 161.
(*e*) By rule of court, Hil. T. 4 Will. IV.
(*f*) 1 Saund. 204, n. 2.
(*g*) *Dalston* v. *Reeve*, 1 Lord Raym. 77.
(*h*) *Newton* v. *Allin*, 1 Queen's B. Rep. 518; 1 Gale & Dav. 44; *Morrison* v. *Chadwick*, 7 C. B. Rep. 266; 6 Dow. & Low. 567.
(*i*) *Jordan* v. *Twills*, Selw. N. P. *Covenant*, VII. *Eviction*; 1 Saund. 304, n. 4.

defendant pleaded, that he entered to distrain for rent, and traversed that he ousted him from the premises; to which the plaintiff demurred, for that he did not traverse that he ousted him from the premises, or any part thereof; the Court thought the plea good, and that proof of any part, had the plaintiff joined issue, would have been sufficient (*j*). Certain premises had been demised by lease to the defendant for building purposes, and at the time of the execution of the lease there existed a public passage through the lands unknown to the lessee. The lessee began to build on this passage (having been informed by the landlord's agent that he might do so), but the county surveyor, by order of justices, removed the defendant's buildings, to preserve the passage for the public. It was held, that the occupation of part of the premises by the surveyor, with assertion of an easement for the public, and did not constitute an eviction of part by title paramount (*k*).

Plea of Accord and Satisfaction (*l*).

Accord and satisfaction made before breach of a covenant, cannot be pleaded in bar of an action on the covenant, for, until breach, no damages are claimable (*m*); but it is a good plea where there has been an actual breach. This plea goes in discharge of damages, and not of the covenant itself, for that remains (*n*); therefore, where the plaintiff declared that in consideration that he would permit *S. P.* to enjoy a farm at *C.* for one year, the defendant covenanted to pay the rent of 72*l.* per annum, and also 200*l.* then in arrear; and the breach assigned was the non-payment of the rent; and the defendant pleaded, that "before any cause of action did arise on the covenant, it had been agreed between him and the plaintiff, that the plaintiff should take 30*l.* in discharge of all covenants, which the plaintiff had accepted:" on demurrer, this plea was held to be a bad one, for at the time there was no covenant broken or damages sustained. In covenant, where the damages to be recovered are uncertain, a lesser thing may be done in satisfaction; and in such case, "accord and satisfaction" is a good plea: but on a breach that the house was not in repair, a plea that the plaintiff agreed that the defendant should employ a person four days in and about repairing the house, in satisfaction, is bad; for the defendant was obliged to do the repairs by the original covenant (*o*). In covenant for not delivering up premises at the end of a term in good repair, a plea that after the covenant was broken, an agreement was entered into that, in consideration that the defendant had become tenant from year to year, and had promised to repair the premises before a certain day, the plaintiff would give time for the reparation without bringing an action, and that the plaintiff had nevertheless commenced his suit before that day, is bad; first, because it states an

(*j*) Bull. N. P. 301.
(*k*) *Herbert* v. *Kennan*, 7 Ir. Jurist, 43.
(*l*) As to what defences this plea is pleadable with, see 15 & 16 Vict. c. 76, s. 84.
(*m*) *Kaye* v. *Waghorn*, 1 Taunt. 428.
(*n*) Esp. N. P. 308; *Alden* v. *Blaque*, Cro. Jac. 99.
(*o*) *Adams* v. *Tapling*, 4 Mod. 88.

accord executory only; and, secondly, because there was no good consideration for the defendant's promise to repair, or for the plaintiff's promise to forbear to sue (*p*). To covenant for enjoyment free from arrears, a plea that the defendant delivered money to the plaintiff, with intention for him to pay it over to the lessor, is good (*q*).

Plea of Tender and Refusal.

Upon a bare covenant for the payment of money, the defendant may plead a tender (*r*); therefore, where an action of debt was commenced against the defendant for the non-payment of rent, and discontinued, and an action of covenant was then brought for the same rent, which the defendant tendered previously to its commencement; it was held, that such tender might be pleaded. It is doubtful whether, on a plea of tender, the defendant's perpetual readiness to pay be traversable.

Plea of riens en arrere.

Riens en arrere is not a good plea to an action of covenant for non-payment of rent on a specified day (*s*); and that the demand "was levied by distress" cannot be pleaded, for that is a confession that it was not paid at the day, to which time the breach refers (*t*).

Plea of Infancy and Bankruptcy.

Infancy is another plea in this action, which may or may not be good, according to circumstances. Bankruptcy of the lessee is no plea to an action of covenant brought for rent accrued since; for besides that the rent was not a debt due at the time of the bankruptcy, and so could not be proved under it, it is a settled principle that the tenant's liability on his covenant to pay rent subsists during the continuance of the lease, notwithstanding he may become a bankrupt, and be deprived of all his property; but it is otherwise of the assignee of the tenant (*u*).

Plea of Payment of Money into Court.

Where a sum of money demanded was certain, or capable of being ascertained by computation, payment into Court was admitted (*x*): therefore money was allowed to be paid into Court on a breach assigned in covenant for the non-payment of money (*y*); as in an action of covenant for rent, or for 5*l.* an acre for ploughing meadow: but there could formerly be no payment of money into Court where the damage was unliquidated, and the breach was of any description other than for a money demand; as in an action for dilapidations (*z*). By the recent statute (*a*), however, money may now, in all cases of covenant, be brought into Court. Where there were several counts or breaches in the declaration, and as to some of them the defendant might bring money into Court, but not as to the others, he might obtain

(*p*) *Bayley* v. *Homan*, 5 Scott, 94; 3 Hodges, 184; 3 Bing. N. C. 915.

(*q*) *Griffith* v. *Harrison*, 4 Mod. 249.

(*r*) *Johnson* v. *Clay*, 1 Moore, 200; 7 Taunt. 486.

(*s*) *Hare* v. *Savil*, 1 Brownl. & Gold. 19; *Baden* v. *Flight*, 4 Scott, 412; 3 Hodges, 141; 3 Bing. N. C. 685.

(*t*) Esp. N. P. 309; *Aldridge* v. *Howard*, 4 Man. & Gran. 921; 5 Scott, N. R. 623.

(*u*) *Mills* v. *Auriol*, 1 H. Black. 433; and see *Auriol* v. *Mills* (*in error*), 4 Term Rep. 94; and *Wilkins* v. *Wingate*, 6 Term Rep. 62.

(*x*) *Hallett* v. *East India Company*, 2 Burr. 1120.

(*y*) *Fulwell* v. *Hall*, 2 W. Black. 837.

(*z*) *Salt* v. *Salt*, 8 Term Rep. 47.

(*a*) 3 & 4 Will. IV. c. 42, s. 21, and the rule of Trin. Term, 1 Vict.

a rule for bringing it in specially: thus, where an action was brought in covenant upon a lease for non-payment of rent, and not repairing, the Court made a rule, that upon payment of what should appear to be due for rent, the proceedings as to that should be stayed; and as to the other breaches, that the plaintiff should proceed as he should think fit. It was also held, that money might be paid into Court on one of several breaches of a covenant contained in a lease set forth in a declaration, where the plaintiff's particular specified the sum he claimed on that breach (*b*). Where there are several breaches or counts, a plea of payment of one entire sum in satisfaction of all is good (*c*). In covenant for non-repair of premises, a plea of payment of money into Court, and that the plaintiff had not sustained damages to a greater amount, admits some damage upon every part of the breach of covenant in the declaration, and admits that a notice to repair was given in writing, as well as other similar omissions of allegations in the declaration (*d*). In covenant on an insurance against fire, money may be paid into Court, under 19 Geo. II. c. 37, s. 7 (*e*).

Other Special Pleas.

In an action against the assignee of a term, a plea of assignment over before the breach occurred, is a good plea in bar, even to a married woman (*f*). Such a plea ought to show that the assignment over was made after the assignment stated in the declaration; but if it does not, no objection can be made against it after replication, that such assignment over was fraudulent (*g*). Where, in covenant against the assignee of a lease, the plaintiff declared that all the right, &c., vested in the defendant by assignment, and that afterwards the premises were out of repair; and defendant pleaded in bar, that for one period he was possessed of one-sixth of the premises, as tenant in common with *A.*, *B.* and *C.*, and for another period, of one-third, as tenant in common with *B.* and *C.*, and that no more or greater interest in the premises ever came to him by assignment; it was held, that the plea was bad in substance, as it could not be a bar to the whole action; that it was bad in form also, as it merely confessed that the defendant had possession of part of the premises, and not that he was assignee (*h*). In a similar case it was held, that a

(*b*) *Smith* v. *King*, 2 Dowl. 750; 3 Moore & Scott, 799.

(*c*) *Marshall* v. *Whiteside*, 1 Mees. & Wels. 188; 1 Gale, 379; 4 Dowl. 766; Tyr. & Gr. 485.

(*d*) *Wright* v. *Goddard*, 8 Ad. & El. 144; 3 Nev. & Per. 361; 1 Will. Wol. & Hod. 230. If an amount is tendered before plea, sufficient to cover the plaintiff's cause of action, he ought to accept it, or he may become liable to costs from that time; but a refusal to accept such a tender may be explained, as in an action by a landlord for non-repair of premises, where the attorney refused a sum, not knowing the value of the dilapidations, but afterwards accepted the same sum on its being paid into Court on plea; *Ackroyd* v. *Read*, 5 Mees. & Wels. 542.

(*e*) *Solomon* v. *Bewicke*, 2 Taunt. 317.

(*f*) *Barnfather* v. *Jordan*, 2 Dougl. 452.

(*g*) *Cooke* v. *Harris*, 1 Lord Raym. 367; 3 Salk. 48.

(*h*) *Merceron* v. *Dowson*, 8 Dowl. & Ryl. 264; 5 Barn. & Cres. 479. Where, to an action of covenant by tenants in common for not repairing a messuage, there was a plea, that the lessee, after the demise to

plea in abatement, that the estate of the lessee vested in the defendants, jointly with a third person, should state the mode in which they became jointly assignees (*i*). A lessee cannot plead, to covenant for rent, an assignment and tender by the assignee (*k*). If the defendant plead an assignment over before the rent accrued, it will not be a good replication, that the assignee never took actual possession (*l*). In covenant for seven quarters' rent, a plea, showing a surrender before the last four of the seven quarters' rent accrued, is bad on demurrer, because it does not go to the whole breach, and the breach is not entire, but part of it may be proved (*m*). In covenant for quiet enjoyment, the declaration stated, that before the demise to the plaintiff, the defendant had made a demise to *A.*, which was then subsisting; that in order to get into possession, the plaintiff brought an ejectment, but was non-suited on account of that prior demise, and that he had never been in possession; plea, that for the first half-year of the plaintiff's lease, the plaintiff might have enjoyed, &c., but that for non-payment of the rent for twenty-one days after that half-year, the defendant had a right to re-enter according to a proviso in the lease, and that he did re-enter, &c.; it was held on demurrer, that this was no answer to the plaintiff's demand (*n*). To an action on an assignment of a lease by deed against an administratrix, a plea of a parol promise by the plaintiff, that if the defendant applied for administration he would not charge her for breach of the covenants, is no answer (*o*). To an action on a covenant in an indenture of lease against the lessee for not yielding up all improvements erected during the term, a plea of a parol agreement between the lessor and an assignee of the lessee, that if the assignee would erect a greenhouse he should be at liberty to pull it down at the end of the term, is no answer (*p*).

Replications and subsequent Pleadings.

The replications and subsequent pleadings must of course depend entirely upon the form of the pleas, and must conform to them.

SECT. 6.—*Damages.*

Assessment of Damages.

In an action by a lessee on a covenant for quiet enjoyment, in a lease which was not warranted by the power the lessor had to lease, it was held, that the lessee might recover the value of the term, some costs in an action of ejectment, which the executor of the lessor defended,

him, and before the breach complained of, had purchased the interest of one of the lessors, whereby the lessee became tenant in common of the premises with the plaintiffs; it was held ill on general demurrer, the action being properly brought; *Gates* or *Yates* v. *Coles*, 2 Brod. & Bing. 660; 5 Moore, 554.

(*i*) *Heap* v. *Livingston*, 11 Mees. & Wels. 896; 1 Dow. & Low. 334.

(*k*) *Orgill* v. *Kemshead*, 4 Taunt. 642.

(*l*) *Walker* v. *Reeves*, 2 Dougl. 461, n.; better reported, 3 Dougl. 19.

(*m*) *Barnard* v. *Duthy*, 5 Taunt. 27.

(*n*) *Ludwell* v. *Newman*, 6 Term Rep. 465.

(*o*) *Harris* v. *Goodwyn*, 2 Scott, N. R. 459; 2 Man. & Gr. 405; Drink. 73.

(*p*) *West* v. *Blakeway*, 3 Scott, N. R. 199; 2 Man. & Gr. 729; 9 Dowl. 846.

and the sum recovered against the plaintiff for mesne profits, but not interest on either of those sums (*r*). It seems that interest may be recovered on rent due on a particular day as damages (*s*). Whether a party has broken any of his covenants or not, is a matter properly triable at law, as the damages (supposing a breach) cannot be settled without such trial (*t*). A lease of mines contained a covenant to work them, and also a covenant to raise at least a certain quantity of iron stone every year, and pay a certain royalty for it or else to pay a fixed rent; the lessor having declared in respect of breaches of both these covenants, and money having been paid into Court and accepted in satisfaction of the latter breach, the lessor is entitled to nominal damages only in respect of the former (*u*).

SECT. 7.—*Judgment and Execution.*

How the Judgment must be given.

In covenant for non-payment of rent at divers days, which amounts to so much, if in the declaration the sum is miscast, it is not error, but the plaintiff shall have a verdict for so much as is really in arrear (*x*).

(*r*) *Williams* v. *Burrell*, 1 Com. B. Rep. 402.

(*s*) Per Lord Ellenborough in *Skerry* v. *Preston*, 2 Chit. 245.

(*t*) *Stafford* v. *London* (*City*), 4 Bro. Parl. Cas. 635.

(*u*) *Foley* v. *Addenbrooke*, 13 Mees. & Wels. 174.

(*x*) *Thwaites* v. *Ashfield*, 5 Mod. 213.

CHAPTER II.

ACTION OF DEBT.

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When the Action of Debt is maintainable between landlord and Tenant generally.

SECT. 1.—*When maintainable.*

THE action of debt is founded upon a privity of contract, either express or implied, in which the certainty of the sum or duty appears; and the plaintiff is to recover the sum in numero, and not in damages (*a*). So far as regards the relative situation of landlord and tenant, it is, therefore, confined to the recovery of rent; but it may be supported, whether the contract of demise be by deed, by writing not under seal, or by parol. At common law, rents reserved on leases for years, or tenancies at will, were at all times recoverable by the action of debt (*b*); but it did not lie for rent reserved upon a freehold lease during the continuance of the lease (*c*): but since the statute abolishing real actions, it seems doubtful whether debt will not lie for a rent in fee; and at any rate it will lie for such a rent expressly covenanted to be paid (*d*). The statute of 8 Anne, c. 14, s. 4 (*e*), also enacts, that any persons entitled to rent in arrear, or a lease for life or lives, may have an action of debt during the existence of the life, as on a lease for years during the term; and by the statute 32 Hen. VIII. c. 37, s. 1, the executors and administrators of tenants, in fee, fee-tail or for life, of rent-services, rent-charges, rent-seck and fee-farms, may bring debt for the arrearages against the tenant who ought to have paid the same. Any words which are sufficient to create a privity of contract between the parties will enable the landlord to maintain an action of debt; it lies, therefore, for non-payment of the rent on the word "yielding" in a lease for years; for it is an agreement to pay the rent, which amounts to a contract. Since the action of debt is maintainable in respect of the privity of contract, it is immaterial whether there is any privity of estate or not; therefore, as between the parties to the contract, an entry by the tenant upon the land demised is not necessary to enable the landlord to support an action of debt for rent. Again,

(*a*) Bull. N. P. 167.
(*b*) Esp. N. P. 188.
(*c*) *Winchester* (*Bishop*) v. *Wright*, 2 Lord Raym. 1056.
(*d*) *Varley* v. *Leigh*, 2 Exch. Rep. 446; 17 Law J., N. S., Exch., 289.
(*e*) Debt does not lie at common law, nor by this statute, for the arrears of an annuity or yearly rent devised payable out of lands to *A.* during the life of *B.*, to whom the lands are devised for life, *B.* paying the same thereout, so long as the estate of freehold continues; *Webb* v. *Jiggs*, 4 Maule & Selw. 113.

the action lies for rent upon a lease, though the defendant entered before his title began; for though clearly he is a disseisor by his entry, and the accruing of his term shall not alter his estate, yet there is a privity of contract, and whether the entry be tortious or not, it cannot discharge the contract for payment of the rent (*e*). In some cases, the action of debt is the peculiar remedy, as against a lessee for an apportionment of rent, where he has been evicted from part of the premises by a third person; or against a devisee of land for a breach of covenant by the devisor. The action of debt is also the method of recovering the double value of premises given by the statute 4 Geo. II. c. 28, s. 1 (*f*); and it can also be maintained for double rent under the statute 11 Geo. II. c. 19, s. 18 (*g*), for double the value of goods fraudulently removed under the statute 11 Geo. II. c. 19, s. 3 (*h*), and on replevin bonds (*i*).

Effect of an Assignment of the Interest of the Parties.

If the lessor assign his rent, without the reversion, the assignee may maintain an action of debt for the rent, because the privity of contract is transferred (*k*): but if the lessor grant away his reversion, he cannot have an action of debt for the rent, because being incident to the reversion, it passes with it (*l*). The grantee of the reversion even cannot have debt against the lessee, if he has assigned over; for there was no privity between them, but by reason of the privity of estate, and that being gone by the assignment, this action will not lie (*m*). If a lessee for years assign all his interest to another, the lessor may still have an action of debt against him, for rent in arrear, after the assignment; first, because the lessee shall not prevent, by his own act, such remedy as the lessor has against him, on his contract; secondly, because he might grant the term to a poor man, who would not be able to manure the land, and so for need or malice the land would lie untilled, and the lessor be without remedy, either by distress or action of debt (*n*). The lessor may, however, either tacitly or expressly accept the assignee for his tenant, and so discharge the original lessee; and if he once accept rent from the assignee, he can never resort to this remedy against the first lessee (*o*).

When the Action of Debt lies for Use and Occupation.

The action of debt will lie for use and occupation (*p*), (even by a corporation aggregate (*q*),) where rent is in arrear by a tenant who holds under a lease not by deed, as under a writing without deed (*r*), or a parol demise. The action of debt for use and occupation is main-

(*e*) *Alexander* v. *Dyer*, Cro. Eliz. 169.
(*f*) Ante, Book II., Chap. VI., Sect. 3, (b), p. 524.
(*g*) Ante, Book II., Chap. VI., Sect. 3, (c), p. 526.
(*h*) Ante, Book II., Chap. II., Sect. 4, (d), p. 382.
(*i*) Post, Chap. VI., Sect. 8.
(*k*) *Allen* v. *Bryan*, 5 Barn. & Cres. 512; *Robins* v. *Coz*, 1 Lev. 22; *Marle* v. *Flake*, 3 Salk. 118. See ante, 585.
(*l*) Esp. N. P. 202.
(*m*) *Humble* v. *Glover*, Cro. Eliz. 328.
(*n*) *Auriol* v. *Mills*, 4 Term Rep. 98.
(*o*) Esp. N. P. 201.
(*p*) *Wilkins* v. *Wingate*, 6 Term Rep. 62; and see *Egler* v. *Marsden*, 5 Taunt. 25.
(*q*) *Rochester* (*Dean, &c.*) v. *Pierce*, 1 Camp. 466.
(*r*) *Gibson* v. *Kirk*, 1 Queen's B. Rep. 850; 1 Gale & Dav. 252.

tainable, although the defendant may not himself have occupied the premises; for the occupation appears to be only so far material as it is evidence of the existence of the contract upon which the rent becomes due. Wherever there is an express contract between the parties, the action is maintainable upon it; and where that is not the case, evidence of the occupation is strong to show the existence of an implied contract (*s*).

Sect. 2.—*Declaration.*

Venue.

In debt for rent upon a lease, founded on the privity of estate,—as when brought by the assignee or devisee of the lessor against the lessee (*t*); or by the lessor or his personal representatives against the assignee of the lessee (*u*); or against the executor of the lessee, in the debet and detinet (*x*);—the action is local, and the venue must be laid in the county where the estate lies; but in debt by the lessor against the lessee or his executor, in the detinet only, the action is transitory, and the venue may be laid in any county. Debt for use and occupation is not a local action (*y*). Where in debt for rent it was not shown in what parish the lands were situated, and a particular of the plaintiff's demand described them in a wrong parish; it was held, that the plaintiff might recover, it not appearing that any misrepresentation was intended, or that the defendant held more than one parcel of land of the plaintiff, so as to be misled by it (*z*).

What necessary when the Rent is due by Deed.

In declaring in debt on a specialty, it is usual to set out the deed; but that does not appear to be absolutely necessary in the case of debt for rent, unless the action is brought on a lease of an incorporeal hereditament,—as tithes or the like,—which lying in grant could not have been granted without deed (*a*). The declaration commonly proceeds at once to the statement of the instrument, without any inducement or statement of the consideration upon which it was founded; for in general the circumstances under which the deed was made are immaterial; thus, in declaring upon a lease, it is not necessary to set out the lessor's title to the lands demised. Upon the principle that the action is maintainable upon the privity of contract, in a declaration in debt for rent on a lease for years, the plaintiff need not set forth any entry or occupation; for though the defendant neither enters nor occupies, he must pay the rent, it being due by the lease or contract, and not by the occupation; therefore, though it is usual

(*s*) See further on this subject, post, Chap. IV., Sect. 1, (b).
(*t*) *Thrale* v. *Cornwall*, 1 Wils. 165.
(*u*) *Taylor* v. *Shum*, 1 Bos. & Pul. 23.
(*x*) Esp. N. P. 213.
(*y*) *Egler* v. *Marsden*, 5 Taunt. 25; *Herring* v. *Watts*, 8 Scott, N. R. 755; 7 Man. & Gran. 1018.
(*z*) *Davies* v. *Edwards*, 3 Maule & Selw. 380.
(*a*) 2 Saund. 297, n. 1.

in the declaration to allege that the lessee entered, it is not necessary. In declaring, however, on a lease at will for rent in arrear, the plaintiff must show an occupation; for the rent being only due in respect thereof, it should appear to the Court when the lessee entered, and how long he occupied (*b*). As each periodical reservation,—or gale, as it is called,—of rent, is a distinct debt, for which the lessor may have his action, he may declare for an entire gale at the end of any quarter or half-year, without showing how the former quarter or half-year has been satisfied; but, if he declare only for part of the gale, due at the end of any half-year or quarter, it is bad, unless he show how the remaining part was satisfied; for otherwise the lessee may be exposed to many actions for the same demand (*c*). Whenever rent is reserved periodically, the declaration should always state when it was due and owing, or it will be bad (*d*).

Where a declaration in debt for rent states that the rent became and was due, to wit, on a day named, being a quarter day, for so many quarters "*then* elapsed," the plaintiff on nunquam indebitatus must show that rent accrued in respect of the quarters ending on that day, and cannot insist upon rent accruing for earlier quarters (*e*).

What is a Variance in setting out the Deed.

Any material variance between the declaration and the deed declared on was formerly fatal (*f*); but now, by statute 3 & 4 Will. IV. c. 42, s. 23, extending the enactments of statute 9 Geo. IV. c. 15, misrecitals of instruments may be amended at the trial without any difficulty. And by 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96, amendments necessary in order to determine the real matter in controversy *must* be made.

Profert of Deed abolished.

The 15 & 16 Vict. c. 76, s. 55, renders it unnecessary "to make profert of any deed or other document mentioned or relied on in any pleading."

When the Title of Plaintiff must be alleged.

This action being founded upon the privity of contract, and the lessee, who is an original party to the deed, being estopped from denying the title of his lessor, the title of the latter need not be set out in an action between the latter and the former. Where, however, the action is brought by a party claiming by a derivative title from the lessor, it is necessary to allege and show the deduction of his title; and where the lessor had only a particular estate, it is necessary to show its commencement, and that he had an authority to grant the lease; thus, in debt by a remainderman, for rent reserved upon a lease by tenant for life, the plaintiff must show what authority the tenant for life had to make the lease (*g*).

(*b*) *Eaton* v. *Jaques*, 2 Dougl. 457.
(*c*) 2 Saund. 303, n. b.
(*d*) *Piltarfe* v. *Darby*, Show. 8.
(*e*) *Johnson* v. *Gibson*, 1 Ell. & Bl. 415.
(*f*) *Sands* v. *Ledger*, 2 Lord Raym. 792; *Vavasour* v. *Ormrod*, 6 Barn. & Cres. 430; 9 Dowl. & Ryl. 597; *Farewell* v. *Dickenson*, 6 Barn. & Cress. 251; 9 Dowl. & Ryl. 245; and *Curtis* v. *Spitty*, 1 Scott, 737.
(*g*) *Sands* v. *Ledger*, 2 Lord Raym. 792.

What necessary when the Action is for Use and Occupation.

In debt for use and occupation, the plaintiff may declare generally for the use and occupation of divers messuages, lands and tenements, without specifying where they are situate (*k*). The declaration need not set forth the particulars of the demise (*l*): therefore, in a case, where to a count for use and occupation generally the defendant demurred, and assigned for causes that it did not set forth any demise of the premises, nor for what term they were demised, nor what rent was payable, nor for what length of time the defendant held and occupied the premises, nor when the sum thereby supposed to be due became due, nor for what space of time; after argument, the Court of Common Pleas gave judgment for the plaintiff on that count. If the particulars of a demise be alleged, they must be proved: therefore, in an action for double rent on the statute 11 Geo. II. c. 19, s. 18, where the declaration stated a lease for three years, but on the evidence it appeared that the lease for three years was void under the Statute of Frauds, and that the defendant was only tenant from year to year; though this was sufficient for the action, yet a lease for three years having been laid, and not proved, the plaintiff was nonsuited (*m*).

Action of Debt by Executors or Administrators.

The declaration in debt by executors or administrators must be in the detinet only, even though the rent be reserved on a demise which commenced on the death of the testator, so that he never received any rent.

Action of Debt against Executors or Administrators.

In debt for rent against an executor or administrator, if the whole rent has accrued in the lifetime of the lessee, the action against his executor must be in the detinet only; and the executor, though he do not enter, is still chargeable in the detinet, because he cannot so waive the term as not to be liable for the rent as far as he has assets (*n*); but for the rent accrued after the death of the lessee, the action may be brought either in the debet or detinet, if the executor enters, for he is chargeable as assignee in respect of the perception of the profits, and it is not material whether he has assets or not. In such case he cannot plead plene administravit; but if the land be of less value than the rent, he may plead the special matter, viz. that he has no assets, and the land is of less value than the rent, and may pray judgment, whether he shall be charged otherwise than in the detinet only (*o*). Debt against an executor or administrator for rent in arrear, partly in the time of the testator or intestate, and partly in the time of the executor or administrator, is well brought in the detinet only (*p*). Now, by statute 3 & 4 Will. IV. c. 42, s. 14, an action of debt on simple contract is, in all cases, maintainable against executors and administrators.

(*k*) *King* v. *Fraser*, 6 East, 348; 2 Smith, 462.
(*l*) *Wilkins* v. *Wingate*, 6 Term Rep. 62.
(*m*) 2 Dougl. 668.
(*n*) 1 Saund. 1, n. 1; Bull. N. P. 169.
(*o*) Bull. N. P. 169; Esp. N. P. 217.
(*p*) *Aylmer* v. *Hide*, 2 Selw. N. P. 610.

SECT. 3.—*Pleadings.*

Pleas in the Action of Debt.

A plea of not guilty is a good plea, since the new rules (*p*), to an action by a landlord on the statute 11 Geo. II. c. 19, s. 3, for double value of goods fraudulently removed (*q*). Before these rules, it was said that in debt for rent on a demise by writing, without deed or by parol, the proper plea was non demisit (*r*).

Plea of nil habuit in Tenementis.

If both lessee and lessor sign a lease, the former is estopped from pleading nil habuit in tenementis to an action of debt for rent by the lessor (*s*). Nil habuit in tenementis, however, has been held to be a good plea on a demise by deed-poll, because, as to the lessee, it is no estoppel. It cannot be pleaded by a lessee in any case where occupation is enjoyed, for the Court will not permit a tenant to impeach his landlord's title (*t*). In debt on bond, conditioned for the payment of rent reserved upon a demise according to certain articles, the defendant is estopped from saying that he had not any thing in the land demised by the articles (*u*). In debt for rent by husband and wife, upon a lease by her and her first husband, it is a good plea that her first husband was sole seised, and that she had nothing in the land (*x*).

Plea of Riens in Arrere.

Riens in arrere is a good plea in debt for rent, though it would be bad in covenant for rent; for in covenant, such plea confesses the covenant broken, and goes only in mitigation of damages (*y*). Where the defendant pleaded, "that nothing of the rent is in arrear and unpaid as by the declaration is above supposed;" it was held to be the same as if he had said nil debet, and that it related to the time of the action brought, as well as that of the plea pleaded (*z*).

Plea of Payment or Tender.

The defendant may also plead payment at or after the day; for acceptance of rent may be pleaded in bar to debt for rent, though not to a recovery in covenant. If the defendant plead a tender on the land at the day, he must make a profert of the money into Court (*a*).

Plea of Payment of Money into Court.

In debt there may be a plea of payment of money into Court.

Plea of Entry and Eviction.

Entry and eviction of the whole or any part of the premises demised is a good plea in bar to an action of debt for the rent; for the doctrine of the lessee being estopped from denying his lessor's title exists only during the continuance of the occupation. It must, however, be a tortious entry and eviction, or an expulsion sufficient to occasion a suspension of the rent; a mere trespass will not be suffi-

(*p*) Hil. T. 4 Will. IV.
(*q*) *Jones* v. *Williams*, 4 Mees. & Wels. 375; 1 Horn. & Hurl. 348; 7 Dowl. 206.
(*r*) Bull. N. P. 170.
(*s*) *Wilkins* v. *Wingate*, 6 Term Rep. 62; and see *Parker* v. *Manning*, 7 Term Rep. 537. See ante, Book I., Chap. IV., Sect. 19, p. 174.
(*t*) Esp. N. P. 233; *Curtis* v. *Spitty*, 1 Bing. N. C. 15; 4 Moore & Scott, 554.
(*u*) *Strowd* v. *Willis*, Cro. Eliz. 362.
(*x*) *Brereton* v. *Evans*, Cro. Eliz. 700; and see *Lainson* v. *Tremere*, 1 Ad. & El. 792; 3 Nev. & Man. 603.
(*y*) Esp. N. P. 235.
(*z*) *Warner* v. *Theobald*, Cowp. 590.
(*a*) *Brownlow* v. *Hewley*, 1 Ld. Raym. 83.

cient; for if the lessor enter by virtue of a power reserved, or as a mere trespasser, and the lessee be not evicted, it will be no suspension of the rent (*c*). Besides stating the entry and eviction, the plea must state that the lessee was kept out of possession until after the rent became due, or it will be bad (*d*). Where to debt for rent, on a demise of three rooms, the plea was, that the plaintiff demised the said three rooms and another room, and that he entered into the other room, but did not traverse the demise of the three rooms only, it was held to be bad for want of such a traverse (*e*).

Plea of the Statute of Limitations.

The Statute of Limitations, 21 Jac. I. c. 16, enacts, that all actions for rent in arrear, or grounded on any lending or contract without specialty, must be brought within six years; although these words are general as to the limitation of all actions of debt for the arrears of rent; yet it has been held, that an action of debt for the arrears of rent reserved by indenture is not within the meaning of the statute (*f*). By statute 3 & 4 Will. IV. c. 42, s. 3, however, all actions for rent due on specialty are to be brought within twenty years after the cause of action accrued (*g*). The statute must in all cases be pleaded, and the plea must conclude with a verification (*h*).

Plea of Set-off.

By the statutes 2 Geo. II. c. 22, s. 13, and 8 Geo. II. c. 24, ss. 4, 5, mutual debts between the plaintiff and defendant may be set-off against each other; and by the late rules such matters must be specially pleaded (*i*).

Plea of Release.

A release must be specially pleaded (*k*). A release of all demands will not operate to release rent before it becomes due, for there is no demand; but it will release rent then due (*l*): therefore, if a man let land to another for a year, yielding the rent at Michaelmas, and before Michaelmas releases to the lessee all actions, he may still have his action for rent, for the release does not discharge it; but

(*c*) Bull. N. P. 177; *Doe* d. *Cheney* v. *Batten*, Cowp. 242.

(*d*) 1 Saund. 204, n. 2.

(*e*) Ibid. 206.

(*f*) Ibid. 58. The 3 & 4 Will. IV. c. 27, s. 42, does not apply to actions commenced before 24th July, 1833, when it was passed; *Paddon* v. *Bartlett*, 3 Ad. & El. 884; 5 Nev. & Man. 383; 1 Har. & Wol. 477. The limitation of the right to sue in covenant on an indenture of demise is regulated by the statute 3 & 4 Will. IV. c. 42, s. 3, and is not limited to six years by the statute 3 & 4 Will. IV. c. 27, s. 42; *Paget* v. *Foley*, 2 Bing. N. C. 679; 2 Hodges, 32; 3 Scott, 120; *Strachan* v. *Thomas*, 12 Ad. & El. 536; 4 Per. & Dav. 229; see also *Grant* v. *Ellis*, 2 Mees. & Wels. 113. See ante, Book II., Chap. II., Sect. 4, (a), p. 376. Neither does the 3rd section of 3 & 4 Will. IV. c. 42, repeal the 42nd section of 3 & 4 Will. IV. c. 27; *Humfrey* v. *Gery*, 7 Com. B. Rep. 567. The limitation prescribed by the 3 & 4 Will. IV. c. 27, does not apply to an action on a collateral covenant for payment of a rent charged on land, and the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge is barred by the above statute; *Manning* v. *Phelps*, 10 Exch. Rep. 59.

(*g*) The Statutes of Limitations are various. The first is the statute 21 Jac. I. c. 16. The statute 9 Geo. IV. c. 14, s. 1, requires all acknowledgments of debts to take the case out of the statute of James to be in writing. Further alterations have been made by the statutes 3 & 4 Will. IV. c. 27 (amended by 7 Will. IV. & 1 Vict. c. 28, and 6 & 7 Vict. c. 54), and 3 & 4 Will. IV. c. 42, s. 3.

(*h*) 1 Saund. 283, n. 2.

(*i*) Hil. Term, 4 Will. IV.

(*k*) See the Rules Hil. Term, 4 Will. IV.

(*l*) *Stevens* v. *Snow*, 2 Salk. 578.

he may discharge the lessee of the rent before the day by a special release (*m*).

Plea of Infancy.

Infancy is a good plea in debt for rent; but as a lease made to an infant is not void, but voidable only, if it be beneficial to him, he is liable to an action for the rent reserved (*n*). Where, to debt for rent, the defendant pleaded infancy at the time of the lease made; on demurrer the Court held, that the lease was voidable only at the election of the infant, manifested by waiving the land before the rent-day came, but he not having done so, and being of age before the next rent-day came, it was deemed an election, and the plaintiff had judgment (*o*).

Other special Pleas.

If a lessor, who has covenanted to repair, bring debt for his rent, it seems that the lessee may plead specially that he expended the rent in necessary repairs, and so owes nothing; if the lessor had brought covenant for rent, instead of debt, the lessee could not plead expenditure in reparations at all, the remedy being reciprocal (*p*). Where there is an express covenant in the same indenture, that the lessee may deduct for charges and repairs, the defendant clearly may plead it in bar to debt for rent (*q*).

Replications.

Though in debt for rent on a demise by indenture, it is not necessary to allege that the deed was an indenture; yet if it is not so alleged, and the defendant plead nil habuit in tenementis, it is said to be primâ facie a good plea, because no estoppel appears upon the record. The plaintiff, by replying that he had a sufficient estate to make the demise, loses the benefit of the estoppel, and as he will not rely thereon, the jury shall find the truth; but if he replies that the demise was by indenture, and concludes with a prayer of judgment, if the defendant shall be admitted to plead the plea against his own acceptance of the lease by indenture, the defendant shall be estopped (*r*). Where the declaration states the lease to be by indenture, the plaintiff need not reply the estoppel, but may demur, because the estoppel appears on the record (*s*).

SECT 4.—*Evidence.*

Evidence on non est factum.

The lease need not be proved in an action of debt on bond for the performance of covenants therein, where there has been judgment and a suggestion of damages to be assessed on the writ of inquiry; for the party is estopped from saying that the lease was not duly executed (*t*).

(*m*) Co. Litt. 292 b.
(*n*) *Ketsey's case*, Cro. Jac. 320.
(*o*) Ibid.; and see ante, p. 37; and *North Western Railway Company* v. *M'Michael*, 5 Exch. Rep. 128.
(*p*) Bull. N. P. 176.
(*q*) Esp. N. P. 234.
(*r*) 1 Saund. 276, n. 1; Bull. N. P. 170.
(*s*) 1 Saund. 25, n. 4.
(*t*) *Collins* v. *Rybot*, 1 Esp. 158.

Evidence on never was indebted.

The plea of "never was indebted" has the same operation as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance are to be pleaded specially (*u*).

SECT. 5.—*Damages.*

What Damages Jury give.

Though the debt is by specialty, yet if it depends upon something extrinsic, as rent, for example, the plaintiff may have a verdict for what is really due, though more is demanded (*x*).

(*u*) See post, Chap. IV., Sects. 3, 4.

(*x*) *Incledon* v. *Cripps*, 2 Salk. 659. The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 95, enacts, that "in all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a debt or damages."

CHAPTER III.

ACTION OF ASSUMPSIT.

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SECT. 1.—*When maintainable.*

(a) *Generally.*

For what the Action of Assumpsit is maintainable between Landlord and Tenant.

IF the lease be by writing not under seal, or by verbal demise, the remedy of the parties for the breach of such stipulations, as the terms of the agreement express, or the contract implies, is by an action of assumpsit. Assumpsit cannot be maintained on contract to repair by the assignee of the reversion, where the demise is not by deed, as the statute 32 Hen. VIII. c. 34 (*a*), does not in such case apply (*b*); but it may be maintained, in such case, by the lessor himself, notwithstanding the assignment (*c*). The usual actions of assumpsit within the scope of this work are:—those which are brought to recover the price of the sale, and the value of the use and occupation of real property; for the sale of crops, and the agistment of cattle—those in which contribution for party-walls is sought to be recovered—those which arise from the breach of contract between landlord and tenant, respecting the repair, or husband-like treatment of the premises, indemnity against ground-rent, or the quiet enjoyment of the land—and those which arise from the breach of contract between the vendor and vendee of real property.

Upon what Instruments the Action is maintainable.

Covenant being the proper form of action in all cases where the contract is under seal, assumpsit can only be supported when the contract is by writing not under seal, or by parol; but the contract may be either expressly entered into by the parties, or raised by implication of law. Where a person will not rely upon the promise which the law will raise, but takes a bond as a security, he cannot recover in assumpsit on the implied promise (*d*). Therefore a lessee, who has assigned his term by indenture, is liable, in an action of covenant on the word "grant," to his assignee for money which he has paid to the

(*a*) See ante, 585.
(*b*) *Standen* v. *Christmas*, 10 Queen's B. Rep. 135.
(*c*) *Bickford* v. *Parson*, 5 C. B. 920.
(*d*) *Toussaint* v. *Martinant*, 2 Term Rep. 100.

superior landlord under a distress for rent, and assumpsit will not lie on an implied contract to indemnify the assignee, nor on an express promise without any new consideration (*e*).

(b) *For Use and Occupation* (*f*).

When Assumpsit for Use and Occupation is maintainable.

At common law it was held, that assumpsit would lie for rent on an express promise made at the same time as the lease, but not on an implied promise (*g*). By statute 11 Geo. II. c. 19, s. 14, however, "in order to obviate some difficulties that many times occur in the recovery of rents, where the demises are not by deed," it is enacted, "That it shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements or hereditaments held or occupied by the defendant, in an action on the case, for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action, any parol demise, or any agreement (not being by deed), whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered." In all cases, therefore, in which the demise is not by deed, whether a certain rent be reserved or not, the action of assumpsit is maintainable for use and occupation: even if there be an agreement by deed to demise a house, by words not amounting to an actual demise, the party may maintain assumpsit for use and occupation (*h*). *A.*, being tenant of *B.*, of a house, sub-let it to *C.*, and afterwards *B.* told *A.* that he had no objection to accepting *C.* as tenant, but that he would not exonerate *A.* from the rent. It was ruled, that as *B.* still held *A.* liable for the rent, *A.* might sue *C.* for the rent as due from *C.* to him in an action for use and occupation. It was also ruled, that a verbal agreement between *A.* and *C.* for *A.* to grant *C.* a lease of the house and some ground at a joint increased rent, but which lease *A.* afterwards refused to execute, afforded no answer to an action for use and occupation of the house by *A.* against *C.* (*i*). Where there has been an actual occupation, assumpsit for use and occupation lies in respect of incorporeal hereditaments (*k*). Where there has been an occupation under an agreement to take a lease of certain minerals, and to work them in certain proportions, an action for use and occupation may be maintained, as it is not a mere license,

(*e*) *Baber* v. *Harris*, 9 Ad. & El. 532; 1 Per. & Dav. 360; 2 Will. Wol. & Hod. 1.

(*f*) The 15 & 16 Vict. c. 76, Sched. (B.), gives the following form of declaration in use and occupation:—"The defendant's use, by the plaintiff's permission, of messuages and lands of the plaintiff." The following form is applicable to an action upon a lease for rent:—"That the plaintiff let to the defendant a house, No. 401, Piccadilly, for seven years, to hold from the —— day of ——, A. D. ——, at £ —— a year, payable quarterly, of which rent —— quarters are due and unpaid."

(*g*) Bull. N. P. 138.

(*h*) *Elliott* v. *Rogers*, 4 Esp. 59.

(*i*) *Dawson* v. *Lamb*, 3 Car. & Kir. 269.

(*k*) *Bird* v. *Higginson*, 2 Ad. & El. 696; 4 Nev. & Man. 505; 1 Har. & Wol. 61; 6 Ad. & El. 824; *Thomas* v. *Fredericks*, 10 Queen's B. Rep. 775.

but a right, constituting a hereditament within the statute 11 Geo. II. c. 19, s. 14 (*i*). Where two tenants in common demised premises, and the rent was for a time paid to the agent for both, but after notice given a moiety was paid to each, it was held, in a joint action of assumpsit by trustees for the rent, that it was a question for the jury, whether this was a new contract of demise with a separate reservation of the rent to each (*k*). A corporation aggregate may sue in assumpsit or debt for use and occupation, where the tenant has held premises under them, and paid rent (*l*), whether the subject matter be a corporeal or incorporeal hereditament (*m*). The action for use and occupation may be brought in the County Court of Middlesex (*n*): and where for a sum not exceeding 20*l.*, in the County Courts established under the statute 9 & 10 Vict. c. 95 (*o*).

Nature of the Action for Use and Occupation.

The action for use and occupation is founded on a contract; and unless there be a contract express or implied, the action cannot be maintained (*p*). There may, however, be a liability for use and occupation where an action for rent cannot be maintained, therefore if a party enter under an agreement for a demise at a certain rent, the rent not to begin till the repairs are completed by the landlord, the agreement being silent as to the terms of present occupation, the entry and occupation before the repairs are executed may be evidence for the jury of an implied agreement to pay in the meanwhile what the premises are worth; and even if the tenant leave before the repairs are done, the question will be whether there was such an implied agreement, and if there were, he will be liable for a reasonable compensation for his occupation (*q*). The action being, as we have seen, founded on contract, will not lie where the possession of the tenant is adverse and tortious; unless, indeed, the plaintiff ceases to consider it as such, by waiving the tort, and recurring to his remedy by the action on the contract for use and occupation (*r*). Where the plaintiff was entitled to a cottage after his mother's death, and the defendant had

(*i*) *Jones* v. *Reynolds*, 4 Ad. & El. 805; 6 Nev. & Man. 441; 7 Car. & Pay. 335.

(*k*) *Powis* v. *Smith*, 5 Barn. & Ald. 850; 1 Dowl. & Ryl. 490. See also as to distress by tenants in common, ante, 357.

(*l*) *Stafford* (*Mayor, &c.*) v. *Till*, 4 Bing. 75; 12 Moore, 260; *Dean and Chapter of Rochester* v. *Pierce*, 1 Camp. 466; *Southwark Bridge Company* v. *Sills*, 2 Car. & Pay. 371.

(*m*) *Mayor, &c. of Carmarthen* v. *Lewis*, 6 Car. & Pay. 608; *R.* v. *Inhabitants of Chipping Norton*, 5 East, 239; *R.* v. *Inhabitants of North Duffield*, 3 Man. & Selw. 247; *Dean and Chapter of Rochester* v. *Pierce*, 1 Camp. 466; *Beverley* v. *Lincoln Gas Light and Coke Company*, 6 Ad. & El. 829; *S. C.* 2 Nev. & Per. 283; *Southwark Bridge Company* v. *Sills*, 2 Car. & Pay. 371.

(*n*) *Parker* v. *Vaughan*, 2 Bos. & Pul. 29.

(*o*) See post, Chap. IX.

(*p*) *Birch* v. *Wright*, 1 Term Rep. 378.

(*q*) *Smith* v. *Eldridge*, 2 Com. Law Rep. 855. The distinction between rent and compensation for use and occupation is amply illustrated in the old cases before the statute gave the right of action for use and occupation in cases where there has been a demise; see *Johnson* v. *May*, 3 Lev. 150; *Freemason* v. *Booman*, 2 Keb. 291; *Mason* v. *Wellbank*, Skin. 238; and see the principle on which the above case was decided, *Jones* v. *Clark*, 2 Buls. 73; and see also as to the distinction between an action for rent and an action for use and occupation; *Towne* v. *Eynrich*, 1 Com. Law Rep. 235; *S. C.* 13 C. B. 892.

(*r*) See *Turner* v. *Cameron's Coalbrook, &c. Company*, 5 Exch. Rep. 932.

resided in it with his mother rent free till her death, and had since continued in possession, and had paid no rent, it was held, that the plaintiff might recover in an action for use and occupation (s). It follows that the remedy by this action is not concurrent with the action of ejectment for the same period of time, for they are wholly inconsistent,—in one, the plaintiff says that the defendant is his tenant under a contract of tenancy, and therefore he must pay him rent; in the other, he says that the contract is at an end, and he is no longer his tenant, therefore he must deliver up the possession: he cannot do both. The assignee of a lessee who merely continues in occupation after the expiration of a lease of the whole estate, may be treated by the heir of the lessor, but who is entitled to an undivided third only, as a tenant at sufferance, and be sued for use and occupation (t). After a recovery of possession of the premises by ejectment, the plaintiff may maintain use and occupation for the rent to the time of the demise, but not after (u): so it may be maintained by a grantee of an annuity, after a recovery in ejectment against a tenant who was in possession under a demise from year to year, for all rent in his hands at the time of notice by the grantee, and down to the day of the demise in the ejectment, but not afterwards (x). If rent is reserved quarterly, and the tenant holds over for a quarter, in the middle of which the landlord gives a notice and recovers for the subsequent time double value under the statute 4 Geo. II. c. 28, s. 1, he cannot recover anything for the previous part of the quarter (y). Where a woman, who held under a yearly tenancy before marriage, the rent being payable half-yearly, married in the middle of a half-year, and left the house, it was held, that an action of assumpsit for use and occupation for the half-year's rent could not be maintained against the husband alone, it being necessary to show that the occupation had been at his request (z). So in an action against the assignees of a bankrupt, it was held, that proof of the occupation being at their request was material (a). An action for use and occupation will not lie where the title is in dispute: the Court, therefore, will not try a title by such an action, ejectment being the proper remedy: this was decided in a case before the Court of King's Bench, by Lord Kenyon, C. J., wherein the action was brought against the tenant for rent, while the heir at law and a devisee were contesting their right to the premises (b). The proprietors of a theatre leased it, subject to the rights of a prior lessee of the use of the refreshment rooms; held, in an action for use and occupation against the lessee of the refresh-

(s) *Hellier* v. *Sillcox*, 19 Law J., Q. B., 295.
(t) *Bayley* v. *Bradley*, 5 C. B. Rep. 396.
(u) *Doe* d. *Batten* v. *Cheney*, Cowp. 246.
(x) *Birch* v. *Wright*, 1 Term Rep. 378.
(y) *Cobb* v. *Stokes*, 8 East, 358.
(z) *Richardson* v. *Hall*, 1 Brod. & Bing. 50; 3 Moore, 307.
(a) *Naish* v. *Tatlock*, 2 H. Black. 319; but see *Gibson* v. *Courthorpe*, 1 Dowl. & Ryl. 205.
(b) MS. Hil. T. 37 Geo. III.

ment rooms, that he was not entitled to any deduction from the rent on account of alterations made by the lessee of the theatre in the conduct of the theatre, which deprived the defendant of part of his profits, those alterations not having been made by the authority of the plaintiff (c).

When maintainable against a Person in Possession under a Contract of Sale or an Agreement for a Lease.

Upon the principle that the action can only be maintained where there is an actual contract either express or implied, it has been held, that if a purchaser take possession of premises under a contract of sale, which, on account of a defect in the vendor's title, fails to be completed, the vendor cannot afterwards recover rent for the period of the purchaser's possession, upon an implied contract for use and occupation (d): and where a man agreed to purchase premises, on an assurance that the person of whom he purchased had a long term in them, and on the faith of such assurance, at a considerable expense, entered into the possession of them; it was held, that he could not, on his refusing to complete his purchase (on account of the seller having a shorter term), be charged in an action for use and occupation (e). Both these cases have been since recognized by Best, C. J., who decided that where a person was in possession of premises under an agreement for a lease, which was never executed by reason of a default of the lessor, and afterwards gave up the possession, that he was not liable in use and occupation, although he had received rent from the under-tenants during the period of his occupation (f). But where a party was let into possession of premises provisionally, and with a view to an agreement for occupying them, which he afterwards refused to sign, he was held liable in use and occupation for the period of his occupation (g). So, in a subsequent case, where the vendee was suffered to enter on the premises while the title was under investigation, and the interest was afterwards determined for want of title, it was held, that the vendor could not recover for use and occupation, although the jury found the occupation to be beneficial (h). But a vendee is liable in use and occupation for the time that he continues in possession after the contract of sale goes off (i). The tenant of premises at 47*l.* a year received a notice to quit, and the landlord agreed with another

(c) *Drury Lane Theatre Company* v. *Chapman*, 1 Car. & Kir. 14.

(d) *Kirtland* v. *Pounsett*, 2 Taunt. 145; and see *Seaton* v. *Booth*, 1 Har. & Wol. 742; 4 Ad. & El. 528.

(e) *Hearne* v. *Tomlin*, Peake, 192.

(f) *Rumball* v. *Wright*, 1 Car. & Pay. 589.

(g) *Coggan* v. *Warwicker*, 3 Car. & Kir. 540.

(h) *Winterbottom* v. *Ingham*, 7 Queen's B. Rep. 611.

(i) *Howard* v. *Shaw*, 8 Mees. & Wels. 118. *A.* being in possession of land, agreed by writing that *H.* should sell, and he, *A.*, should purchase, the land for an estate pur autre vie; that *A.* "should be entitled to the possession or to the rents" "on or from this day;" that *H.* should make a good title in twenty-one days, and if the purchase should not be completed by a day named, *A.* was to pay interest. The purchase was not completed, but *A.* continued to hold. *H.* gave notice to quit in the ordinary form of notice to tenant from year to year. It was held, in the absence of any evidence as to right of possession in *A.*, that *H.* on these facts might recover against *A.* in ejectment. *Doe* d. *Bord* v. *Burton*, 16 Queen's B. Rep. 807.

party for a holding to commence on the expiration of the current term, at 80*l.* a year; before the term expired, the new tenant, by consent of all parties, was admitted in the place of the outgoing tenant; the new agreement was afterwards abandoned, but the new tenant continued to occupy; it was held, in an action for use and occupation, to be a question for the jury what rent was fairly payable, no necessary inference arising from the former holding at 47*l.*(*k*). Where *A.*, being tenant of *B.* of a house sub-let it to *C.*, and afterwards *B.* told *A.* that he had no objection to accepting *C.* as tenant, but that he would not exonerate *A.* from the rent; it was held, that as *B.* still held *A.* liable for the rent, *A.* might sue *C.* for the rent as due from *C.* to him, in an action for use and occupation, and that a verbal agreement between *A.* and *C.*, for *A.* to grant *C.* a lease of the house, and some ground at a joint increased rate, but which lease *A.* afterwards refused to execute, afforded no answer to an action for use and occupation of the house by *A.* against *B.*(*l*). In a case in the Exchequer, where the owner of an estate contracted to sell it to another, who thereupon sold part of the property so contracted for, by auction, to a third person; and the sub-vendee obtained possession, and the original vendor afterwards refused to perform his contract; on which a suit in equity was brought, pending which the original vendor obtained possession from the sub-vendee, on a demand to be restored to it, it being rumoured that the original purchaser had failed in the suit instituted for a specific performance; it was held, that the sub-vendee might, after a conveyance was decreed, maintain an action for use and occupation against the original vendor, for all the time during which he held possession so obtained from the second purchaser (*m*).

When maintainable against a Vendor after Conveyance.

If a vendor remains in possession after the conveyance is executed, an action for use and occupation cannot be maintained, as where a person conveyed an undivided moiety of several houses, in one of which he remained in possession (*n*).

What is a sufficient Title to maintain Use and Occupation.

Where the relation of landlord and tenant subsists between the parties to the action, and the defendant has come into the possession from the plaintiff, in this action, as in all actions for rent, the former is estopped from calling in question or impeaching the title of the latter to the premises, and it is not material in such case that the plaintiff should have the legal estate (*o*): but the defendant may show that the plaintiff's title has expired (*p*). This rule, which always

(*k*) *Thetford* (*Mayor, &c.*) v. *Tyler*, 8 Queen's B. Rep. 95.

(*l*) *Dawson* v. *Lamb*, 3 Car. & Kir. 269.

(*m*) *Hull* v. *Vaughan*, 6 Price, 157. See further on this subject, ante, Book I., Chap. V., Sect. 7, p. 205.

(*n*) *Tew* v. *Jones*, 13 Mees. & Wels. 12.

(*o*) *Hull* v. *Vaughan*, 6 Price, 157.

(*p*) *Doe* d. *Lowden* v. *Watson*, 2 Stark. 230; *Claridge* v. *Mackenzie*, 4 Man. & Gran. 152; 4 Scott, N. R. 811. See ante, Book I., Chap. IV., Sect. 19, p. 169, 170; and post, Chap. VI., Sect. 5, (h); Chap. VII., Sect. 12, (a). In an action for use and occupation, the plaintiff having given evidence of payment of rent by the defendant for nineteen years, the defendant would have gone into evidence to prove a title in another. Per Wilmot, J.: "Payment of rent, and holding under a person for so long a time,

applied to the case of ejectment, may now, notwithstanding the case of *Balls* v. *Westwood* (*q*), be considered applicable with some qualification to the action of use and occupation (*r*). Upon this principle it has been held, that in an action for use and occupation by an incumbent against a tenant of the glebe lands, the defendant cannot give evidence of a simoniacal presentation of the plaintiff, in order to avoid his title (*s*). So where premises had been let to *B.* for a term determinable by a notice to quit, and pending such term *C.* applied to *A.*, the landlord, for leave to become the tenant instead of *B.*, and upon *A.* consenting, agreed to stand in *B.*'s place, and offered to pay rent; it was held, that (though *B.*'s term had not been determined either by a notice to quit, or a surrender in writing) *A.* might maintain an action for use and occupation against *C.*, and that the latter could not set up *B.*'s title as a defence to that action (*t*): but where there was no express substitution of the defendant for a person who held under a lease which had never been assigned or surrendered; it was held, that he was not liable (*u*). A lease recited that one-third part of the land belonged to the lessor, and the other two-third parts to other persons, who had demised them to the lessor, and it then demised the whole to a lessee, who continued in possession after the expiration of the term; in use and occupation by the lessor for this subsequent occupation of the undivided third, it was held, there was a primâ facie case of title in the plaintiff, but which the defendant might rebut (*x*). A person who has occupied premises and paid rent to the apparent proprietor, cannot, when sued by him, allege that he has only the equitable estate, or is entitled only as co-executor with others (*y*). Payment of rent by a tenant to an authorized agent, who pays over the rent to his principal, is evidence against the tenant of the principal's title, although the agent did not disclose the name of the principal at the time. Where a tenant had paid rent to an agent of *A.*, and the premises were afterwards conveyed to *B.*, and the tenant continued to pay the rent to the agent, who paid it over to *B.* without informing the tenant of the change, such payment was held to be some evidence of *B.*'s title, and in an action of replevin by the tenant against parties claiming under *B.*, *B.* was not bound to prove the conveyance to him (*z*). But where a tenant was let into possession

is conclusive evidence against the defendant, and he cannot set up a title in another; and as to the objection that has been made, that the defendant may be liable to two actions for the rent, by persons having different titles, that cannot be the case; for though another has title, yet he cannot bring an action for the rent till he has made an entry, and recovered in ejectment; (which entry need not now be actually made in such case, but is supposed, 3 Burr. 1895; Run. Eject. 199,) and then it must be trespass for the mesne profits." Espin. N. P. 21.

(*q*) 2 Camp. 11.

(*r*) *Mountnoy* v. *Collier*, 1 Ell. & Bl. 630.

(*s*) *Sylliveen* v. *Stradling*, 2 Wils. 208; *Cooke* v. *Loxley*, 5 Term Rep. 4.

(*t*) *Phipps* v. *Sculthorpe*, 1 Barn. & Ald. 50.

(*u*) *Hyde* v. *Moakes*, 5 Car. & Pay. 42.

(*x*) *Bayley* v. *Bradley*, 4 C. B. Rep. 396.

(*y*) *Dolby* v. *Iles*, 11 Ad. & El. 335; 3 Per. & Dav. 287.

(*z*) *Hitchings* v. *Thompson*, 5 Exch. Rep. 50.

by *A.*, and paid him rent, and afterwards *A.* agreed to grant a lease to *B.*, who then received one quarter's rent from the tenant, but afterwards the agreement between *A.* and *B.* was rescinded, it was held, that in an action by *B.* for use and occupation for the next quarter's rent, that the tenant was not estopped from showing these facts, whereby the parties were remitted to their original rights (*a*). Where the lessor has assigned his reversion, the tenant is equally excluded from disputing the title of the assignee: thus, where a house was devised to a trustee, in trust for a devisee, for her sole and absolute use, who afterwards married *B.*, and he let part of it, under a written agreement signed by himself only, to the defendant, as a yearly tenant, and afterwards granted a lease for years of the whole of the house to the plaintiff, which the wife refused to execute, although she was named therein; and the defendant had notice of the lease, and was required to pay any rent that might subsequently accrue to the plaintiff; it was held, that the defendant was liable to the plaintiff, and that he could not impeach his title, as he must be taken to stand in the same situation as *B.*, whose title as landlord the defendant had acknowledged, by occupying and enjoying the premises under him (*b*). A person, having an agreement for a lease to himself, underlet part of the premises, and then agreed that the lease should be granted to another person, instead of himself, which was accordingly done, and notice was given to the under-tenant: it was held, that the lessee might maintain use and occupation against the under-tenant (*c*). After execution of an agreement for a lease, if the lessor mortgages the premises, the mortgagee may maintain an action for the actual use and occupation subsequent to the mortgage and notice thereof to the tenant (*d*). Where the defendant has not been let into possession by the plaintiff, he is only liable for rent from the time the latter acquired the legal estate, even although he may have had previously an equitable interest: thus, where premises were mortgaged to *A.* and the equity of redemption assigned to *B.*, and *A.* afterwards assigned the legal estate to *B.*; it was held, that *B.* could only recover rent from the tenant, from the time when he acquired the legal estate (*e*). If *A.* be in possession of land, and *B.* trespass upon it and occupy it for some time to the exclusion of *A.*, it is doubtful whether *A.* can waive the trespass and recover in use and occupation, as the latter action is based upon a contract, and no such contract exists in the case supposed. But a mortgagee, who has never been in actual possession

(*a*) *Brook* v. *Biggs*, 2 Bing. N. C. 572; 1 Hodges, 462; 2 Scott, 803.

(*b*) *Rennie* v. *Robinson*, 1 Bing. 147; 7 Moore, 539.

(*c*) *Green* v. *The London Cemetery Company*, 9 Car. & Pay. 6.

(*d*) *Rawson* v. *Eicke*, 7 Ad. & El. 451; Will. Wol. & Dav. 675; 2 Nev. & Per. 423; see also *Mortimer* v. *Preedy*, 3 Mees. & Wels. 602; 1 Horn. & Hurl. 157; 6 Dowl. 544; and *Waddilove* v. *Barnett*, 2 Scott, 763; 2 Bing. N. C. 538; 1 Hodges, 395; 4 Dowl. 347. See ante, 211, 212.

(*e*) *Cobb* v. *Carpenter*, 2 Camp. 13, n.

or seised of the land, and has not obtained a judgment in ejectment either by default or verdict against a party who has entered subsequently to the mortgage, cannot maintain trespass against such party, and therefore cannot waive the tort and sue in assumpsit (*f*). The action is maintainable without attornment, upon the statute 4 Anne, c. 16, ss. 9 and 10, by the assignees of the original lessor, who were trustees of one whose title the tenant (defendant) had notice of before he paid over his rent to his original landlord, though the tenant had no notice of the legal title being in the plaintiffs (*g*). Where there is an absolute lease in writing, not under seal, for a fixed term of years, and the landlord assigns his reversion, the assignee may maintain use and occupation, for the lessor having granted for himself and his assigns the permission to occupy, the assignee is virtually included, so that the occupation was by permission of the assignee as soon as the assignment was made (*h*). As the courts of law cannot notice equitable titles, it follows that he who is merely so entitled never can succeed in this action: it has accordingly been held, that where *A.* is seised in trust for *B.* and *C.*, neither *B.* nor *C.* can maintain use and occupation, &c. in his own name against the tenant, treating *A.* as his agent (*i*). Where there is a derivative title in the plaintiff from the first lessor, the doctrine of estoppel does not apply (*k*), and it is open to the tenant to show that no title passed: thus, where the occupier of a house paid rent to churchwardens, and the latter afterwards demised the house by lease for a term to *A.*, with notice to the tenant that he must consider *A.* as his landlord; it was held, in an action for use and occupation, that the tenant might impeach the lease, and show that the lessee had derived no title from the churchwardens (*l*). Where a mortgagor leased by deed, the assignee of the mortgagee, who is not bound by the lease, though the mortgagor joined in the assignment, may maintain an action for use and occupation against the tenant (*m*). Where lands were let by auction, and a memorandum of the terms was signed by the auctioneer and the tenant, and underneath there was a signature of approval by the owner, and a direction to pay the rent into the hands of the auctioneer, it was considered that the auctioneer could not maintain use and occupation (*n*). An

(*f*) *Turner* v. *Cameron's Coalbrook, &c. Company*, 5 Exch. Rep. 932.

(*g*) *Lumley* v. *Hodgson*, 16 East, 99; see also *Cook* v. *Moylan*, 1 Exch. Rep. 67; 5 Dowl. & Low. 101.

(*h*) *Standen* v. *Christmas*, 10 Queen's B. Rep. 135; and see *Bickford* v. *Parson*, 5 Q. B. 863.

(*i*) *Morgell* v. *Paul*, 2 Man. & Ryl. 303.

(*k*) But see ante, 155, 582.

(*l*) *Phillips* v. *Pearse*, 5 Barn. & Cres. 433; 8 Dowl. & Ryl. 43. A person holding under a lease, granted by parish officers before the statute 59 Geo. III. c. 12, s. 17, is a tenant from year to year; *Doe* d. *Higgs* v. *Terry*, 4 Ad. & El. 274; 5 Nev. & Man. 556; 1 Har. & Wol. 547; *Doe* d. *Hobbs* or *Higgs* v. *Cockell*, 4 Ad. & El. 478; 6 Nev. & Man. 179; see also *Allason* v. *Stark*, 9 Ad. & El. 255; 1 Per. & Dav. 183; and *Gouldsworth* v. *Knight*, 11 Mees. & Wels. 337; *Rumball* v. *Munt*, 8 Queen's B. Rep. 382; *St. Nicholas, Deptford* (*Churchwardens, &c.*) v. *Sketchley*, 8 Queen's B. Rep. 394; ante, p. 9.

(*m*) *Down* (*Lord*) v. *Thompson*, 11 Jurist, 1008.

(*n*) *Evans* v. *Evans*, 1 Har. & Wol. 239.

agreement to work a mine as long as it is "fairly workable," does not oblige the tenant to work it at a dead loss (*p*).

No Occupation.

It is now fully settled, although there are decisions and dicta of judges pointing the other way (*q*), that an action for use and occupation will not lie where there has not been an actual entry by the lessee (*r*). So where there has been an agreement to take premises from a future day, some occupation under it must be shown (*s*). And it is a misdirection on the part of a judge to tell a jury that "a constructive occupation" is sufficient to entitle the plaintiff to recover without telling them what a constructive occupation is (*t*). It has been held, that the landlord of a house, demised under a written agreement, might recover against his tenant, in an action for use and occupation, for rent accruing after the premises are burnt down, and no longer inhabited by the tenant (*u*): and the same has since been held in a case where there was not a written agreement (*x*). If a down be let for the purpose of digging ore, an action for use and occupation may be maintained, if the party has once taken possession; and he continues liable to the end of the tenancy, though he does not work the minerals (*y*).

What is a sufficient Occupation.

Where there is no other contract than that which is to be inferred from the fact of the occupation as tenant, he is also liable; for the action being founded on the implied contract, as well as that which is expressed, it is a general rule, that wherever the defendant uses or enjoys premises as a tenant by permission of the plaintiff, he is liable in the action. Where a parol demise has been made to two parties jointly, and one of them enters under it, he enters in respect of both, and use and occupation may be maintained against both, although there is no distinct proof that the other entered at all (*z*). Where, by written agreement, a party has let to the defendant, at a yearly rent, the right of fishing in a river with rod and line, and the fishery has

(*p*) *Jones* v. *Shears*, 7 Car. & Pay. 346.

(*q*) *Pinero* v. *Judson*, 6 Bing. 206; *Smith* v. *Twoart*, 3 Scott, N. R. 172; *Atkins* v. *Humphrey*, 2 Com. B. Rep. 654. Thus it had been laid down by Gibbs, C. J., that the action might be maintained upon an occupation which the defendant might have had, if he had not voluntarily abstained from it, as well as upon an actual occupation; *Whitehead* v. *Clifford*, 5 Taunt. 519.

(*r*) *Lowe* v. *Ross*, 5 Exch. Rep. 553; *Edge* v. *Strafford*, 1 Car. & Jer. 391; *Nation* v. *Tozer*, 1 Cromp. M. & Ros. 172.

(*s*) *Woolley* v. *Watling*, 7 Car. & Pay. 610.

(*t*) *Towne* v. *D'Heinrich*, 13 C. B. Rep. 892.

(*u*) *Baker* v. *Holtzapffell*, 4 Taunt. 45.

(*x*) *Izon* v. *Gorton*, 5 Bing. N. C. 501; 7 Scott, 537; 2 Arn. 39. See further on this point, ante, Book II., Chap. I., Sect. 7, p. 344.

(*y*) *Jones* v. *Reynolds*, 7 Car. & Pay. 335; 4 Ad. & El. 805; 6 Nev. & Man. 441. A lessee of coal mines entered into a covenant to pay a stated royalty of 1*s.* per ton for the coal obtained, and to pay a minimum rent of 300*l.* a year, that is to say, 3,000*l.* rent, or so much as, with the royalty, would amount at least to that sum. The coal turned out not to be worth the cost of working, and accordingly was not worked. The lessor brought an action for the 300*l.* a year rent; it was held, that as the lessor was not suing upon the covenant to work, and as the rule caveat emptor applied to a party taking a lease of coal mines, because every person acquainted with such property must know that mines are liable to be interrupted by faults, the Court would not interfere by injunction to restrain the action for the rent; *Ridgway* v. *Sneyd*, 24 Law Times, Chanc., 58.

(*z*) *Glen* v. *Dungey*, 4 Exch. Rep. 61.

By Under-tenants.

been so used, the rent may be recovered under an indebitatus count for use and occupation of the fishery, and the plaintiff's claim may be so described in the particulars of demand (*a*). It is not, however, absolutely essential that there should be an actual occupation of the premises by the defendant himself; for if his under-tenant, or any other person by his permission, occupy, he is liable: thus it has been held, that if *A.* agree to let lands to *B.*, who permits *C.* to occupy them, *A.* may recover the rent, in an action against *B.* for use and occupation (*b*). So where an under-tenant held over against the will of the lessee after the expiration of the term, the lessee is liable for the period of the holding over, but not for a whole year's rent (*c*). But where a tenant for nine months, having an option at the end of that time to take a lease, held over by under-letting for six months, he was held liable to a whole year's rent (*d*). Where the defendant, in expectation of a lease which he had agreed to take from the plaintiff, procured attornments from some of the tenants and received rent from others, he was held liable in an action for use and occupation (*e*). There is no implied warranty on a lease of a house or of land that it is reasonably fit for habitation, occupation or cultivation; therefore, where a person agreed to let a house and garden, with the use of the fixtures, for a term at a certain rent, and the tenant entered, but quitted before any rent became due, on account of the house being infested with bugs, it was held, that there was no defence to an action for the rent (*f*). So where there was a demise of the eatage of a field for a specific time, at a certain rent, and the tenant's cattle died from the effects of some poisonous substance spread on the land, without the landlord's knowledge (*g*). So where the foundations of a house were so rotten that it began to fall down, and the sewers were so bad that the lower part was not fit for occupation (*h*). But where a furnished house, let by itself, was infested with bugs, and the tenant left immediately, it was held the landlord could not recover the rent (*i*). It would seem that if there is a default or fraud on the part of the landlord, he might perhaps not be able to recover the rent in such cases (*k*). It has, however, been held that even if the landlord is bound to do repairs, there is no implied condition that the tenant may quit if the repairs are not done, and therefore the landlord may, notwithstanding,

No beneficial Enjoyment.

(*a*) *Holford* v. *Pritchard*, 3 Exch. Rep. 793.

(*b*) *Bull* v. *Sibbs*, 8 Term Rep. 327.

(*c*) *Ibbs* v. *Richardson*, 9 Ad. & El. 849; 1 Per. & Dav. 618.

(*d*) *Waring* v. *King*, 8 Mees. & Wels. 571.

(*e*) *Neal* v. *Swind*, 2 Cromp. & Jerv. 278; S. C. nom. *Neale* v. *Sweeney*, 2 Tyr. 464.

(*f*) *Hart* v. *Windsor*, 12 Mees. & Wels. 68, overruling *Edwards* v. *Etherington*, Ry. & Mood. 268; 7 Dowl. & Ryl. 117; *Collins* v. *Barrow*, 1 Mood. & Rob. 112; *Salisbury* v. *Marshall*, 4 Car. & Pay. 65; and *Cowie* v. *Goodwin*, 9 Car. & Pay. 378.

(*g*) *Sutton* v. *Temple*, 12 Mees. & Wels. 52.

(*h*) *Arden* v. *Pullen*, 10 Mees. & Wels. 321.

(*i*) *Smith* v. *Marrable*, 11 Mees. & Wels. 5; 1 Car. & Mar. 479; 2 Dowl., N. S., 310. See also ante, 98, 282, 346, 433.

(*k*) *Arden* v. *Pullen*, 10 Mees. & Wels. 321; *Sutton* v. *Temple*, 12 Mees. & Wels. 52.

recover the rent (*l*). The badness of the drainage, which the landlord ought to repair, is no answer to an action for use and occupation, and would seem to be inadmissible in such action for the purpose of reducing the damages (*m*). In one case it was held, that if a landlord by his misconduct justified a tenant in an abrupt departure during a tenancy limited to a particular time, he could not recover rent for the time after the departure of the tenant (*n*). If a tenant leaves his house empty, and his landlord puts a person in to take care of it, the landlord may yet recover for rent, but not if he has entered into profitable occupation (*o*). Slight evidence of occupation is generally sufficient to maintain the action: thus, it has been held, that the putting up of a board for the purpose of letting houses by a person who built them, and agreed to become tenant of them for a certain time, is sufficient to enable a person for whom they were erected to recover rent on a count for use and occupation (*p*). So where a person who had previously signed a written agreement, obtained the key for the purpose of letting in a woman to clean the house, and also paid for some paper with which one of the rooms was decorated; it was held sufficient to warrant a jury in finding there had been occupation (*q*).

Evidence of Occupation.

What amounts to an Eviction from the Occupation.

Where premises are let at an entire rent, an eviction from part, if the tenant thereupon give up possession of the residue, is a complete defence to an action for use and occupation (*r*): but if the tenant, after the eviction, continue in possession of the residue, he is liable for that portion (*s*). Where lands have been let to one, who underlets to others, and the latter receives a notice to quit from the original landlord, in consequence of which one of them does so, and the lands occupied by him remain unlet for a year, and are then let by the original tenant, the original landlord cannot recover in use and occupation for the rent of the unoccupied premises during the year; and it seems that such circumstances amount to an eviction, and might be pleaded to the whole demand (*t*). Where a tenant from year to year, at a rent payable half-yearly, quitted at the end of a current year without giving notice, and the landlord re-let the premises before the end of the next half-year to another tenant; it was held, that the landlord had evicted the first tenant, and could not maintain use and occupation against him for any rent subsequent to the period when he quitted (*u*). If a landlord, in the middle of a quarter, accept from his tenant the key of the house demised, under a parol agreement that,

Surrender.

(*l*) *Surplice* v. *Farnsworth*, 8 Scott, N. R. 307; 7 Man. & Gran. 576.

(*m*) *Heard* v. *Camplin*, 15 Law Times, 437.

(*n*) *Kirkman* v. *Jervis*, 7 Dowl. 678.

(*o*) *Bird* v. *Defonvielle*, 2 Car. & Kir. 415; see also *Redpath* v. *Roberts*, 3 Esp. 225.

(*p*) *Sullivan* v. *Jones*, 3 Car. & Pay. 579.

(*q*) *Smith* v. *Twoart*, 3 Scott, N. R. 172; 2 Man. & Gr. 841; and see *Towne* v. *D'Heinrich*, 13 C. B. 892.

(*r*) *Smith* v. *Raleigh*, 3 Camp. 513; see also ante, 338, 346.

(*s*) *Stokes* v. *Cooper*, 3 Camp. 514, n.

(*t*) *Burn* v. *Phelps*, 1 Stark. 94.

(*u*) *Hall* v. *Burgess*, 5 Barn. & Cres. 332; 8 Dowl. & Ryl. 67.

upon her then giving up the possession, the rent shall cease, and he himself occupies the premises from that time, he cannot afterwards recover, in an action for use and occupation of the house, for the time subsequent to his accepting the key (*x*). Where a lease of premises for a term of years expired at Midsummer, 1821, and the tenant refused to give up possession at that time, and insisted that he was entitled to a notice to quit, and continued in possession until Christmas following, and paid rent to that time, when he tendered the keys of the premises to the landlord, which the latter refused to accept; it was held, that such continuing possession by the tenant did not amount to a holding over by him, but was conclusive evidence of a tenancy from year to year, which entitled the landlord to maintain an action of use and occupation, to recover the amount of a quarter's rent, which became due at Lady-day, 1822 (*y*). Where *A.* demised the first and second floors of a house to *B.* for a year, at a rent payable quarterly; and during a current quarter, some dispute arising between the parties, *B.* told *A.* that she would quit immediately; to which the latter answered, she might go when she pleased, and she accordingly left, and *A.* accepted possession of the apartments; it was held, that *A.* could neither recover the rent, which by virtue of the original contract would have become due at the expiration of the current quarter, nor rent pro ratâ for the actual occupation of the premises for any period short of the quarter (*z*). Where a tenant, whose rent was payable half-yearly, on the 1st of April and 1st of October, quitted on the 28th of July, on the expiration of a notice given by a railway company, in pursuance of their act, and did not obtain or require compensation for his interest in the premises; it was held, that he was liable to his landlord for the rent due on the following 1st of October (*a*). A lessee of tithes is liable on his covenant to pay rent, notwithstanding the tithes have been commuted for a rent-charge, his remedy being by surrender of his lease under the 88th section of the Tithe Commutation Act, 6 & 7 Will. IV. c. 71 (*b*). If the tenant quits without giving notice, and the landlord put up a bill to let the apartments, it will not prevent his recovering (*c*).

When maintainable by Executors of a Tenant for Life.

At common law, as the rent was only payable at the time of reservation, if a tenant for life died in the intermediate period, there was no method of recovering the rent for the portion of the last half-year or quarter of the tenancy, but now the statutes 11 Geo. II. c. 19, s. 15, and 4 & 5 Will. IV. c. 22, empower the executors or administrators of

(*x*) *Whitehead* v. *Clifford*, 5 Taunt. 518. See ante, Book I., Chap. VII., Sect. 3, (d), p. 256.

(*y*) *Bishop* v. *Howard*, 2 Barn. & Cres. 100; 3 Dowl. & Ryl. 293.

(*z*) *Grimman* v. *Legge*, 8 Barn. & Cres. 324; 2 Man. & Ryl. 438.

(*a*) *Wainwright* v. *Ramsden*, 5 Mees. & Wels. 602.

(*b*) *Tasker* v. *Bullman*, 3 Exch. Rep. 351.

(*c*) *Redpath* v. *Roberts*, 3 Esp. 225; see also *Bird* v. *Defonvielle*, 2 Car. & Kir. 415.

such tenant for life, to recover a proportion of the rent, according to the time the tenant for life lived (*d*).

To what Extent maintainable against Executors, &c.

It has been already stated, that the personal representatives of a tenant, if they take possession of the premises, stand exactly in the same situation as their testator or intestate; they are liable for rent due before the decease, in their representative character, to the extent of the assets they have in hand, whether they take possession or not; and they are liable for rent accruing due afterwards in their individual capacity, if they take possession of the premises. It seems, however, that they may divest themselves of this responsibility by offering to surrender where the occupation of the premises is not profitable, and they have fully administered (*e*). In an action for use and occupation, charging the defendant, who was an administrator of the original lessee, in his own character, for rent due after the intestate's death; it was held, that although the defendant had taken possession, yet having proved that the premises had been productive of no profit to him, and that, eight months after the death of the intestate, he had offered by parol to surrender them to the plaintiff, such proof constituted a good defence to the action (*f*). In an action for use and occupation against a person who was one of the administrators of a lessee by deed, but who had also personally agreed with the lessor to take on the premises, it was held to be a question for the jury whether the defendant occupied as assignee of the lease, or upon a fresh taking (*g*).

To what Extent maintainable in cases of Bankruptcy and Insolvency.

Assumpsit for use and occupation does not lie against a lessee from year to year, for rent accruing due after the date of a fiat in bankruptcy against him, or filing of a petition for adjudication, if the assignees accept his interest in the premises, or if on their refusal he delivers them up to his landlord (*h*); nor can the landlord recover for a portion of the rent up to the time of the bankruptcy, if the rent was agreed to be paid half-yearly (*i*). Where a tenant from year to year of a house at a yearly rent became a bankrupt in the middle of the year, and his assignees entered and kept possession for the remainder of the year, it was held, that the lessor could not maintain an action for use and occupation against the assignees, for the bankrupt's occupation as well as their own, without proving their special instance and request for the bankrupt to occupy during the time that elapsed before his bankruptcy (*k*); but in a later similar case, in which this decision was

(*d*) See ante, Book II., Chap. I., Sect. 6, p. 341.

(*e*) See ante, 236, 238, 239.

(*f*) *Remnant* v. *Bremridge*, 8 Taunt. 191; 2 Moore, 94; but see *Hopwood* v. *Whaley*, 6 C. B. 744; 6 Dow. & Low. 342; where the authority of this case is much shaken; and see ante, p. 667.

(*g*) *Drury Lane Theatre Company* v. *Chapman*, 1 Car. & Kir. 14.

(*h*) See ante, 228.

(*i*) *Slack* v. *Sharp*, 8 Ad. & El. 366; 3 Nev. & Per. 390; 1 Will. Wol. & Hod. 496; *Ex parte Hopton*, 2 Mont. Deac. & De G. 347.

(*k*) *Naish* v. *Tatlock*, 2 H. Black. 319; see also *Richardson* v. *Hall*, 3 Moore, 307; 1 Brod. & Bing. 50.

not referred to, it was held, that an action for use and occupation would lie against the assignees for the whole year (*l*). The assignee of an insolvent debtor cannot bring an action for rent against the tenant of premises, in which the insolvent had a life interest, in the names of his trustees of these premises, without their consent on the offer of an indemnity against costs (*m*). The assignees of an insolvent tenant, in consideration of being allowed to move certain fixtures, agreed to pay to the landlord 7*l.* for the last quarter's rent; it was held, that the sum could not be recovered, on a count on an account stated, there having been no use and occupation by them; and that the agreement should be declared on specially (*n*). An incumbent, whose living is under sequestration, cannot sue a tenant for use and occupation of the glebe had during the period of the sequestration; and the defence is available under nunquam indebitatus (*o*). The lessor of a tenancy from year to year cannot maintain use and occupation against the trustees, under a deed of assignment for the benefit of creditors, upon an occupation by them for the purpose of disposing of the insolvent's property, unless they have actually occupied as tenants (*p*).

Not maintainable when let for an illegal or immoral Purpose.

An action for use and occupation will not lie where the premises are let for a purpose illegal or contrà bonos mores. Thus, where in an action for use and occupation of a lodging, it was shown that the lodging was let, with the knowledge of the plaintiff, for the purpose of prostitution, the action was held not to be maintainable (*q*). It seems, however, to be necessary to show that the lodging was let to an immodest woman to enable her to consort with the other sex; for if the woman merely lodges there, and receives her visits elsewhere, it has been held to be no objection to recovery (*r*). Where the lodging was under a weekly tenancy, and it did not appear that the premises had been originally let for the purpose of prostitution; it was held, that the plaintiff could not recover the weekly rent which accrued after he was fully informed of the defendant's mode of life (*s*).

Effect of Distress.

It would seem that in an action for rent it is no answer that the landlord has distrained goods to the full value of the rent, if he has sold them for a less sum; if he has sold them at too low a price, the tenant's remedy is by action (*t*). Distress is no answer unless the rent be satisfied (*u*).

(*l*) *Gibson* v. *Courthope*, 1 Dow. & Ryl. 205.

(*m*) *Spicer* v. *Todd*, 2 Cromp. & Jerv. 165; 1 Dowl. 306.

(*n*) *Clarke* v. *Webb*, 2 Dowl. 671; 1 Cromp. M. & Ros. 29; 4 Tyr. 673. See ante, Book I., Chap. VI., Sect. 8, p. 229.

(*o*) *Powell* v. *Hibbert*, 15 Queen's B. Rep. 129.

(*p*) *How* v. *Kennett*, 3 Ad. & El. 659; 1 Har. & Wol 391; 5 Nev. & Man. 1.

(*q*) *Crisp* v. *Churchill*, 1 Bos. & Pul. 340, n.; *S. P. Girardy* v. *Richardson*, 1 Bos. & Pul. 341, n.; 1 Esp. 13; and *Howard* v. *Hodges*, 1 Selw. N. P. 67.

(*r*) *Appleton* v. *Campbell*, 2 Car. & Pay. 347.

(*s*) *Jennings* v. *Throgmorton*, Ryan & Mood. 251; see ante, 187, n. (*a*).

(*t*) *Efford* v. *Burgess*, 1 Mood. & Rob. 23.

(*u*) *Lear* or *Deave* v. *Edmonds*, 1 Barn. & Ald. 157; 2 Chit. 301; see also *Dawson* v. *Cropp*, 1 Com. B. Rep. 961; 3 Dow. & Low. 225.

When the Action of Assumpsit is maintainable for Non-repair.

(c) *For Breach of Husbandry and Repairs.*

Wherever the contract of tenancy is by writing not under seal, or by parol, the action of assumpsit is the proper remedy which the landlord has to recover the damages sustained by him, from his tenant having suffered the premises to become out of repair. This is equally the case, whether the tenant hold for a term of years, or be merely a tenant from year to year; or whether he has bound himself to the performance of a particular description of repairs by the terms of his contract of tenancy, or be merely liable to such as are cast upon him by the implied obligation of the law. Where the tenant holds under an express contract to repair, his liability is regulated by that contract, and there can be no implied contract to repair arising from the relation of landlord and tenant (*x*). On the other hand, where the obligation to repair arises merely from the fact of his tenancy, he is only liable to make good such dilapidations as arise from his commissive acts, and is not responsible for any which are merely permissive. To whatever extent, however, the defendant is liable, the remedy against him is by a special action of assumpsit (*y*). Where there is a demise from year to year, so long as the parties shall please, and a new tenant takes possession, whose occupation as tenant the reversioner omits to determine by a notice to quit, the pleadings may allege a new relation of landlord and tenant on the original terms between the reversioner and the new tenant (*z*). The assignees of a void lease by deed, which had been treated by all parties as valid, having for several years paid the rent reserved, and not having re-assigned, were held liable in assumpsit for repairs and rent up to the end of the term, according to the covenants in the lease (*a*). The assignee of the reversion cannot maintain assumpsit on a contract to repair on a demise not by deed, as the statute 32 Henry VIII. c. 34 (*b*), does not apply (*c*); but in such case the lessor himself may, notwithstanding an assignment (*d*).

When maintainable for Breach of Husbandry.

The observations in the preceding paragraph apply also to the remedy which a landlord has against his tenant, for the breach of the obligation to follow the course of good husbandry; whether that obligation arises from an express contract between the parties, or is merely implied from their standing in the relative situation of landlord and tenant. In the latter case, however, the obligation to cultivate is confined to following the usual course of husbandry pursued in the neighbourhood where the premises are situate (*e*), and does not extend to such obligations as do not necessarily arise out of the relation of

(*x*) *Standen* v. *Christmas*, 10 Queen's B. Rep. 135.

(*y*) The extent of liability is fully pointed out, ante, Book II., Chap. IV.

(*z*) *Buckworth* v. *Simpson*, 1 Cromp. M. & Ros. 834; 1 Gale, 38; 5 Tyr. 344.

(*a*) *Beale* v. *Sanders*, 3 Bing. N. C. 850; 3 Hodges, 147; 5 Scott, 53.

(*b*) See ante, 585.

(*c*) *Standen* v. *Christmas*, 10 Queen's B. Rep. 135.

(*d*) *Bickford* v. *Parson*, 5 C. B. 920.

(*e*) *Powley* v. *Walker*, 5 Term Rep. 373.

landlord and tenant: thus a declaration in assumpsit has been held bad on demurrer, which stated that, in consideration that the defendant *had* become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon, and to keep the buildings in repair, because these obligations do not necessarily arise out of the bare relation of landlord and tenant (*f*). In assumpsit on a promise to manage a farm in a good and husband-like manner, and according to the custom of the country, it seems to be sufficient to allege the breach in the words of the promise (*g*).

(d) *To recover Money paid on Distress.*

When the Action is maintainable to recover Money paid on Distress.

Wherever a tenant may be ousted from his occupation in default of a payment to be made (*h*), he may pay in his own discharge, and for the redemption of the land, and such expenses are to be borne by the landlord (*i*). Where one is compelled to make a payment, for which another is liable, assumpsit on an implied promise will lie for the repayment: thus, where the goods of a stranger, on the premises of another, were distrained by the landlord for rent in arrear, and the stranger was obliged to pay the rent to redeem them; the Court held, that the stranger might maintain assumpsit for money paid to the use of the original lessees, who were bound by their covenants to the landlord, although some of them had to the knowledge of the plaintiff, before he placed his goods on the premises, assigned their interest to one of their co-lessees, who was in the exclusive possession at the time (*k*). But an under-tenant, whose goods are distrained and sold for rent due from his immediate landlord, cannot maintain assumpsit against him for money paid; for in the sale under the distress, the money paid by the purchaser vested in the original landlord in satisfaction of the rent, and never was the *money* of the under-tenant (*l*). But the authority of this case has been much shaken by the language of the Court in *Rodgers* v. *Maw* (*m*), and in *Bandy* v. *Cartwright* (*n*). A landlord who distrains his tenant's goods for rent in arrear, and is not guilty of any misconduct with regard to the distress, and sells the goods, is not liable to his tenant in an action for money had and received for the overplus of the sale which he does not leave in the hands of the sheriff, under the stat. 2 Will. & Mary, sess. 1, c. 5, the proper remedy being an action on the case for not leaving the overplus in the hands of the sheriff under that statute (*o*). An under-tenant of part of

(*f*) *Brown* v. *Crump*, 6 Taunt. 300; *S. C.* 1 Marsh. 567, not *S. P.*

(*g*) *Falmouth (Earl)* v. *Thomas*, 1 Cromp. & Mees. 89; 3 Tyr. 26.

(*h*) See ante, Book II., Chap. II., Sect. 8, p. 398.

(*i*) *Smith* v. *Pearce*, MS. Sitt. after M. T. 43 Geo. III., Lord Ellenborough, C. J.

(*k*) *Exall* v. *Partridge*, 8 Term Rep. 308.

(*l*) *Moore* v. *Pyrke*, 11 East, 52.

(*m*) 15 Mees. & Wels. 449.

(*n*) 22 Law J., Exch., 285.

(*o*) *Yates* v. *Eastwood*, 6 Exch. Rep. 805.

premises, who has paid the whole rent to the original lessor of the whole premises, under a threat of distress, cannot recover against the under-tenant of the other part, as for a contribution as for money paid *to his use*, if indeed he can so recover at all (*p*). Where a party threatened with a distress for rent pays money when he might legally have defended himself, it is not a payment by compulsion, and can neither be recovered back, nor set-off against another demand (*q*). Nor can money paid voluntarily, with a full knowledge of all the facts, be recovered back. Therefore, where the plaintiff, a tenant to the defendant, received notice from a mortgagee of the defendant's term that the interest was in arrear, and was required to pay to the mortgagee the rent then due, but notwithstanding paid the rent to the defendant and was afterwards compelled by distress to pay the amount over again to the mortgagee, it was held, that the money could not be recovered back in an action for money had and received (*r*). So in the case of a distress damage feasant (*s*). A broker having seized goods under a distress for rent, the tenant desired time, and that the broker would not remove or sell; on which the latter required the tenant to sign written requests from time to time, by which he also engaged to pay the charges of the levy, and the expenses of keeping a man in possession; the goods were not removed, and the broker applied for and obtained those charges, but the tenant objected to the amount as well as to the sum alleged to be due for rent; it was held, that the payment by the tenant was not a voluntary payment, and that if the charges were illegal or excessive he might recover them back in an action for money had and received (*t*). A tenant under a lease cannot maintain assumpsit on an implied promise, for money paid under a distress by a superior landlord, being excluded by the express contract: the remedy is on the covenant (*u*). A promise to pay rent to a landlord going to distrain, by a person who is in possession of the goods under a bill of sale, by which the landlord is induced to forego his distress, is not a contract within the Statute of Frauds, and therefore need not be in writing (*x*).

(e) *For other Things.*

To recover Damages for Breach of Special Agreements.

The action of assumpsit is maintainable for the breach of any special agreement which is entered into by writing not under seal, or verbally. It being impossible to point out all the various cases to which this remedy is applicable, it is sufficient to state generally, that whenever

(*p*) *Hunter* v. *Hunt*, 1 Com. B. Rep. 300.
(*q*) *Knibbs* v. *Hall*, 1 Esp. 84.
(*r*) *Higgs* v. *Scott*, 7 Com. B. Rep. 63.
(*s*) *Gulliver* v. *Cosens*, 1 Com. B. Rep. 788; *Lindon* v. *Hooper*, Cowp. 414; and see *Brown* v. *M'Kinally*, 1 Esp. 279; *Lothian* v. *Henderson*, 3 Bos. & Pul. 530; *Levy* v. *Goodson*, 4 Term Rep. 687; and *Snowden* v. *Davis*, 1 Taunt. 359.
(*t*) *Hills* v. *Street*, 5 Bing. 37; 2 Moore & Pay. 96.
(*u*) *Schlenker* v. *Moxey*, 3 Barn. & Cres. 789; 5 Dowl. & Ryl. 747; 1 Car. & Pay. 178.
(*x*) *Williams* v. *Leper*, 2 Wils. 308; 3 Burr. 1886; see ante, 240, &c.

the parties have entered into an agreement upon any subject,—as for instance, a contract for the sale of real property, or for its occupation, or respecting the use and mode of paying for fixtures, or the like,—and one party complains of the infraction of the contract, his proper remedy is by an action of assumpsit.

The common Indebitatus Assumpsit.

Besides the action of assumpsit framed upon a special contract, there is another form in which the action may be brought, usually called an indebitatus assumpsit. This is adopted where damages are sought to be recovered for the non-payment of a debt, either actually existing, or implied by the law upon the non-performance of any precedent duty or obligation. Where the plaintiff agreed to let to the defendant land on building leases, and lend him money to build, to be repaid by a particular time, and the defendant agreed to build, and convey the houses as security; and after part had been built, and part only of the money had been advanced, the plaintiff requested the defendant to desist, which he did; it was held, that, after the time fixed, the plaintiff might recover the money he had advanced, on a count for money lent, without resorting to the agreement (*y*). Where a tenant agreed with his landlady, that if she would accept another as her tenant in his place (he being restrained from assigning the lease without her consent), he would pay her 40*l.* out of 100*l.* which he was to receive for the good-will, if her consent was obtained; having received the 100*l.* from the new tenant, who was cognizant of that agreement, he was held liable to the landlady in an action for money had and received to her use (*z*). But when goods are distrained for rent and replevied by the tenant, and afterwards (the tenant becoming bankrupt) they are sold by the assignees; the landlord having succeeded in replevin, and obtained a judgment of retorno, cannot recover the amount of the rent from the assignees in an action for money had and received (*a*). Where a person agreed to let a house for a year, and if he did not procure a lease of it for the tenant at the end of that time to repay him half the amount expended by the tenant in repairs; it was held, that that amount could not be recovered under the common count for money paid (*b*). If there has been a recovery in assumpsit against two defendants, and a levy for the whole damages on one, that one may recover a moiety against the other in an action for money paid to his use (*c*); although it is otherwise where the recovery against the two was in case.

To recover Money paid on a Consideration which has failed generally.

Where money has been paid under an agreement, which has not been performed, it may be recovered back in an action for money had and received (*d*). Where by an agreement the defendant was to accept of the assignment of a lease of a farm from the plaintiffs, and to take the

(*y*) *James* v. *Cotton*, 7 Bing. 266; 5 Moore & Pay. 26.
(*z*) *Griffiths* v. *Young*, 12 East, 513.
(*a*) *Merreweather* v. *Nixon*, 8 Term Rep. 186.
(*b*) *Thurnell* v. *Symonds*, 1 Car. & Kir. 44.
(*c*) *Braddyl* v. *Jones*, 4 Dougl. 52.
(*d*) *Ferrer* v. *Nightingal*, 2 Esp. 639.

fixtures and crops at a valuation, and he was afterwards let into possession, and the valuation was made, but he refused to take the lease, alleging that the plaintiffs had failed to make a good title; it was held, that indebitatus assumpsit would not lie for the price of the fixtures and crops, the plaintiffs' only remedy being by a special action on the agreement (*e*). Where the plaintiff paid money to the defendant, on the defendant's promise to make him a lease of land, and before the lease was made the defendant was evicted; it was held, that the plaintiff might recover the money in assumpsit, the consideration not having been performed (*f*). Rent paid by *A.* to *B.*, claiming as devisee, which *A.* is afterwards compelled to pay to the heir, may be recovered back as money had and received, where *B.* claims no title when the action is brought (*g*). Where a deposit is paid on a contract to grant a lease, to run from a future day, the vendee has a right to rescind, on the vendor not proving his title, and may maintain an action for the deposit, without waiting for the day from which the lease was to run (*h*).

Sect. 2.—*Declaration.*

What must be stated in Assumpsit on Special Agreements.

If a person takes a house under a written agreement to repair, the implied agreement to use the premises in a tenant-like manner is part of the same contract, and must be declared on as such, and not as two agreements as to two houses in two counts (*i*). In assumpsit the promise alleged was to use a house and furniture in a tenant-like manner, and at the end of the term to have it cleaned; the evidence was that it was clean when defendant took it, and that he agreed to leave it as he found it; this was held no variance (*k*). In assumpsit for not repairing the venue is not local, though the contract be only implied from the situation of the parties (*l*).

When the Plaintiff's Title must be stated.

It is never necessary to allege the title of the plaintiff in an action of assumpsit, when the action is brought against one who has derived

(*e*) *Neal* v. *Viney*, 1 Camp. 471.

(*f*) Palm. 364; 1 Esp. N. P. 8.

(*g*) *Newsome* v. *Graham*, 10 Barn. & Cres. 234; 5 Man. & Ryl. 64.

(*h*) *Roper* v. *Coombes*, 9 Dowl. & Ryl. 562. Action for money had and received on the common counts. Defendant was possessed of a lease for years, which he sold to plaintiff for sixteen guineas, and at the time of the sale observed that it was a good lease for seven years: it turned out afterwards, that the lessor was tenant for life only, and had no right to make a lease for a longer term than his own life; in consequence of which the plaintiff was turned out of possession in two years after the assignment of the lease had taken place, the lessor having died previously to the bargain between the plaintiff and the defendant. The plaintiff thereupon brought his action to recover the money paid for the lease, as paid on a consideration which had failed. On Leycester objecting to the plaintiff recovering on the declaration, which contained only the common counts, Lawrence, J., referred to the case of *Cripps* v. *Reade*, 6 Term Rep. 606, tried before him at Oxford, in which a lease had been sold by one as administrator, whose letters of administration were afterwards repealed, and where he permitted the plaintiff to recover on a similar declaration, and the Court of King's Bench confirmed his opinion. Verdict for the plaintiff. *Matthews* v. *Hollings*, cor. Lawrence, J., at Shrewsbury, Ox. Sum. Cir. 1801, MS.

(*i*) *Holford* v. *Bennett*, 7 Mees. & Wels. 348; Hurl. & Walm. 67.

(*k*) *Stanley* v. *Agnew*, 12 Mees. & Wels. 827.

(*l*) *Buckworth* v. *Simpson*, 1 Cromp. M. & Ros. 834; 1 Gale, 38; 5 Tyr. 344.

his interest directly from him; for the same doctrine, by which the tenant is estopped from disputing the title of his landlord from whom he has derived his estate, applies to this action as well as to covenant (*m*). In special assumpsit, therefore, against the tenant for not performing his agreement, the estate of the lessor is an immaterial averment, if the tenant has had the enjoyment of his lease.

What must be stated in a Declaration for Use and Occupation.

The declaration in assumpsit for use and occupation is framed in the common indebitatus form; and alleges that the defendant was indebted to the plaintiff for the use and occupation by the defendant of premises of the plaintiff, and by his sufferance and permission. It is not necessary to state in what parish the premises are situate; and if the parish is described by a wrong name it is immaterial, at least if it be described by a name generally known, and which could not, therefore, mislead the defendant (*n*); thus, evidence of a house situate in the parish of M. will support an averment of a house "at S.," S. being extra-parochial, and both places usually going by the name of S. (*o*). Where, however, the house was described as in a certain parish, and there was no such parish, it was formerly held fatal, but would now be amendable under 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96 (*p*). In an action for use and occupation by churchwardens and overseers in their corporate capacity, under 59 Geo. III. c. 12, s. 12, the declaration must describe them as churchwardens and overseers (*q*).

SECT. 3.—*Pleadings and Practice.*

What Pleas may be pleaded generally.

In assumpsit, the plea of non assumpsit operates only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law: all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, must be specially pleaded (*r*).

Pleas in Actions for Use and Occupation.

The same pleas may be in all cases pleaded to assumpsit for use and occupation, which may be pleaded to any other indebitatus assumpsit. Nil habuit in tenementis is a bad plea; for the action is founded on the promise, and, therefore, if the plaintiff had an equitable title, or no title at all, yet if the defendant enjoyed by his permission, it is sufficient; for it is no more necessary for the plaintiff to say that it was his house, than in assumpsit for goods sold it is necessary to say that they were his goods (*s*). In an action for use and occupation of lodg-

(*m*) See ante, 590.
(*n*) *Kirtland* v. *Pownsit*, 1 Taunt. 570.
(*o*) *Burbidge* v. *Jakes*, 1 Bos. & Pul. 225.
(*p*) *Wilson* v. *Clark*, 1 Esp. 273; *S. P. Guest* v. *Caumont*, 3 Camp. 235. See ante, 588, 589, 590; but see as to amendments, ante, Chap. I., Sect. 4, p. 588.
(*q*) *Ward* v. *Clarke*, 12 Mees. & Wels. 747; 1 Dowl. & Low. 1027.
(*r*) See Rules of Hil. Term, 4 Will. IV.
(*s*) *Lewis* v. *Willis*, 1 Wils. 314; Bull. N. P. 139; Esp. N. P. 165.

ings by *A. H.*, defendant's wife, at his request, the defendant cannot plead that *A. H.* was not his wife (*t*). In an action for use and occupation, a plea, that the plaintiff, before action, took and detained, as a distress for the rent, goods of value sufficient to satisfy the same, was held bad on special demurrer, for not showing that the rent was satisfied (*u*). A plea in a similar action that the defendant delivered to the plaintiff, and that the plaintiff accepted of the defendant, goods in full satisfaction and discharge of the promises stated, was considered a nullity upon an affidavit of falsity, and the plaintiff was allowed to sign judgment as for want of a plea (*x*). In an action for use and occupation, under a plea of non assumpsit, the defendant may (since the Rules of H. T. 4 Will. IV.) show that he has received a notice to pay rent to a mortgagee of the premises; but if the action be for occupation enjoyed before the notice was received, such a defence must be specially pleaded (*y*). Eviction by the plaintiff in the middle of a quarter need not be specially pleaded (*z*).

Plea of Tender.

Where a tender has been made, it must be pleaded specially, so that the Court may judge of its efficiency, and the defendant may have an opportunity of rendering its effect nugatory by replying a subsequent demand and refusal. Formerly the tender had to be proved precisely as alleged, and the slightest variance was fatal; therefore a plea of tender of half-a-year's rent simply, was not supported by evidence of a tender of the half-year's rent, requiring the lessor to get change, and pay back the property-tax (*a*). But the judges would now probably amend under 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96.

Plea of the Statute of Limitations.

When it is intended to rely upon the Statute of Limitations as an answer to a claim, it must always be specially pleaded. In the action of assumpsit, the limitation fixed by the legislature is six years; and it applies to actions for rent as well as to other demands. The statute is a good defence to an action by a landlord for rent, against one who had once been his tenant from year to year, but who had not within the last six years occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although the tenancy had not been determined by a notice to quit (*b*). In cases where the statute applies, it is necessary, by statute 9 Geo. IV. c. 14, in order to take a case out of the Statute of Limitations, that there should be a promise or acknowledgment in writing to bind the party.

(*t*) *Sinclair* v. *Hervey*, 2 Chit. 642.

(*u*) *Leare* or *Deare* v. *Edmonds*, 1 Barn. & Ald. 157; 2 Chit. 301. But see 15 & 16 Vict. c. 76, s. 51, abolishing special demurrers.

(*x*) *Richley* v. *Proone*, 1 Barn. & Cres. 286; 2 Dowl. & Ryl. 551.

(*y*) *Waddilove* v. *Barnett*, 2 Bing. N. C. 538; 2 Scott, 763; 1 Hodges, 395; 4 Dow. 347; see also *Newport* v. *Hardy*, 2 Dowl. & Low. 921; *Brook* v. *Biggs*, 2 Bing. N. C. 572; 1 Hodges, 462; 2 Scott, 803.

(*z*) *Prentice* v. *Elliott*, 5 Mees. & Wels. 606; 7 Dowl. 819; see also *Selby* v. *Browne*, 7 Queen's B. Rep. 620.

(*a*) *Robinson* v. *Cooke*, 6 Taunt. 330.

(*b*) *Leigh* v. *Thornton*, 1 Barn. & Ald. 625; and see *Hughes* v. *Thomas*, 13 East, 474.

In assumpsit for breach of an agreement to keep premises in repair, the Court would not allow the defendant to plead payment into Court, and also a tender (c).

SECT. 4.—*Evidence.*

What is Evidence under Non Assumpsit.

The plea of non assumpsit operates only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied in law, and all matters in confession or avoidance, including not only those by way of discharge, but those which show the transaction to be void or voidable in point of law, on the ground of fraud or otherwise, must be specially pleaded (*d*).

Plaintiff's Evidence in Use and Occupation, where there is a Written Contract.

Where there is an agreement in writing, expressing the amount of rent, or the duration of the term, evidence of a verbal agreement, to annul or substantially vary the written contract, is inadmissible; else the Statute of Frauds would be eluded, and the same uncertainty introduced by suppletory or explanatory evidence, which that statute has suppressed in respect to the principal object (*e*): thus, where there was a written agreement that a lease should be made of a house at 26*l.* per annum, on which an action was brought for use and occupation, and the defendant paid 26*l.* into Court; and at the trial the plaintiff offered to give parol evidence, that, beside the 26*l.* per annum, the defendant was to pay the ground landlord 2*l.* 12*s.* 6*d.*; this evidence was rejected, particularly as no evidence was offered of the actual payment of such rent. So where there was a written agreement dated on the 5th of May, which expressed a tenancy to commence from the Lady-day preceding, evidence of an understanding that the rent was to be payable only from the 5th of May is not admissible (*f*). Verbal evidence of an agreement cannot be received, where it appears from the party's own witness that it was reduced to writing (*g*); and this even where the written agreement, for want of being stamped, or for other informality or defect, is inadmissible (*h*). It has, however, been recently held, that the mere *fact* of tenancy may be proved by verbal evidence, although there may be a written instrument between the landlord and tenant defining the *terms* of the tenancy, without proving such written agreement (*i*); but verbal evidence cannot be received of the fact under *whom* he came into possession (*k*); nor can verbal evi-

(c) *Dearle* v. *Barrett*, 2 Ad. & El. 82; 4 Nev. & Man. 200; *S. C.* nom. *Barrett* v. *Dearle*, 3 Dowl. 13.

(d) See the Rules of Hil. T. 4 Will. IV.

(e) *Preston* v. *Merceau*, 2 W. Black. 1249; 3 Wils. 276. See also ante, Book I., Chap. IV., Sect. 1, (d), p. 64, &c.

(f) *Henson* v. *Coope*, 3 Scott, N. R. 48.

(g) *Rex* v. *Merthyr Tydvil*, 1 Barn. & Adol. 29; *Fenn* d. *Thomas* v. *Griffith*, 6 Bing. 533; 4 Moore & Pay. 299; *Butcher* v. *Jarratt*, 3 Bos. & Pul. 143; *Fry* v. *Chapman*, 5 Dowl. 265.

(h) *Brewer* v. *Palmer*, 3 Esp. 213; *Doe* d. *St. John* v. *Hare*, 2 Esp. 724.

(i) *Rex* v. *Holy Trinity in Kingston-upon-Hull*, 7 Barn. & Cres. 611; 1 Man. & Ryl. 444; *S. P. Strother* v. *Barr*, 5 Bing. 136; *Jenkins* v. *Hill*, Q. B. 6 Feb. 1853.

(k) *Doe* v. *Harvey*, 8 Bing. 239; 1 Moore & Scott, 374.

dence be given as to the party to whom the demise was made (*l*), nor of the terms of the holding (*m*). But in replevin it was held, that the admissions of the plaintiff as to the amount of his rent, and that it was payable quarterly, were admissible in evidence, though it appeared he held under an agreement in writing (*n*). Where a tenant was to hold land according to certain rules in writing, under which a former tenant held, but the length of the term was agreed on orally, it is not necessary, in order to show the expiration of the term, to give in evidence the written rules (*o*). If the plaintiff prove a contract of tenancy, without its appearing either upon examination or cross-examination that it was in writing, and the defendant prove that it was, it is incumbent on *him* to produce it (*p*). Where a tenant occupied premises, under an agreement, containing a proviso to keep the premises in tenantable repair, and the landlord declared generally, that "the defendant became tenant of the premises, and in consideration thereof undertook to repair," without setting out the agreement; it was held, that such agreement was admissible in evidence to prove the fact of tenancy as the consideration for the promise to repair (*q*). The words, "we approve of this draft," signed by the parties on the back of a draft agreement of demise, show that it was not intended to be the contract, but the draft may be used as evidence of what they intended, and without any stamp (*r*). In an action for rent of land, verbally let on the same terms as in the former tenant's lease, such lease must be produced properly stamped (*s*). Where a proposal was made in writing by *A.* to let a piece of land to *B.*, on certain terms contained in a written agreement between *B.* and *C.*; and *A.* afterwards agreed by parol that *B.* should have the lands upon the terms proposed; it was held, in an action for a breach of the agreement, that the original proposal was receivable in evidence without a stamp (*t*). Where a witness deposed, that the settled draft of a lease was the final agreement between the parties, for one of whom he acted as agent; it was held, that an unstamped memorandum, written afterwards by himself, but not signed by anybody, was admissible in evidence as a mere proposal, to show that the settled draft was not the final agreement between the parties (*u*).

Plaintiff's Evidence in Use and Occupation, where there is no Written Contract.

Where there is no written contract between the parties, to show the terms upon which the defendant held the premises, evidence is

(*l*) *Rex* v. *Rawden*, 3 Man. & Ryl. 426.

(*m*) *Cotterill* v. *Hobby*, 4 Barn. & Cres. 465.

(*n*) *Howard* v. *Smith*, 3 Scott, N. R. 574; 3 Man. & Gr. 254.

(*o*) *Hey* v. *Moorehouse*, 6 Bing. N. C. 52; 8 Scott, 156.

(*p*) *Rex* v. *Padstow*, 4 Barn. & Adol. 208; 1 Nev. & Man. 9; *S. P. Fielder* v. *Wray* or *Ray*, 6 Bing. 332; 3 Moore & Pay. 659; 4 Car. & Pay. 61; *Marston* v. *Dean*, 7 Car. & Pay. 13.

(*q*) *Colley* v. *Streeton*, 2 Barn. & Cres. 273; 3 Dowl. & Ryl. 522.

(*r*) *Lambourn* v. *Pedgriph*, 4 Car. & Pay. 312.

(*s*) *Turner* v. *Power*, 7 Barn. & Cres. 625; Mood. & Malk. 131.

(*t*) *Drant* v. *Brown*, 5 Dowl. & Ryl. 552.

(*u*) *Hawkins* v. *Warre*, 5 Dowl. & Ryl. 512.

usually given of the fact of the occupation by the tenant, and of the value of the premises, upon which the jury give damages for the use and occupation. Where the defendant or his under-tenant has been in the *actual* possession, proof of that fact is sufficient. Where the *plaintiff* is obliged to resort to a *constructive* possession, greater difficulty occurs; and the plaintiff must make it out in the best manner *he can* under the peculiar circumstances of each case. Payment of a poor rate, assessed on the occupier of a house, is not of itself evidence *of* occupation by the party so paying (*x*). Suffering judgment by default, in an action for use and occupation, amounts to an admission that the defendant held a house of the plaintiff, who need not show that it was his house; and it lies on the defendant to prove that he did not occupy the particular house to which the attention of the jury has been directed (*y*). A judgment in a former action between the same parties is evidence of the plaintiff having occupied under the contract of letting, but is not conclusive (*z*). If the occupier of a house submit to a distress for rent, stated in the notice of distress to be due from him as tenant to the distrainer, this is an acknowledgment of the tenancy (*a*): but where a person having title sued the tenant, who received possession from another person, it was held, that the declaration of the tenant, "I don't consider the land as yours, but prove the right, and I'll pay you rent," would not maintain the action (*b*). If a tenancy be established by the plaintiff in an action for use and occupation, it is incumbent on the defendant, in order to divest himself of the liability, to show that the tenancy was afterwards determined, or that the landlord had accepted another person as tenant (*c*). Where the defendant, when applied to for rent on behalf of the plaintiff, to whom the person who let the defendant into possession had assigned his interest, refused, on the ground that he had notice to quit, but said that he would give up the premises to the plaintiff at the expiration of the notice; it was held, to be very slight evidence of the assignment of the property to the plaintiff (*d*).

Evidence generally.

The evidence in the other actions of assumpsit, which are connected with the subject of landlord and tenant, must of course be regulated by the particular breach of contract complained of, or the particular line of defence adopted by the defendant.

A declaration stated that the plaintiff became and was tenant to the defendant under certain articles of agreement, and declared for an eviction by a person having a previous lease; one of the issues joined was on the tenancy; at the trial it appeared that it was a mere agreement for a lease; held, that the judge could not amend under the

(*x*) *Rex* v. *Burton*, MS.
(*y*) *Davis* v. *Holdship*, 1 Chit. 644, n.
(*z*) *Jones* v. *Reynolds*, 4 Ad. & El. 805; 7 Car. & Pay. 335; 6 Nev. & Man. 441.
(*a*) *Panton* v. *Jones*, 3 Camp. 372.
(*b*) *Cripps* v. *Blank*, 9 Dowl. & Ryl. 480.
(*c*) *Ward* v. *Mason*, 9 Price, 291.
(*d*) *Stephens* v. *Lynn*, 8 Car. & Pay. 389.

3 & 4 Will. IV. c. 42, s. 23 (*e*). The Court held that these enactments were intended to meet variances arising from mere slips or accidents, and did not extend therefore to a case where the declaration set out the reddendum of a lease according to its legal effect (*f*).

SECT. 5.—*Damages.*

What the Jury are to find in Assumpsit.

The action of assumpsit being brought for damages exclusively, the regulation of the amount is peculiarly within the province of the jury; and it is for them to give any sum to which they think the plaintiff is entitled within the sum laid in the declaration. Where there is any written contract between the parties, the jury may refer to it for the purpose of fixing the amount of damages; although the document could not be strictly used as evidence: thus it has been held, that in assumpsit for use and occupation, recourse may be had to the original agreement, though void under the Statute of Frauds, to calculate the amount of the rent due on such agreement (*g*). Whenever the plaintiff complains of any special damage or injury he has sustained by reason of the breach of contract, which does not necessarily spring from such breach, he must, in order to recover, allege such special injury in his declaration, and show its connection with the breach of contract. In assumpsit, for not giving the plaintiff possession to certain apartments and fixtures in the defendant's house, agreed to be let by him to the plaintiff, under a written agreement, in consideration of a certain annual rent, the plaintiff may give evidence of a particular loss sustained by breach of such an agreement, although he may have stated the loss generally in his declaration: therefore, evidence of loss of business by the plaintiff's wife, in her trade of a milliner, was held admissible as evidence of general damage, although no special damage on that ground was laid in the declaration, nor any particular customers named, nor any averment introduced as to the nature of her business (*h*). Where a landlord avails himself of his right of entry for breach of the terms of a lease, lets to another tenant, and then sues the first tenant for damages, the jury are entitled to take into consideration the rent agreed to be paid by the new tenant, without regard to the possibility of his proving insolvent, and the plaintiff cannot recover damages for rent due after the day laid in the writ of ejectment (*i*). It seems that interest may be recovered as damages where rent is due on a particular day (*k*).

(*e*) *Brashier* v. *Jackson*, 6 Mees. & Wels. 549; 8 Dowl. 784. As to amendments in ejectment, see post, Chap. VII., Sect. 9, (c). And see the 15 & 16 Vict. c. 76, s. 222; and 17 & 18 Vict. c. 125, s. 96, which confer large and liberal powers of amendment.

(*f*) *Bowers* v. *Nixon*, 2 Car. & Kir. 372.

(*g*) *De Medina* v. *Polson*, Holt, 47.

(*h*) *Ward* v. *Smith*, 11 Price, 19.

(*i*) *Oldershaw* v. *Holt*, 12 Ad. & El. 590; 4 Per. & Dav. 307; Arn. & Hod. 1.

(*k*) *Skerry* v. *Preston*, 2 Chit. 245.

CHAPTER IV.

ACTIONS OF CASE, TRESPASS, TROVER AND DETINUE.

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SECT. 1.—*Injuries to Houses and Lands in Possession.*

What is the proper Form of Action.

WHEREVER a direct injury is committed to houses or lands, which are in the possession of the party complaining, the proper form of action is trespass; where, however, the injury is merely consequential upon some act of the defendant, which, if abstractedly considered, would not be illegal, the remedy is case. The latter action is also in some few instances a concurrent remedy with trespass (*a*).

What Title will maintain the Action.

To entitle a party to bring trespass, he must at the time of the act committed, have either the actual or a constructive possession in respect of the thing being actually vested in him (*b*); therefore, whoever is in possession may maintain the action against a wrong-doer to his possession: thus, where a party being entitled, under a lease from the Crown, to the sole right of digging lead in a certain district, to the soil of which she had no right, let to the plaintiff all her right so to dig during her term; it was held, that an action might be maintained against the defendant for taking the lead (*c*). The tenant of the surface of land is the tenant of and in the legal possession of the mines under it, although where there is no express or implied grant of the mines to him, he is not entitled to work them (*d*). The action lies against a wrong-doer, even though the tenant's possession be void: therefore, one in possession of glebe land under a lease, void by reason

(*a*) See *Wells* v. *Ody*, 1 Mees. & Wels. 452; 2 Gale, 12; 5 Dowl. 95; Tyr. & Gr. 715; 7 Car. & Pay. 410. By the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 41, forms of action are substantially abolished.

(*b*) *Smith* v. *Milles*, 1 Term Rep. 475; *Brown* v. *Notley*, 3 Exch. Rep. 219. The term "constructive possession" does not, it appears, relate to land. The statute 8 Hen. VI. c. 9, s. 6, which gives an action of trespass with treble damages to the party grieved by a forcible entry and expulsion, applies only to persons having the freehold; *Cole* v. *Eagle*, 8 Barn. & Cres. 409. See post, Chap. XI., Sect. 7.

(*c*) *Harker* v. *Birkbeck*, 3 Burr. 1563; see also *Taylor* v. *Eastwood*, 1 East, 212.

(*d*) *Keyse* v. *Powell*, 2 Ell. & Bl. 687.

of the rector's non-residence, may yet maintain trespass upon his possession against a wrong-doer (*e*). A lessee for years, after his lease is expired, may have an action for a trespass on the land before his lease was ended (*f*). But where a tenant's interest is determined, as for instance, by the death of a tenant for life, under whom he holds, and he does no act indicating an intention to remain in possession, he is to be presumed to be out of possession, and therefore cannot maintain trespass (*g*). A person legally entitled to land, having entered *without* making any formal declaration of his entry, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession afterwards (*h*). Where the agent of the lessor entered on the expiration of the tenancy for the express purpose of demanding possession, the lessor may maintain trespass, not only against the tenant, but also against persons claiming under him (*i*). But where a tenant remains in apartments after the expiration of his term, it may be doubtful whether he can maintain trespass against the landlord for forcibly entering and turning him out (*k*). A lessee before entry cannot maintain trespass; and where a lease was made by way of mortgage, to hold from thenceforth, subject to a proviso that on non-payment of the money on a certain day, the mortgagee might enter, he cannot maintain trespass for an entry made by a stranger before that day (*l*).

What is a sufficient Possession.

It is not necessary to have an interest in the soil to maintain an action of trespass: for one who has an interest in the profits merely, though not in the soil itself, has a sufficiently exclusive possession to maintain the action. It is accordingly laid down, that if *J. S.* agree with the owner of the soil to plough and sow the ground, and for that to give him half the crop, *J. S.* may have his action for treading down the corn; for the owner is not jointly concerned in the growing corn; but is to have half after it is reaped by way of rent, which may be of other things than money (*m*). Again, it has been held, that one who has contracted with the owner of a close, for the purchase of a growing crop of grass there, for the purpose of its being mown and made into hay by the vendee, has such an exclusive possession of the close, though for a limited purpose, that he may maintain trespass quare clausum fregit against any person entering the close, and taking the grass, even with the assent of the owner (*n*); and that the vendee under similar circumstances may maintain trespass against the sheriff,

(*e*) *Graham* v. *Peat*, 1 East, 244.

(*f*) Bro. Tresp. 456; 2 Rol. Abr. 551, 1, 46; *Symonds* v. *Seaborne*, Cro. Car. 325; *Bedingfield* v. *Onslow*, 3 Lev. 209; *Evelyn* v. *Raddish*, Holt, N. P. C. 543.

(*g*) *Brown* v. *Notley*, 3 Exch. Rep. 219.

(*h*) *Butcher* v. *Butcher*, 7 Barn. & Cres. 399; 1 Man. & Ryl. 220.

(*i*) *Hey* v. *Moorhouse*, 6 Bing. N. C. 52; 8 Scott, 156; *Brown* v. *Notley*, 3 Exch. Rep. 219.

(*k*) *Newton* v. *Harland*, 1 Man. & Gr. 644; 1 Scott, N. R. 474; ante, p. 522.

(*l*) *Wheeler* v. *Montefiore*, 2 Queen's B. Rep. 133; 1 Gale & Dav. 493; and see *Turner* v. *Cameron's Coalbrook, &c. Company*, 5 Exch. Rep. 932.

(*m*) Bull. N. P. 85.

(*n*) *Crosby* v. *Wadsworth*, 6 East, 522.

if, when cut, the close be entered, and part of the grass carried away by a person who has purchased the grass of a bailiff of the sheriff, who had seized and sold it under a fi. fa. against the original vendor, where the person actually entering claims under the sale of the sheriff's bailiff, and carries off the crop by his authority (*o*). A person who is seised in fee of the soil and freehold, the surface of which other persons have the exclusive possession of during a portion of the year, may maintain trespass against persons who dig holes through the surface during that portion of the year, but not against persons who injure the surface only (*p*). A lessee for life or years of land has no property in the trees growing on the land; and even if the clause in the lease be "without impeachment of waste," it gives no property, but is merely an exemption from an action. If a stranger cut down any trees, the lessee may maintain trespass, but he shall not recover damages for the value of the trees, because the property of them is in him in reversion; but the damages shall be for cropping and breaking his close, and perhaps for the loss of shade, &c. (*q*).

What are sufficient Acts of Injury to maintain Trespass.

An action of trespass may be maintained for any wrongful entry into the house, lands, or tenements of another without his consent; or for treading down, spoiling, eating, &c. his hay or corn; or cutting down his trees; or hunting in his close; or breaking down his hedges or ditches; or throwing down or disturbing the setting of his fold; or breaking up his pond. It is also maintainable if a man enters and does damage to another, though he does not keep the possession (*r*); and it is no justification of a trespass on a close that the defendant entered it to take certain goods of his which were there (*s*). A landlord, taking advantage of the absence of his lodger, fastened the door and excluded the lodger from the apartments he had hired; it was held, that this was sufficient to warrant a jury in finding that the landlord was guilty in trespass of breaking and entering the apartments (*t*).

What are sufficient Acts of Injury to maintain Case.

If the owner of land, on which is a house, construct on the other part of the land a sewer, and let the house, and afterwards, by reason of the original faulty construction of the sewer, and the continued use of it by the owner in such a faulty state, the house is injured, the owner is liable to his lessee for keeping and continuing the sewer so constructed (*u*). A lessee, who overcharges his room with weight, whereby it falls into the room beneath, is liable (*x*).

The distinctions as to forms of actions are of less importance now than they were formerly; for although these have not been actually

(*o*) *Tomkinson* v. *Russell*, 9 Price, 287.
(*p*) *Cox* v. *Glue*, 17 Law J. (N. S.) C. P., 162; 12 Jurist, 185.
(*q*) Esp. N. P. 384; 4 Co. Rep. 62 a.
(*r*) F. N. B. 87, B. &c.; Com. Dig. tit. *Trespass* (A 2).
(*s*) *Anthony* v. *Haneys*, 8 Bing. 186; 1 Moore & Scott, 306.
(*t*) *Lane* v. *Dixon*, 3 Com. B. Rep. 776.
(*u*) *Alston* v. *Grant*, 3 Ell. & Bl. 128.
(*x*) Com. Dig. *Action for Nuisance* (A).

abolished by the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 41, 1852, still the fact of it being unnecessary to mention any form of action in the writ, together with power of joining any causes of action in the same suit, have relieved the pleader of many of the difficulties that formerly beset him.

SECT. 2.—*Injuries to Houses and Lands in Reversion.*

What is the proper Form of Action.

Where an injury is committed to the house or land of a person who, not being in possession, has merely a reversionary interest therein, the proper remedy is by an action on the case, and so he may have an action for continuing the nuisance, even after a former recovery for committing it (*y*). In this form of action the landlord may recover damages commensurate with the degree of injury which he has sustained by the deterioration of that property of which the reversion is in him. Where a plaintiff demised a cottage without exception of mines, it was held, that he might maintain case for the injury done to the cottage by a stranger, who had excavated coal, though it was not clear whether the injury was from an excavation under the cottage or under adjoining land in the occupation of the plaintiff (*z*). A plaintiff suing for injury to his reversionary interest by pulling down a messuage, and alleging in his declaration that the messuage was in the possession and occupation of *A.*, as tenant to him, is entitled to succeed, upon proof that *A.* was his tenant, but had given up possession to the defendant shortly before the act complained of, without, however, assigning his interest: the meaning of the allegation being, not that the messuage was in the actual possession of the tenant, but that the tenant had a right to the possession in point of interest, so that the plaintiff could sue as reversioner, and that as no assignment had been made to the defendant, the interest still continued in the tenant (*a*).

What Title is sufficient to maintain the Action.

The nature of the reversion to which the plaintiff is entitled is only so far material as to regulate the amount of damages to be recovered by him. A reversioner for a life estate can only recover such damages for an injury to the estate during the term of the lease as are equivalent to the injury done to the life estate (*b*). Where a farm was demised to *A.* and *B.* jointly, and *A.*, by agreement, underlet part of it to *C.*, and gave receipts for payment of rent and a notice to quit, in his name alone; it was held, that *A.* and *B.* could not maintain a joint action against *C.* for pulling down a shed which stood on part of the premises demised (*c*). It must, however, appear upon the face of the declaration, that the plaintiff is entitled to a reversionary interest of

(*y*) *Shadwell* v. *Hutchinson*, 2 Barn. & Adol. 97; 4 Car. & Pay. 333; Mood. & Malk. 351; 3 Car. & Pay. 615.

(*z*) *Raine* v. *Alderson*, 4 Bing. N. C. 702; 1 Arn. 329; 6 Scott, 691. See further as to form of action, post, Sect. 4, (f).

(*a*) *Hosking* v. *Phillips*, 3 Exch. Rep. 168; and see *Fowles* v. *Miller*, 3 Taunt. 137.

(*b*) *Evelyn* v. *Raddish*, Holt, 543; S. C. not *S. P.* 7 Taunt. 411.

(*c*) *Steel* v. *Western*, 7 Moore, 29.

some description. Where the plaintiff was seised in fee for the use of the inhabitants of a particular parish, and the house was occupied by the parish paupers, and by a person appointed to take charge of them; it was held, that neither the poor nor the master of the workhouse could be considered as tenants to the plaintiff, so as to make a nuisance a damage to the plaintiff's *reversion* (*d*). Where the plaintiff brought an action on the case for diverting a watercourse, stating, that the locus in quo was in the possession of one *J. S.*, as his tenant; it was held, that the averment was satisfied by proof of a mortgage from *J. S.*, the tenant for life, to the plaintiff, who was entitled to the reversion (*e*). So in case by the reversioner of a copyhold estate, payment of rent by the tenant to the plaintiff is sufficient primâ facie evidence of the reversion being in him, and proof by the defendant of the surrender to and admittance of third parties does not throw upon the plaintiff the burthen of proving a reconveyance to them (*f*). So a mortgagee of a lessee may declare in case as a reversioner, against the assignees of the lessee who have improperly removed fixtures (*g*).

What is a sufficient Act of Injury.

A reversioner cannot sue for anything as an injury to his reversion, unless it permanently injures his estate, or operates in denial of his rights (*h*): therefore a temporary fixing of barges and planks in a part of a river near certain premises, thereby obstructing the navigation of that part and hindering persons from passing to the premises and the unloading of boats thereon, is not an injury to the reversion (*i*). The reversioner may sue for an injury done to his house by the defendant's neglect to scour a watercourse in an adjoining close, whereby the watercourse was obstructed, the water thrown back, and the water from the course ran into the house and damaged it (*k*), or for an injury done to it by mining under it (*l*), or for an injury done to it by raising the pavement so much in front of it as to block up the entrance and the lower windows of it (*m*): and where two houses were connected by a party-wall, and the owner of one of them pulled down his house, without shoring up that of his neighbour, in consequence of which the latter house was injured and partly fell down: it was held, that the landlord of the latter could not maintain an action on the case against the owner of the former, to recover damages for this injury without proving that he had a right to have his house supported by the defendant's house, or that he was entitled to previous notice of the pulling down of the house, in order that he might have an opportunity himself of shoring up the house in the occupation of his tenant (*n*). The declara-

(*d*) *Martin* v. *Goble*, 1 Camp. 320.
(*e*) *Partridge* v. *Beer*, 1 Dowl. & Ryl. 272; *S. C.* not *S. P.* 5 Barn. & Ald. 604.
(*f*) *Daintry* v. *Brocklehurst*, 3 Exch. Rep. 207.
(*g*) *Hitchman* v. *Walton*, 4 Mees. & Wels. 409; 1 Horn. & Hurl. 374.
(*h*) *Hopwood* v. *Schofield*, 2 Mood. & Rob. 34.
(*i*) *Dobson* v. *Blackmore*, 10 Queen's B. Rep. 991.
(*k*) *Bell* v. *Twentyman*, 1 Queen's B. Rep. 726.
(*l*) *Raine* v. *Alderson*, 4 Bing. N. C. 702.
(*m*) *Leader* v. *Moxon*, 3 Wils. 461.
(*n*) *Peyton* v. *Mayor of London*, 9 Barn. & Cres. 725.

tion must allege the injury to have been done to the damage of the reversion, or must state an injury of such a permanent nature as to be necessarily injurious to the reversion; otherwise the want of such allegation will be cause for arresting the judgment: therefore, where the plaintiff declared as reversioner of a yard and part of a wall, which *W. F.* occupied as tenant to him; and that the defendant wrongfully placed on the said part of the wall quantities of bricks and mortar, and thereby raised it to a greater height than before, and placed pieces of timber on the said wall, overhanging the yard, per quod the plaintiff lost the use of the said part of the wall, and also, by means of the timber overhanging the wall, quantities of rain and moisture flowed from the wall upon the yard, and thereby the yard and the said part of the wall were injured, without stating that his reversion was prejudiced; the Court arrested the judgment (*o*). Building a house with eaves, and fixing a pipe which conducted the rain water into an adjoining yard, which was in the possession of a tenant, are acts for which the landlord may maintain an action, if the jury think the reversion to be damaged (*p*). So the reversioner may maintain an action for the erection of a wall, whereby his lights are obstructed (*q*). An action on the case lies by the owner of a house against his lessee, for opening a new door, though the house be not thereby weakened or injured, because the reversionary interest might still be injured (*r*). It is no answer to an action by a reversioner against a third person, that the injury was occasioned by the wrongful act of the tenant, for which he might be liable in an action (*s*). The fact of a stranger merely trespassing in exercise of a claim of right of way, is not enough to give the reversioner a right of action against him (*t*). An action is maintainable by a reversioner against the surveyor of a highway for cutting away part of a bank adjoining a public road, though the premises are thereby in fact improved. Where a lease reserved a limited power to the lessors to make a way across the land for certain purposes; in an action of case by the lessee as a reversioner for making a way across the land for other purposes, it is not a ground of complaint that the intention of the defendants was to use the way for other purposes than they had a right to use it; but the question is, whether at the time it was made it had become necessary or expedient for the defendants to make a way for the purposes for which they were entitled, and whether the road made was a proper road for that purpose (*u*). An action may be

(*o*) *Jackson* v. *Pesked*, 1 Maule & Selw. 234.

(*p*) *Tucker* v. *Newman*, 11 Ad. & El. 40; 3 Per. & Dav. 14.

(*q*) *Jesser* v. *Gifford*, 4 Burr. 2141; *Shadwell* v. *Hutchinson*, 3 Barn. & Adol. 97; Mood. & Malk. 350; *Turner* v. *Sheffield and Rotherham Railway Company*, 10 Mees. & Wels. 425.

(*r*) *Young* v. *Spencer*, 10 Barn. & Cres. 145; 5 Man. & Ryl. 47.

(*s*) *Egremont* (*Lord*) v. *Pulman*, Mood. & Malk. 404.

(*t*) *Baxter* v. *Taylor*, 4 Barn. & Adol. 72; 1 Nev. & Man. 11: explained in *Tucker* v. *Newman*, 11 Ad. & El. 43.

(*u*) *Durham and Sunderland Railway Company* v. *Walker*, 2 Queen's B. Rep. 940; 2 Gale & Dav. 326.

maintained even by the reversioner (*x*) for obstructing the lights of an ancient messuage, or for continuing the obstruction by erecting buildings so near that the light and air cannot have access to the rooms (*y*). An action for an injury to the inheritance lies by the reversioner against the tenant pending the term, though the tenant may restore the property before the end of the term (*z*). It was formerly held, that an action on the case would lie by a lessee for years against his under-tenant for so negligently keeping his fire that the premises were burned down; and this appears to be the law still (*a*).

SECT. 3.—*Nuisances.*

(a) *Nuisances in Public Ways, &c.*

When an Action may be maintained for Nuisances in Public Ways, &c.

It is universally the duty of the occupier of a house, having an area fronting the public street, so to fence it as to make it safe to passengers; and it is no defence to an action against him for neglecting to do so, whereby the plaintiff fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered, the area was in the same open state as when the accident happened (*b*). The occupier of land is bound to fence off any hole or area upon it which adjoins or is near to a highway, and is primâ facie liable for any damage arising from neglecting to do so (*c*). A tradesman who has a cellar opening upon the public street is bound, when he uses it, to take reasonable care that the flap of it is so placed and secured as that under ordinary circumstances it shall not fall down; but if the tradesman has so placed and secured it, and a wrong-doer throws it over, the tradesman is not liable for an injury occasioned by it (*d*). So he is bound, when he uses the flap, to conduct his business with such a degree of care as will prevent a reasonable person, acting himself with an ordinary degree of care, from receiving an injury (*e*).

(b) *Nuisances to Commons.*

What Acts amount to a Nuisance.

The most usual acts of nuisance to commons are by injury to the soil, by digging turves, or paring the pasture, or by surcharging the common by overstocking it with cattle. In any of these cases an action is maintainable, either by the lord or by the commoners. In an action for a surcharge of common, the plaintiff need not show that he turned on any cattle of his own at the time of the surcharge, but only that he could not have enjoyed his common so beneficially as he

(*x*) *Shadwell* v. *Hutchinson*, 2 Barn. & Adol. 97; 4 Car. & Pay. 33; *Jesser* v. *Gifford*, 4 Burr. 2141; *Turner* v. *Sheffield, &c. Railway Company*, 10 Mees. & Wels. 425.

(*y*) See ante, Book II., Chap. VIII., Sect. 3, p. 555.

(*z*) *Queen's College, Oxford* v. *Hallett*, 14 East, 489.

(*a*) See ante, 435, 461, 491.

(*b*) *Coupland* v. *Hardingham*, 3 Camp. 398.

(*c*) *Barnes* v. *Ward*, 2 Car. & Kir. 661.

(*d*) *Daniels* v. *Potter*, 4 Car. & Pay. 262.

(*e*) *Proctor* v. *Harris*, 4 Car. & Pay. 337.

ought (*e*). In an action for disturbance of plaintiff's right of common, the declaration stated that he was possessed of a messuage and land, with the appurtenances, and by reason thereof ought to have common of pasture, &c.; it was held, that this allegation was divisible, and that proof that the plaintiff was possessed of land only, and entitled to the right of common in respect of it, was sufficient to entitle him to damages pro tanto (*f*).

(c) *Procedure for Nuisances.*

What is the proper Remedy.

In cases of actions brought for an injury sustained by an individual, in consequence of a nuisance in a public way, the remedy is in general by action of case; but besides this, as such nuisances are almost always injurious to the public, the parties are liable to be proceeded against criminally by indictment (*g*). The proper form of remedy, for an injury sustained by a private nuisance, is an action of case (*h*). As the freehold of a common is in the lord, and the commoners, having no title to the land, have merely a right of enjoying its productions to the extent of their common right, the remedies which they have in case of a nuisance committed on the common differ. For any injury to the common, the lord may maintain an action of trespass, as it is considered that his freehold is damnified. On the other hand, the commoner can maintain an action of case only, to recover damages for the injury he has sustained by his common right having been abridged (*i*).

Against whom the Action should be brought.

The cleansing and repairing of drains is primâ facie the duty of the occupier (*k*). The occupier of a house is primâ facie liable for an injury sustained by a person from the want of repair of the covering to a cellar; but if the landlord was bound to repair it then he will be liable (*l*); and where a public nuisance is caused by a ruinous house, the occupier is chargeable to the public (*m*). There is no obligation towards a neighbour cast by law on the owner and proprietor of a house (*n*), merely as such, to keep it repaired in a substantial manner, his only duty being to prevent it from being a nuisance (*o*). An action lies against the landlord of a house demised by lease, who employs workmen and superintends the repairs of the house, though the lessee

(*e*) *Wells* v. *Watling*, 2 W. Black. 1233.

(*f*) *Ricketts* v. *Salwey*, 2 Barn. & Ald. 360; 1 Chit. 104, 112.

(*g*) See post, Chap. XI., Sect. 8.

(*h*) See ante, 638

(*i*) See ante, Book II., Chap. VII., Sect. 1, (c), p. 549.

(*k*) *Russell* v. *Shenton*, 3 Queen's B. Rep. 449.

(*l*) *Payne* v. *Rogers*, 2 H. Black, 349; and see *Tenant* v. *Golding*, 1 Salk. 21, 360, 770.

(*m*) *Reg.* v. *Watts*, 1 Salk. 357.

(*n*) The phrase "owner and proprietor" of a house is ambiguous; it may mean a party who has the whole legal interest in the premises, so that no one else has any estate in possession or reversion, or one who has a subsisting legal interest, or who is owner of the whole or some interest as distinguishable from that of the tenant in possession; *Chauntler* v. *Robinson*, 4 Exch. Rep. 163; *Lister* v. *Lobley*, 7 Ad. & El. 124, per Lord Denman, C. J.

(*o*) *Chauntler* v. *Robinson*, 4 Exch. Rep. 163.

pays for them, for a nuisance occasioned by the negligence of the workmen (*p*). An action may be maintained, even although the party, who has committed the nuisance has made a lease to another: for the plaintiff may bring the action against either the tenant for years, or his under-lessee, at his election (*q*). A person who lets premises with a nuisance upon them, and subsequently receives rent, is liable for the continuance of the nuisance: and so if he re-lets them after the user of the buildings has created a nuisance, or if he has undertaken the cleansing and has not performed it (*r*). An action may be maintained for the continuance of a nuisance in erecting a building, against the original wrong-doer, though he has no right to enter upon the land and remove it (*s*). But a landlord is not liable in respect of a new nuisance created by his tenant during the term (*t*). But if the owner of land erect a building which is a nuisance, and let the land, he is liable to an indictment for such nuisance being continued during the term: and it has been held, that he is also liable if the occupation of such building is likely to become a nuisance; or if it requires particular care to prevent the occupation from becoming a nuisance, and the nuisance occur from the want of such care on the part of the tenant (*u*). It may, however, be doubtful whether these two positions can be supported to their full extent (*x*). It was held by Littledale, J., that if the party buy the reversion during the tenancy, and the tenant afterwards, during his term, erect a nuisance, the reversioner is not liable for it; but if such reversioner re-let, or having an opportunity to determine the tenancy, omit to do so, allowing the nuisance to continue, he is liable for such continuance; and the Court held, that such purchaser is liable to be indicted for the continuing of the nuisance, if the original reversioner would have been liable, though the purchaser has had no opportunity of putting an end to the tenant's interest, or abating the nuisance. Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants, such liability attaches only upon parties in actual possession. Where, therefore, an action was brought against *A.*, the owner of premises, for a nuisance arising from smoke issuing out of a chimney, to the prejudice of the plaintiff in his occupation of an adjoining messuage, on the ground that *A.*, having erected the chimney, and let the premises with the chimney so erected, had impliedly authorized the lighting of a fire therein, it was held, that the action would not lie; it was held also, that inasmuch as the premises

(*p*) *Leslie* v. *Pounds*, 4 Taunt. 649.

(*q*) *Rosewell* v. *Price*, 2 Salk. 460; 6 Mod. 116.

(*r*) *Rich* v. *Basterfield*, 4 Com. B. Rep. 805.

(*s*) *Thompson* v. *Gibson*, 7 Meeæ. & Wels. 456.

(*t*) *Rex* v. *Pedly*, 1 Ad. & El. 822; 3 Nev. & Man. 627.

(*u*) *Rex* v. *Pedly*, 1 Ad. & El. 822.

(*x*) See *Rich* v. *Basterfield*, 4 Com. B. Rep. 805.

were in the occupation of *B.*, a tenant at the time the fires were lighted, *A.* was entitled to a verdict on a plea of "not possessed," the allegation as to possession having reference to the time when the nuisance complained of was committed, and not at the time at which the chimney was erected (*y*). If *A.* recover damages against *B.* for stopping his lights, and afterwards *B.* assign the lands in which the nuisance was erected, *A.* may maintain another action against *B.* for the continuance of the nuisance; for before the assignment *B.* was answerable for all the consequential damages; and it shall not be in his power to discharge himself by granting it over; yet *A.* may bring the action against the assignee (*z*). In the case of a continuance of a nuisance, every occupier, after the erection, is equally subject to an action for the nuisance (*a*): and a notice to remove the nuisance, left at the premises, is evidence against a subsequent occupier (*b*). So if a man divert water, by a pipe and cock to his house, an action lies against his wife after his death, if she lives in the house, and uses the water, for every turning of the cock is a new nuisance (*c*).

SECT. 4.—*Injuries by Waste.*

What is the proper Remedy for Waste.

The general remedy for waste is by an action of case in the nature of waste (*d*), the old action of waste being now abolished by the statute 3 & 4 Will. IV. c. 27, s. 36 (*e*). This remedy will lie against a yearly tenant for despoiling the premises: in which the plaintiff will recover by way of damages as much as he may be damnified. This remedy is confined to acts of voluntary waste and does not extend to permissive waste (*f*). It extends, however, to waste committed by a tenant holding over after the expiration of a regular notice to quit (*g*). Where trees are excepted in a lease, the land on which they grow is necessarily excepted also: consequently, if the tenant cut down the trees, the landlord may maintain trespass for breaking and entering his close, and cutting down the trees (*h*): but where a lessor, during the term, cut down pollards growing upon the demised premises, which were fit only for fire-wood; it was held, that as the tenant for life or years would have been entitled to them, if they had been blown down, and was entitled to the usufruct of them during the term, the lessor could not, by wrongfully severing them, acquire any right to them,

(*y*) *Rich* v. *Basterfield*, 4 Com. B. Rep. 783.

(*z*) Bull. N. P. 71. Formerly a distinction was taken, viz. where the continuance occasions a new nuisance, and where the first erection has done all the mischief; that in the first case the assignee is liable to an action, but not in the second.

(*a*) *Brent* v. *Haddon*, Cro. Jac. 555.

(*b*) *Johnson* v. *Bensley*, Ry. & Mood. 189.

(*c*) Com. Dig. tit. *Action of Nuisance*, (A).

(*d*) See 2 Wms. Saund. 252, n. 7.

(*e*) See ante, Book II., Chap. IV., s. 7, p. 461, &c.

(*f*) *Gibson* v. *Wells*, 1 New Rep. 290; 2 Smith, 677; *Martin* v. *Gilham*, 7 Ad. & El. 540; 2 Nev. & Per. 568; see also 1 Chit. Plead. 158, 7th edit.; *Harnett* v. *Maitland*, 16 Mees. & Wels. 257; 4 Dow. & Low. 543.

(*g*) *Burchell* v. *Hornsby*, 1 Camp. 360.

(*h*) *Rolls* v. *Rock*, 2 Selw. N. P. 1287.

and consequently that he or his vendee could not maintain trespass against the tenant for taking them (*h*).

By and against whom Actions are maintainable.

A person who has a life interest by survivorship cannot sue for waste committed before his life interest vested (*i*). One tenant in common cannot maintain an action on the case in the nature of waste, against another tenant in common (in possession of the whole, having a demise of the moiety from the first), for cutting down trees of proper age and growth for being cut; for it is no hurt to the inheritance. If, however, the trees were not fit to be cut, he might maintain such action (*k*). One tenant in common of a close is not entitled to dig and carry away the turf, as such act amounts to a destruction of the property, and therefore constitutes an ouster (*l*). Case in the nature of waste will lie against a tenant for years, after the expiration of his term, for committing waste, as well as covenant for the breach of the covenants contained in his lease (*m*): but case for permissive waste will not lie against a tenant by lease, who has not covenanted to repair (*n*). An action upon the case in the nature of waste cannot be supported against the assignee of a lease, in which the lessee had covenanted from time to time, and at all times during the term, when need should require, sufficiently to repair the premises, with all necessary reparations, and to yield up the same so well repaired at the end of the term, in as good condition as the same should be in when finished under the direction of *J. M.*, upon a breach that the defendant suffered the premises to become and be in decay and ruinous during a large part of the term, and after the term wrongfully yielded them up in much worse order and condition than when the same were finished under the direction of *J. M.* (*o*). An action on the case in the nature of waste lies at the suit of a landlord against his tenant, for acts done by the latter, while holding over after the expiration of a notice to quit (*p*): but it does not lie against an executor for waste committed by his testator, it being a tort, which dies with the testator (*q*).

SECT. 5.—*Wrongful Taking of Goods.*

(a) *Under Distress.*

What is the proper Remedy for an illegal Distress.

Where a distress has been clearly illegal (*r*),—as where it has been made for something other than rent, or for rent which is not due,—

(*h*) *Channon* v. *Patch*, 5 Barn. & Cres. 897; 8 Dowl. & Ryl. 651.

(*i*) *Bacon* v. *Smith*, 1 Queen's B. Rep. 345; 4 Per. & Dav. 651.

(*k*) *Martyn* v. *Knowllys*, 8 Term Rep. 145.

(*l*) *Wilkinson* v. *Haygarth*, 12 Queen's B. Rep. 837.

(*m*) *Kinlyside* v. *Thornton*, 2 W. Black. 1111; *Marker* v. *Kenrick*, 13 C. B. 188.

(*n*) *Herne* v. *Bembow*, 4 Taunt. 764.

(*o*) *Jones* v. *Hill*, 7 Taunt. 392; 1 Moore, 100.

(*p*) *Burchell* v. *Hornsby*, 1 Camp. 360.

(*q*) 2 Instit. 302; 2 Roll. Abr. 828, pl. 7.

(*r*) See ante, p. 398. As to distresses damage feasant, see ante, p. 562. As to fixtures, see ante, p. 484.

the proper remedy to obtain redress is by an action of trespass (*s*). An action of trespass, or on the case, is also maintainable on the statute 2 Will. & Mary, Sess. 1, c. 5, s. 4 (*t*), for double the value of the goods distrained, if no rent is in arrear or due, and the goods have been distrained or sold by virtue or colour of that act. Where a party whose goods were distrained for rent (no rent being due) was compelled to pay a sum of money to procure the distress to be withdrawn, it was ruled, in an action by his executor for injury to his personal estate, not alleging special damage, that the damages were to be limited to the sum to be paid to obtain possession of the goods (*u*). It seems that the defendant may plead not guilty by statute, and give the special matter in evidence, or he may traverse any of the material allegations in the declaration (*x*). The plea of "not guilty by statute," together with a plea of justification under a right of distress, will not be allowed (*y*). Also where, in making the distress, the landlord has turned the tenant out of the possession of the premises, an action of trespass may be maintained: accordingly, trespass lies against a landlord who, on making a distress for rent, turned the plaintiff's family out of possession, and kept the premises on which he had impounded the distress (*z*). Where one, who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the premises for fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the distress; it was held, that at any rate he was liable in trespass for continuing on the premises, and disturbing the plaintiff in the possession of his house, after the time allowed by law (*a*). Trespass is the proper remedy where a landlord has taken goods which are not distrainable at law, but if they are taken amongst other things, the landlord is a trespasser ab initio only as to the goods not distrainable, and the tenant can only recover for damage sustained by the taking of those goods (*b*). It would seem from a recent case (*c*), that the landlord would be a trespasser as to the *entry* as well as to the taking of the goods. In that case a party, who having a right of entry to take one heriot, entered and took two, was held to be a trespasser ab initio as to the entry as well as the seizure. A landlord who, after taking a distress and impounding it, accepts the rent in arrear and expenses, is not liable in trespass, because he retains possession of the goods distrained, though he may be liable in trover for refusing to deliver them

(*s*) As to when replevin is maintainable, see post, Chap. VI.

(*t*) 1 Chit. Plead. 155, 7th edit.; *Masters* v. *Farris*, 1 Com. B. Rep. 715.

(*u*) *Lockier* v. *Paterson*, 1 Car. & Kir. 271.

(*x*) *Jones* v. *Williams*, 4 Mees. & Wels. 375.

(*y*) *Neale* v. *Mackenzie*, 1 Cromp. M. & Ros. 61.

(*z*) *Etherton* v. *Popplewell*, 1 East, 139.

(*a*) *Winterborne* v. *Morgan*, 11 East, 395; 2 Camp. 117, n.; and see *Ladd* v. *Thomas*, 12 Ad. & El. 117; 4 Per. & Dav. 9.

(*b*) *Harvey* v. *Pocock*, 11 Mees. & Wels. 740.

(*c*) *Price* v. *Woodhouse*, 1 Exch. Rep. 558.

up (*d*). Trover may be maintained by a tenant for fixtures which the landlord has severed from the freehold, and distrained for rent (*e*). Trover or trespass may be maintained by a tenant for an improper second distress (*f*). If a party pay money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrong-doer (*g*). Where a landlord demised to three jointly, and two of them, without his consent, assigned their interest to the other, and the landlord distrained the goods of the plaintiff on the premises for rent; it was held, that a joint action of assumpsit would lie against the three for money paid by him to redeem the goods so taken by the landlord as a distress (*h*). An action, however, for money had and received, will not lie for an over-payment of rent under a distress (*i*).

What is the proper Remedy for an irregular Distress.

By the statute 11 Geo. II. c. 19, s. 19, it is provided, that where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act be afterwards done by the party distraining, or by his agent, the distress itself shall not be deemed unlawful nor the party making it be deemed a trespasser ab initio; but the party aggrieved by the unlawful act or irregularity may recover for the special damage in an action of trespass or on the case, at the election of the plaintiff (*k*); provided (sect. 20) that he shall not recover if tender of amends have been made before action brought. The true construction of this statute is, that an action of trespass, or case, must be brought with reference to the nature of the irregularity. It has accordingly been held, that although trespass will lie for an absolutely illegal distress, it cannot be maintained in the case of one which is merely irregular (*l*). Nor will trover lie for goods taken under an irregular distress since that statute (*m*). Where growing crops were sold before they became ripe, it was held that the statute applied (*n*). Case is not maintainable for detaining cattle distrained damage feasant, where a tender of sufficient amends was made after the impounding (*o*). No action lies for selling a distress for rent after a tender made after the impounding; unless, perhaps, it may where there is express malice (*p*). It seems that trespass is a proper form of action

(*d*) *West* v. *Nibbs*, 4 Com. B. Rep. 172.

(*e*) *Dalton* v. *Whittem*, 3 Queen's B. Rep. 961; 3 Gale & Dav. 260; *Clarke* v. *Holford*, 2 Car. & Kir. 540.

(*f*) *Dawson* v. *Cropp*, 1 Com. B. Rep. 961; 3 Dow. & Low. 225; *Lear* v. *Caldecott*, 4 Queen's B. Rep. 123; 3 Gale & Dav. 491. See ante, Book II., Chap. II., Sect. 4, (i), p. 393.

(*g*) *Shipwick* v. *Blanchard*, 6 Term Rep. 298.

(*h*) *Exall* v. *Partridge*, 8 Term Rep. 308; 3 Esp. 8.

(*i*) *Knibbs* v. *Hall*, 1 Esp. 84.

(*k*) See 15 & 16 Vict. c. 76, s. 41, substantially abolishing the forms of action.

(*l*) *Messing* v. *Kemble*, 2 Camp. 115. In actions for irregular distresses, the correct practice is to make either the landlord alone, or the landlord and the broker, defendants, and not to join appraisers and other persons concerned; *Child* v. *Chamberlain*, 6 Car. & Pay. 213.

(*m*) *Wallace* v. *King*, 1 H. Black. 13.

(*n*) *Proudlove* v. *Twemlow*, 1 Cromp. & Mees. 326; 3 Tyr. 260; see ante, Book II., Chap. II., Sect. 3, (b), p. 366.

(*o*) *Sheriff* v. *James*, 1 Bing. 341; 8 Moore, 334; and see *Anscombe* v. *Shore*, 1 Taunt. 261; 1 Camp. 285. See ante, p. 564.

(*p*) *Ellis* v. *Taylor*, 8 Mees. & Wels. 415.

for continuing on the tenant's premises to keep possession of goods distrained after the distress has ceased to be lawful (*q*). Where a declaration contains a count for an excessive distress, and a count in trover, the plaintiff may abandon the special count, and, denying the tenancy, recover under the count in trover, although he has given no previous intimation of his intention to do so (*r*). In case for selling goods distrained for rent, without an appraisement, or without giving notice of the distress, the measure of damages is the value of the goods minus the rent (*s*). In such case, if the sum produced by the sale of the goods is less than the fair value to the tenant, he may recover the difference without any allegation of special damage (*t*). Case, or it would seem trespass, lies against a landlord who, having distrained sufficient to pay his rent, abandons the distress, and afterwards makes a second distress for the same rent (*u*). So a count stating that the defendant distrained goods sufficient to satisfy the arrears of rent, but that he wrongfully and vexatiously made another distress upon the same goods, and also upon other goods, for the same arrears, is a good count in case, though trespass might have been maintained also for the second distress of the additional goods (*x*). An action of trover will not lie at the suit of a landlord, for goods which he has distrained (*y*); but a party who purchases goods under a distress irregularly conducted has a sufficient title to maintain trover (*z*). The sale of goods under a distress, after service of an irregular notice of replevy, without removing the goods off the premises, is not a conversion to enable the tenant to maintain trover (*a*). In order to maintain an action on the case for selling goods after a replevin had been granted by the sheriff, it is necessary there should have been notice given to the distrainer of the replevin (*b*). A landlord is not liable in trover for the value of some cattle distrained off the demised premises, the proceeds of the sale of which he had received, unless he ratified the acts of his bailiffs, with knowledge of the irregularity, or chose, without inquiry, to take the risk on himself, and to adopt the whole of their acts (*c*). So where a landlord gave a broker a warrant to distrain for rent, and the broker took away and sold a fixture and paid the proceeds to the defendant, who received them without inquiry, but without knowledge that anything irregular

(*q*) *Ladd* v. *Thomas*, 12 Ad. & El. 117; 4 Per. & Dav. 9.

(*r*) *Spargo* v. *Brown*, 4 Man. & Ryl. 638.

(*s*) *Biggins* v. *Goode*, 2 Cromp. & Jerv. 364; 2 Tyr. 447; *Whitworth* v. *Maden*, 2 Car. & Kir. 517.

(*t*) *Knotts* v. *Curtis*, 5 Car. & Pay. 322.

(*u*) *Smith* v. *Goodwin*, 4 Barn. & Adol. 413; 2 Nev. & Man. 114.

(*x*) *Lear* v. *Caldecott*, 4 Queen's B. Rep. 123; 8 Gale & Dav. 491.

(*y*) *Moneux* v. *Goreham*, 2 Selw. N. P. 1384; *Turner* v. *Ford*, 15 Mees. & Wels. 212.

(*z*) *Lyon* v. *Weldon*, 2 Bing. 334; 9 Moore, 629.

(*a*) *Cuckson* v. *Winter*, 2 Man. & Ryl. 313.

(*b*) *Mounsey* v. *Dawson*, 6 Ad. & El. 752; 1 Nev. & Per. 763; Will. Wol. & Dav. 283.

(*c*) *Lewis* v. *Read*, 13 Mees. & Wels. 834.

had been done; it was held, that there was no such authority or assent as would sustain the action (*d*).

What is the proper Remedy for an excessive Distress.

The proper remedy for taking an excessive distress, is case upon the statute of Marlbridge, 52 Hen. III. c. 4 (*e*): even though the tenant had *tendered* the rent due to his landlord before the distress was levied (*f*): for in such case the tenant may abandon his action of trespass and maintain an action of case (*g*). A recovery in replevin is a bar to an action on the case (*h*). In no case is trover maintainable for goods merely seized as a distress excessive in quantity (*i*); and in an action on the case express malice need not be proved; but the excess taken must be considerable (*k*). The mere taking and selling, however, on a *claim* of more than is due, the taking and selling themselves not being unreasonable, is not actionable (*l*). So where the amount of rent reserved was reduced by payments of ground rent, and the landlord distrained for the whole, the tenant's remedy is by an action on the case (*m*). In an action for a distress for more than was due, the plaintiff need not prove the precise amount of rent stated in the declaration to be that which is alone due (*n*). Where a declaration in case for an excessive distress made no mention of the sale of the goods; it was held, that the plaintiff could only recover damages for the detention up to the sale and not in respect of the sale (*o*). A right of action once vested, can only be destroyed by a release under seal, or by the receipt of something in satisfaction for the wrong done; therefore, in the case of an excessive distress for rent, a tenant does not waive his right of action, though he afterwards enters into a written agreement with his landlord concerning the sale of the effects seised (*p*). A lodger may maintain an action, if his goods are taken on an excessive distress by the landlord of the party under whom he occupies (*q*). An action will lie for an excessive distress in taking growing crops (*r*).

(b) *By Levy in Execution.*

What is the proper Form of Action for an improper Levy.

Where goods or chattels have been improperly taken by a levy in execution, the usual remedy is by an action of trover, or sometimes

(*d*) *Freeman* v. *Rosher*, 13 Queen's B. Rep. 781.

(*e*) *Hutchins* v. *Whittaker* or *Chambers*, 2 Lord Kenyon, 204; 1 Burr. 590.

(*f*) *Branscomb* (*Lady*) v. *Bridges*, 2 Dow. & Ryl. 256; 1 Barn. & Cres. 145; 3 Stark. 171.

(*g*) *Holland* v. *Bird*, 10 Bing. 15; 3 Moore & Scott, 363.

(*h*) *Phillips* v. *Berryman*, 3 Doug. 286; 1 Selw. N. P. 679.

(*i*) *Whitworth* v. *Smith*, 5 Car. & Pay. 250; 1 Mood. & Rob. 193.

(*k*) *Field* v. *Mitchell*, 6 Esp. 71.

(*l*) *Tancred* v. *Leyland*, 16 Queen's B. Rep. 669; overruling in that respect *Taylor* v. *Henniker*, 12 Ad. & El. 488; 4 Per. & Dav. 242; and supporting *Crowder* v. *Self*, 2 Mood. & Rob. 190; *Avenell* v. *Croker*, Mood. & Malk. 172; and *Wilkinson* v. *Terry*, 1 Mood. & Rob. 377.

(*m*) *Carter* v. *Carter*, 5 Bing. 406; 2 Moore & Pay. 732.

(*n*) *Sells* v. *Hoare*, 1 Bing. 401; 1 Car. & Pay. 28; 8 Moore, 451.

(*o*) *Thompson* v. *Wood*, 4 Queen's B. Rep. 493; 3 Gale & Dav. 518.

(*p*) *Willoughby* v. *Backhouse*, 4 Dow. & Ryl. 539.

(*q*) *Fisher* v. *Algar*, 2 Car. & Pay. 374.

(*r*) *Piggott* v. *Birtles*, 1 Mees. & Wels. 441; 2 Gale, 18; Tyr. & Gr. 729.

trespass. In order to maintain the former action, the plaintiff must have a right of property in the thing, and a right of possession; and unless both these things occur, the action will not lie: therefore, where goods and furniture leased with a house have been wrongfully taken in execution by the sheriff, the landlord cannot maintain trover against the sheriff pending the lease (*s*). Where the owner of a pianoforte lent it to a friend by whose landlord it was distrained for rent, and afterwards, while in possession of the bailiff, it was taken possession of by the sheriff under a fieri facias against the friend, and was removed to an auctioneer's; it was held, that the right of possession was in the owner, so that after demand and refusal he might maintain trover against the auctioneer (*t*). Where the owner of furniture lent it to the plaintiff, and he placed it in a house occupied by the wife of *B.*, who afterwards became bankrupt, and his assignees seized the furniture; it was held, that the plaintiff might recover in trover (*u*). After judgment vacated, and restitution awarded, the defendant brought trespass against the plaintiff for taking the goods, and the Court held that the action would lie; for by vacating the judgment, it is as if it had never been, and is not like a judgment reversed by writ of error. In such case, however, it would not lie against the *sheriff*, who has the queen's writ to warrant him; but the *party* must produce not only the writ but the judgment (*x*). Where the defendant wrongfully seized goods, and placed a man in possession for some days; it was held, that the owner might recover damages, although he had the use of the goods all the time (*y*).

(c) *Other wrongful Taking.*

What is the proper Remedy.

The landlord of a tenant from year to year, although there be no reservation of the timber on the premises, may support an action of trespass de bonis asportatis against a third person, for carrying it away after it has been cut down (*z*). Where a landlord claiming a sum of money as due to him from his lodger, locked up one of the rooms in which were some goods of the lodger, saying, they should not be removed until his bill was paid; it was held, that *trespass* could not be maintained for taking the goods (*a*). Where in trespass against a landlord for breaking and entering the apartments of his lodger, and removing a brass plate from the house door, the defendant in his pleas treated the brass plate as a chattel, and the taking it as a substantive trespass, and there was no evidence to show it was affixed to the freehold; it was held, that it must be assumed to be a chattel only (*b*).

(*s*) *Gordon* v. *Harper*, 7 Term Rep. 9; 2 Esp. 465.

(*t*) *Turner* v. *Ford*, 15 Mees. & Wels. 212.

(*u*) *Burton* v. *Hughes*, 2 Bing. 173; 9 Moore, 334.

(*x*) Bull. N. P. 84.

(*y*) *Baylis* v. *Fisher* or *Usher*, 7 Bing. 153; 4 Moore & Payne, 790.

(*z*) *Ward* v. *Andrews*, 2 Chit. 636.

(*a*) *Hartley* v. *Moxham*, 3 Queen's B. Rep. 701; 3 Gale & Dav. 1; 1 Car. & Mar. 504.

(*b*) *Lane* v. *Dixon*, 3 Com. B. Rep. 776.

The action of trover is also the remedy resorted to, to obtain damages for any wrongful taking, or withholding of goods and chattels from their right owner. This action is founded upon the conversion of the property by the party to his own use: but it is not required that there should have been an actual conversion, as in some cases it will be presumed, from the defendant's having refused to return the property on demand made upon him.

By and against whom Trover is maintainable.

One tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter have so disposed of it as to render it impossible that the co-tenant should ever take and use it (*c*). Where one tenant in common does not destroy the thing in common, but only takes it out of the possession of his companion and carries it away, trover will not lie against him (*d*). There may, however, be such a dealing with a chattel by one of two tenants in common, short of its absolute destruction, which would amount to a conversion (*e*). It is now settled, although contrary opinions have been previously expressed (*f*), that one of two tenants in common is not liable in trover at the suit of his co-tenant for the mere sale of the chattel; though he may be for such a disposition as amounts to a destruction of it (*g*). The conversion of a chattel by a tenant in common to its general and profitable application, though it change the form of the substance, is not such a destruction of the subject-matter as to prevent the plaintiff from taking and using it in its altered state; therefore it creates no right of action (*h*). If a thing be deposited by one, with the authority of another, and received by the bailee to keep on the joint account of the two, one alone cannot lawfully demand it of the bailee without the authority of the other, so as to maintain trover on the bailee's refusal to deliver it: but where it only appeared that it had been agreed between the assignor and the assignee of a lease, that, to save the expense of a counterpart, the lease should be deposited in the hands of a third person, and the assignee afterwards delivered it to the bailee to keep, but without mentioning that it was on the joint account, and no communication was made of the deposit to the assignor, who never interfered further in the matter; but the defendant afterwards (with the privity of the bailee, who acted as his agent) procured an illegal and void conveyance of the property in it from the assignee; it was held,

(*c*) *Fennings* v. *Grenville* (*Lord*), 1 Taunt. 241. Trespass qu. cl. fregit lies by one of several tenants in common against his co-tenant where there has been an actual expulsion; *Murray* v. *Hall*, 7 C. B. Rep. 441; *Wilkinson* v. *Haygarth*, 16 Law J., N. S., Q. B., 103.

(*d*) *Barnardiston* v. *Chapman*, cited in *Heath* v. *Hubbard*, 4 East, 121; *Mayhew* v. *Herrick*, 7 Com. B. Rep. 249.

(*e*) Ibid. 246; and see *Holliday* v. *Camsell*, 1 Term Rep. 658.

(*f*) *Barton* v. *Williams*, 5 Barn. & Ald. 395; M'Clel. & You. 406; 3 Bing. 139; by Parke, B., in *Farrar* v. *Beswick*, 1 Mees. & Wels. 685, whose observations, however, are there misreported; see *Mayhew* v. *Herrick*, 7 C. B. Rep. 238.

(*g*) Ibid. 229.

(*h*) *Fennings* v. *Grenville* (*Lord*), 1 Taunt. 241; and see *Heath* v. *Hubbard*, 4 East, 110.

that the assignee or his legal representatives might alone maintain trover for it after demand and refusal (*i*).

Instances where the Action of Trover is maintainable.

Trover cannot be maintained for fixtures attached to the freehold (*k*); but it can be if they have been removed from the freehold (*l*). If a tenant of land, during his tenancy, remove a dung heap, and at the time of his so doing digs into and removes the soil beneath, the landlord may maintain either trespass de bonis asportatis or trover (*m*). The action of trover is maintainable for deeds: thus where *A.* having agreed to purchase of *B.* the remainder of a term, the latter delivered to him the lease, in order to get an assignment made out; and *A.* then obtained an enlargement of the term from the original landlord, and refused to accept an assignment, or pay the full price agreed on, because some fixtures had been removed; it was held, that *B.* might maintain trover for it (*n*). Trover lies for an unstamped agreement, if it can, upon payment of a penalty and stamp duty, be stamped and rendered available (*o*). This action lies for an undivided part of a chattel (*p*). A plaintiff who claims a right to cut rushes on a common, and cuts five or six loads, which the defendant carries away, may maintain trover for them (*q*).

SECT. 6.—*Recovery of and Trespass for Mesne Profits.*

Nature of the Action for Mesne Profits.

The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 214, following the provisions of the 1 Geo. IV. c. 87, s. 2, enables a landlord, after proving his right to recover possession of premises, to go into evidence of the mesne profits. The section enacts that, "Whenever it shall appear on the trial of any ejectment at the suit of a landlord against a tenant, that such tenant, or his attorney, hath been served with due notice of trial, the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the claimant on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the writ in ejectment, to go into evidence of the mesne profits thereof which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the claimant shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne pro-

(*i*) *May* v. *Harvey*, 13 East, 197.

(*k*) *Mackintosh* v. *Trotter*, 3 Mees. & Wels. 184; and 1 Horn. & Hurl. 20.

(*l*) See ante, Book II., Chap. IV., Sect. 8, (g), p. 484.

(*m*) *Higgon* v. *Mortimer*, 6 Car. & Pay. 616.

(*n*) *Parry* v. *Frame*, 2 Bos. & Pul. 451.

(*o*) *Scott* v. *Jones*, 4 Taunt. 865.

(*p*) *Watson* v. *King*, 4 Camp. 272; 1 Stark. 121.

(*q*) *Rackham* v. *Jesup*, 3 Wils. 332, 338.

fits; and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession of costs, but also for the mesne profits found by the jury: provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein down to the day of the delivery of possession of the premises recovered in the ejectment." Under this section, the landlord is entitled to mesne profits, although the writ and issue do not contain any claim in respect of them (*r*). The action for mesne profits may therefore still be brought, for the verdict in ejectment having in fact established the right of the plaintiff, he is entitled to recover damages for the unjust detention of the possession (*s*).

By whom the Action is to be brought.

Under the old mode of proceeding in ejectment, a joint action for mesne profits might be supported by several lessors of a plaintiff in ejectment after a recovery therein, although there were only separate demises by each (*t*). An action for mesne profits lies where one tenant in common recovers against another in ejectment by default (*u*). It would seem that this action may now be maintained by or against personal representatives under the statute 3 & 4 Will. IV. c. 42, s. 2, within the limitations pointed out by that enactment (*x*).

Against whom the Action is maintainable.

The action is in general to be brought against the defendant in the action of ejectment; but any person found in possession after a recovery in ejectment is liable (*y*). Where premises are in the possession of a tenant, the landlord, who is in the receipt of the rents and profits, is also liable (*z*). So where a lessee underlet and received rent, and stated that the under-lessee was his tenant, and both refused to give up possession, and alleged title in the first lessor, another person being in fact entitled; it was held, that the lessee was liable for mesne profits, though never actually occupying (*a*).

(*r*) *Smith* v. *Tett*, 9 Exch. Rep. 307.

(*s*) 3 Black. Com. 205.

(*t*) *Chamier* v. *Lington* or *Clingo*, 2 Chit. 410; 5 Maule & Selw. 64.

(*u*) *Goodtitle* v. *Tombs*, 3 Wils. 118.

(*x*) See ante, 238, 622.

(*y*) 1 Chit. Pl. 217, 7th edit.; Adams's Eject. 337, 4th edit. Any one in possession of the premises, after a recovery of them by action of ejectment, is a trespasser, and as such liable to damages, and he cannot cover himself under the licence of the defendant in ejectment, for no man can license another to do an illegal act. In this case, Sellon, Serjt., moved for a new trial. It appeared that the plaintiff, by an action of ejectment, had evicted one Mitchell (who had been a tenant of his under an agreement for a lease), and had since brought an action against the present defendant, in which he had declared first in trespass quare clausum fregit, and in another count for damages sustained, being in fact for the mesne profits. Sellon, for the present defendant, contended that his client being in possession merely as the agent of Mitchell, who was in prison, was not liable to any action of trespass nor for the mesne profits, Mitchell himself being the only party to be looked to. But Lord Kenyon observed, that the plaintiff having recovered in ejectment against his tenant, any other party in possession was liable to be deemed a trespasser, and that in an action of trespass damages ought to be given, though not amounting quite to the mesne profits. Rule refused. *Girdlestone* v. *Porter*, K. B., M. T., 53 Geo. III. MS.

(*z*) *Hunter* v. *Britts*, 3 Camp. 455.

(*a*) *Doe* v. *Harlow*, 12 Ad. & El. 40, which overrules the dictum of Mansfield, C. J., in *Burne* v. *Richardson*, 4 Taunt. 720.

When the Action may be brought.

To entitle a party to maintain trespass for the mesne profits, it is not necessary to execute an habere facias possessionem, if the plaintiff has been let into possession by the defendant (*b*): nor, indeed, does it seem necessary that the plaintiff should have been in possession at all since the recovery in ejectment; though, if he has not, it may be doubtful what extent of damages he can recover (*c*). This action may be brought pending a writ of error in ejectment, and the plaintiff may proceed to ascertain his damages, and sign his judgment; but the Court will stay execution till the writ of error be determined (*d*).

Declaration.

The declaration in the action for mesne profits should state the several parcels of land, &c., from which the profits arose. It should also state the time when the defendant broke and entered the messuage, &c., and ejected the plaintiff, and how long the defendant kept and continued the plaintiff so ejected; but defects in these particulars are cured, after judgment by default, and writ of inquiry of damages executed; so that no objection can be taken in arrest of final judgment for such defect in form (*e*). The day on which it is alleged the plaintiff was ejected, and that when he recovered possession, are not material, even though not stated under a videlicet (*f*). The Courts also and the judges possess large powers of amendment under the 222nd section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, and the 17 & 18 Vict. c. 125, s. 96.

Pleas.

The usual plea in trespass for mesne profits is, not guilty, and it has the same effect as in other actions of trespass quare clausum fregit. Bankruptcy is no plea in bar to an action of trespass for mesne profits, for the damages occasioned by the tort are uncertain (*g*); but where, after a recovery in ejectment, and before an action of trespass for mesne profits, the defendant became a bankrupt, and the jury did not include the costs of the ejectment in their verdict in executing a writ of inquiry in the action for mesne profits, the Court refused to set aside the inquisition, because the plaintiff might have proved the costs as a debt under the defendant's commission of bankrupt (*h*). A plea of discharge under an insolvent act (53 Geo. III. c. 102), is no bar to an action of trespass for mesne profits, although accruing before the discharge (*i*). The Statute of Limitations may be pleaded, and by that means the defendant may protect himself from all claims except those arising within the last six years (*k*).

Replications.

In trespass for mesne profits against the defendant in the ejectment, who has pleaded that the plaintiff was not possessed and liberum tene-

(*b*) *Calvert* v. *Horsfall*, 4 Esp. 167.
(*c*) *Doe* v. *Wright*, 10 Ad. & El. 763; 2 Per. & Dav. 672.
(*d*) 2 Sell. Pract. 226; Adams's Eject. 335, 4th ed.; *Doe* v. *Wright*, 10 Ad. & El. 763; 2 Per. & Dav. 672.
(*e*) *Higgins* v. *Highfield*, 13 East, 407.
(*f*) *Ive* v. *Scott*, 9 Dowl. 993.
(*g*) *Goodtitle* v. *North*, 2 Dougl. 584.
(*h*) *Gulliver* v. *Drinkwater*, 2 Term Rep. 261.
(*i*) *Lloyd* v. *Peel*, 3 Barn. & Ald. 407.
(*k*) Bull. N. P. 88.

Evidence.

mentum; a replication by way of estoppel to these pleas, setting out the recovery in ejectment, is good (*l*).

In trespass against the tenant in possession for mesne profits, after a recovery in ejectment, the plaintiff must prove his title. If he sought to recover damages for any time prior to the day of the demise in the declaration of ejectment, he had to give actual evidence of his title; but if he only sought to recover damages from that day, it was sufficient to produce the judgment in ejectment, and the writ of possession executed, and to prove the value of the profits (*m*). The judgment in ejectment was not, however, conclusive evidence of the plaintiff's right to the premises from the day of the demise laid in the declaration, nor is it now from the date of the writ, unless replied by way of estoppel (*n*); but it is still good if so pleaded, either to the plea of not possessed or to a plea of title under a third party: and it is an estoppel from the date of the writ, and the estoppel under it will be presumed to continue until it be shown to have been determined, which determination the defendant must rejoin (*o*). In replying the estoppel, the plaintiff need not aver that the defendant had notice of the proceedings in ejectment, or that a writ of possession was issued or executed (*p*). It seems doubtful whether the plaintiff need allege an entry under the recovery, or whether it be enough to allege that the plaintiff entered by virtue of the judgment (*q*). But where, in an action for mesne profits, it appeared that the defendant had been let in to defend an ejectment under a consent rule, describing him as "mortgagee and landlord," and that the lessor of the plaintiff had recovered; and the defendant was mortgagee, but had never been in possession, the profits having been taken by a receiver; it was held, that the defendant was concluded by the consent rule, and could not allege in the action for mesne profits that he was out of possession at the time of the service of the declaration (*r*). The Common Law Procedure Act, 15 & 16 Vict. c. 76, has not altered the former pleas of the action for mesne profits. The judgment is also evidence even where the defendant in the action for mesne profits comes in under the defendant in the ejectment suit (*s*); but it must be proved that he so came in (*t*). If, under the old system, the judgment had been against the casual ejector, and no writ of possession executed, the defendant in possession might con-

(*l*) *Doe* v. *Wright*, 10 Ad. & El. 763; 2 Per. & Dav. 672.

(*m*) Bull. N. P. 87. But against a precedent occupier the record is no evidence, and therefore against such a one it is necessary for the plaintiff to prove his title, and also to prove an actual entry, for trespass being a possessory action, cannot be maintained without it.

(*n*) *Doe* v. *Huddart*, 2 Cromp. M. & Ros. 316; 4 Dowl. 437; 1 Gale, 260; 5 Tyr. 846; and see *Doe* v. *Wright*, 10 Ad. & El. 763; 2 Per. & Dav. 672; *Aslin* v. *Parkin*, 2 Burr. 665; *Doe* v. *Wellsman*, 2 Exch. Rep. 368; *Matthew* v. *Osborne*, 13 Com. B. Rep. 919.

(*o*) *Wilkinson* v. *Kirby*, 2 Com. Law Rep. 1387.

(*p*) Ibid.

(*q*) Ibid.

(*r*) *Doe* v. *Challis*, 17 Queen's B. Rep. 166.

(*s*) *Doe* v. *Whitcomb*, 8 Bing. 46; 1 Moore & Scott, 107.

(*t*) *Doe* v. *Harvey*, 8 Bing. 239; 1 Moore & Scott, 374.

trovert the title, if he had not been made a defendant in the ejectment, and had a verdict against him; and therefore the recovery in ejectment was not, as against him, conclusive evidence (*u*). Where premises were in the possession of a tenant, and there was judgment in ejectment against the casual ejector, in an action against the landlord for the mesne profits and costs of the ejectment, the judgment in ejectment was held to be no evidence against him, without proof that he had notice of the ejectment, so that he might have come in to defend it; but a subsequent promise by him to pay the rent and costs amounted to an admission that he was liable to the action (*x*). A recovery in ejectment against the wife cannot be given in evidence against the husband and wife, in an action for mesne profits; for in such case there is no evidence of the trespass, except the judgment in ejectment; and the wife's confession of a trespass committed by her cannot be given in evidence to affect the husband, in an action in which he is liable for the damages and costs (*y*). A judgment in ejectment upon the several demises of two, was held to be evidence to support trespass brought by them jointly (*z*). Upon a plea of not guilty, in trespass for mesne profits, evidence is not admissible that the plaintiff had accepted the rent of the premises for the time in dispute, and had agreed to waive the costs of the ejectment (*a*).

Damages.

The plaintiff was not bound to claim the mesne profits from the time of the demise only; for if he proved his title to have accrued before that time, and proved the defendant to have been longer in possession, he might recover antecedent profits (*b*). With respect to the amount of damages given by the jury in this action, they are not bound by the amount of the rent, but may give *extra* damages: indeed, four times the value of the mesne profits have been known to be given in this sort of action of trespass. In trespass for mesne profits of an inn, the plaintiff cannot recover the loss which he has sustained by the defendant shutting up the house and destroying the custom, unless such damage be specially laid (*c*). An agreement by the lessor to relinquish all claims for mesne profits and rent, and for holding over, will extend to the damages to be recovered in an action of trespass

(*u*) *Jefferies* v. *Dyson*, 2 Stra. 960.

(*x*) *Hunter* v. *Britts*, 3 Camp. 455.

(*y*) *Denn* v. *White*, 7 Term Rep. 112.

(*z*) *Chamier* v. *Clingo* or *Lington*, 5 Maule & Selw. 64; 2 Chit. 410. In an action for mesne profits for one year, the declaration contained other counts for destroying fences, to which a justification was pleaded, and upon a new assignmen', the general issue. An examined copy of the judgment in ejectment was proved. The trespass in respect of the fences was also proved: but the judge (Runnington, Serjt.) being of opinion that, as it was committed whilst the defendant was in possession as tenant, the action was misconceived for that part, the jury, by his direction, gave no damages in respect thereof. A rule for a new trial was obtained on the ground of the trespass having been committed after the defendant had ceased to be tenant to the plaintiff, and after the recovery in ejectment; but that not appearing to be the fact, from the report as it was read from the judge's notes, the rule for a new trial was discharged. *Anon.*, M. T. 41 Geo. III. MS.

(*a*) *Doe* d. *Hill* v. *Lee*, 4 Taunt. 458.

(*b*) Bull. N. P. 87.

(*c*) *Dunn* v. *Large*, 3 Dougl. 335.

for cutting hay after the term, brought against persons to whom the tenant had sold the crop (*d*). After judgment by default in ejectment, the costs of that action may be recovered in the action for the mesne profits (*e*); and where the defendant had appeared and pleaded in ejectment, the costs may be recovered, though they have not been taxed (*f*). If the costs have been taxed, that amount only is recoverable (*g*), even though taxed on the application of the defendant (*h*): but if they have not been taxed, the plaintiff may recover all the expenses he has been necessarily put to (*i*). Costs, as between attorney and client, of reversing in a court of error a judgment for the defendant in ejectment, were once held to be recoverable in an action of trespass for mesne profits (*k*). It is no answer to this action that a remittitur damna has been entered on the record in the ejectment cause (*l*).

Costs.

The costs in the action of trespass for mesne profits are regulated in the same manner as in ordinary actions of trespass (*m*). Formerly, if the action were brought in the name of the nominal plaintiff, the Court, on application, would stay the suit till security were given for answering the costs (*n*).

Payment of Money into Court.

In trespass for mesne profits the defendant may pay money into Court as in other actions (*o*).

SECT. 7.—*Other Subjects.*

(a) *Not repairing Fences.*

What are the Remedies for Non-repair of Fences.

Every man's ground is, in the eye of the law, fenced: and where a hedge and ditch join together, the man on whose ground or side the hedge is, is bound to keep the same hedge or fence in repair, and the ditch adjoining to it on the other side scoured. An action on the case lies for not repairing fences whereby cattle come into the ground of the plaintiff, and do damage (*p*); but such action can only be maintained against the occupier, and not against the owner of the fee who is not in possession (*q*). So an action on the case may be maintained by the landlord against his tenant for not repairing fences, upon the ground of the injury done to the inheritance (*r*). If a man who ought to inclose against land do not inclose, whereby the cattle

(*d*) *Hey* v. *Moorhouse*, 6 Bing. N. C. 52; 8 Scott, 156.

(*e*) *Gulliver* v. *Drinkwater*, 2 Term Rep. 261; *S. P. Doe* v. *Davis*, 1 Esp. 358; *Doe* v. *Huddart*, 2 Cromp. M. & Ros. 316; 4 Dowl. 437; 1 Gale, 260; *Anon.*, Lofft, 451.

(*f*) *Symonds* v. *Page*, 1 Cromp. & Jerv. 29.

(*g*) *Brooke* v. *Bridges*, 7 Moore, 471; *Doe* v. *Hare*, 4 Tyr. 29; 2 Dowl. 245.

(*h*) *Doe* v. *Filliter*, 13 Mees. & Wels. 47; 2 Dow. & Low. 186.

(*i*) *Doe* v. *Huddart*, 2 Cromp. M. & Ros. 316; 4 Dowl. 437; 1 Gale, 260; 5 Tyr. 846; *Doe* v. *Davis*, 1 Esp. 358.

(*k*) *Nowell* v. *Roake*, 7 Barn. & Cres. 404; 1 Man. & Ryl. 170; but see *Doe* v. *Filliter*, 13 Mees. & Wels. 48.

(*l*) *Harper* v. *Eyles*, 3 Dougl. 399.

(*m*) And see Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 214.

(*n*) Run. Eject. 439; Bull. N. P. 89.

(*o*) See ante, pp. 596, 605.

(*p*) *Star* v. *Rookesby*, 1 Salk. 335.

(*q*) *Cheetham* v. *Hampson*, 4 Term Rep. 318.

(*r*) See ante, 455.

of his tenants enter into the land and do damage, the owner may have his remedy (*s*). If cattle escape out of the close of *A.* into that of *B.*, through the defect of *B.*'s fences, and *B.* drives them into a highway, and not back into *A.*'s close, trespass is maintainable against him (*t*). An action of case lies for breaking the fences of a third person, whereby the cattle of the plaintiff escaped into the land of the former, and are distrained (*u*). Where the plaintiff declared in case against the defendant for not repairing his fences, per quod the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a haystack; it was held, that the damage was not too remote; and that the action was maintainable (*x*).

(b) *Not removing Tithes.*

What Remedy for Non-removal of Tithes.

An action of case lies against the proprietors of tithes for not taking them away within a reasonable time, whereby the grass and herbage are injured: but trespass will not lie, because it is only a nonfeasance, and not a malfeasance (*y*). The action of case is not maintainable against a parson for not taking away his tithes, unless they have been properly set out (*z*). The declaration for not taking away tithes, may state that the plaintiff set out the tithes, and the defendant refused to take them away; or the plaintiff may declare with a per quod the grass did not grow where the tithes lay, and he could not put his cattle in the close to depasture the residue of the grass, lest they should hurt the tithes (*a*). Though the proprietor of tithes do not remove them in convenient time, the owner of the land cannot put in his cattle and eat them; his remedy is either by distress or action.

(c) *Slander of Title.*

Remedy for Slander of Title.

By slander of title is meant an injury done to the title of another to real property, by reports set on foot to its prejudice. The remedy for this injury is by an action on the case; to support which, it is necessary to give evidence that the defendant was actuated by malicious motives, either by proving direct malice, or by showing circumstances from which it may be inferred (*b*). Where a lease, in which was a proviso for re-entry if the rent were in arrear twenty-eight days, was exposed to sale by the assignee; and rent being then in arrear, the lessor announced at the sale, that the vendors could not make a title; in consequence of which, bidders who came to buy went away; and he afterwards offered 100*l.* for the lease, but subsequently recovered the premises in ejectment; it was held, that no action for slander of

(*s*) Bull. N. P. 74.

(*t*) *Carruthers* v. *Hollis*, 8 Ad. & El. 113; 3 Nev. & Per. 246; 1 Will. Wol. & Hod. 264.

(*u*) *Courtney* v. *Collett*, 1 Lord Raym. 273.

(*x*) *Powell* v. *Salisbury*, 2 You. & Jerv. 391.

(*y*) *Butter* v. *Heathby*, 3 Burr. 1891; Com. Dig. tit. *Nuisance*, (A).

(*z*) *Moyes* v. *Willett*, 3 Esp. 31.

(*a*) *Shapcott* v. *Mugford*, 2 Lord Raym. 187.

(*b*) *Hargrave* v. *Le Breton*, 4 Burr. 2422; *S. P. Smith* v. *Spooner*, 3 Taunt. 246.

title lay against him. In an action for slander of title it has been held, that the defendant may give evidence on the general issue, that he spoke the words claiming title in himself (*c*).

SECT. 8.—*Sheriffs.*

Usual Remedies against Sheriffs.

The most common cause of action against sheriffs, which is applicable to the present subject, is for not paying to the landlord a year's rent, under the statute of 8 Anne, c. 14, upon a levy of goods in execution (*d*). The declaration in the action (which is in case upon the statute) need not state all the particulars of the demise; but if it does, and they are not proved as stated, there shall be a nonsuit (*e*). The common allegation in a declaration, of "the defendant well knowing the premises," in an action by the landlord against the sheriff for removing goods taken in execution without paying him a year's rent, will, after verdict, cure the omission of an averment that the defendant had notice of rent being in arrear; indeed it is questionable whether any other allegation of notice be necessary (*f*). In such an action, it is not necessary to prove that a year's rent is due; it is sufficient to prove the occupation by the tenant; and it lies on the defendant to show that the rent has all been paid (*g*).

(*c*) *Smith* v. *Spooner*, 3 Taunt. 246.

(*d*) See ante, Book II., Chap. II., Sect. 9, (a), p. 337. High bailiffs of the new County Courts are liable in the same manner that sheriffs are, by 9 & 10 Vict. c. 95, ss. 33, 138, 139.

(*e*) *Beeston* or *Bristow* v. *Wright*, 2 Dougl. 665; 1 Term Rep. 236. But see 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96.

(*f*) *Lane* v. *Crocket*, 7 Price, 566.

(*g*) *Harrison* v. *Barry*, 7 Price, 690.

CHAPTER V.

ACTION OF REPLEVIN.

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BOOK III. CHAPTER V. SECT. 1.

SECT. 1.—*For what it lies.*

Nature of the Action of Replevin.

THE action which we have next to treat of is replevin:—this is also a personal action; and may be brought to recover the possession of goods unlawfully taken; the validity of which taking, it is the regular mode of contesting. It is a re-delivery of the pledge, or thing taken in distress, to the owner, by the sheriff or his deputy; upon the owner giving security to try the right of the distress, and to restore it, if the right be adjudged against him: after which the distrainer may keep it to be sold or otherwise disposed of, in the same way as if no replevin had been made (*a*). The action of replevin is not peculiar to goods, &c., taken in distress, although in practice it is usually confined to that injury, but may be brought for all goods and chattels unlawfully

(*a*) 3 Bl. Com. 147, 150. The peculiarity of the action is, that both parties are plaintiffs, or, as they are called, "actors," from the civil law designation of a plaintiff; and this because the plaintiff in replevin sues for damages, and the defendant or avowant to have a return of the goods or cattle. It is, perhaps, to the losing sight of this fact, that much of the difficulty attending the action of replevin is attributable. It is an action founded on the right, and different from trespass, or detinue; and it is now held, that as no lands can be recovered in this action, it cannot with any propriety be considered as a real action, though the title of lands may incidentally come in question, as it may do in an action of trespass or even debt, which are actions merely personal; Bac. Abr. tit. *Replevin*, (A). Where a tenant has, on coming into possession under an assignment, had notice that the lease was held under any particular person to whom the former tenant has paid rent, the title of this person cannot be contested in an action of replevin; *Johnson* v. *Mason*, 1 Esp. 91.

taken (*b*). It will not, however, lie for goods delivered on a contract, but unjustly detained,—as for goods delivered to a carrier (*c*). It is the proper form of action to recover a specific chattel; for in trover damages only are recovered (*d*). If a distress be taken, and before impounding it tender of the rent be made, but is refused, replevin may be maintained for the subsequent detention (*e*). It seems that replevin is not maintainable if the landlord distrains for more than a year's rent due by his tenant, against whom a fiat in bankruptcy has issued (*f*). When an act of parliament orders a distress and sale of goods, it is in the nature of an execution; and an action of replevin does not lie (*g*): thus, when a magistrate having competent jurisdiction adjudges, and, on refusal to pay, issues a warrant of distress and sale, the goods taken under it are not replevisable (*h*). It has accordingly been held, that replevin cannot be maintained for goods distrained by virtue of a warrant from a magistrate, under the Statute of Labourers (20 Geo. II. c. 19, s. 1), to distrain and sell goods on refusal of the party to pay; nor can the question of a magistrate's jurisdiction be tried in such an action; and therefore it cannot be pleaded in bar to a cognizance made under such warrant, that the labourer did not duly make oath before the magistrate, that the sum claimed was due to him for wages, nor that such a sum was not due. So if a man were to presume to replevy goods seized in order to condemnation, it would be a contempt of the Court of Exchequer, for which an attachment would be granted instantly (*i*). The present account of this action will be confined to the notice of it as it regards distress for rent, or cattle damage feasant; the services of copyholders, &c., not being within the scope of consideration.

Different sorts of Replevin.

The action of replevin is of two sorts: 1, in the detinet: 2, in the detinuit. Where the party has had his goods re-delivered to him by the sheriff upon a writ of replevin, or upon a plaint levied before him, the action is in the detinuit, "wherefore he detained the goods," &c.; but where the sheriff has not made such replevin, but the distrainer still keeps possession, the action is in the detinet, "wherefore he detains the goods," &c.—The advantage that the plaintiff has in bringing an action of replevin in the detinet, instead of an action of

(*b*) Com. Dig. *Replevin*, and see the authorities collected in Wilkinson on Replevin, p. 2; *George* v. *Chambers*, 11 Mees. & Wels. 149; *Allen* v. *Sharp*, 2 Exch. Rep. 352.

(*c*) *Galloway* v. *Bird*, 4 Bing. 299; 12 Moore, 547.

(*d*) *Dore* v. *Wilkinson*, 2 Stark. 728.

(*e*) *Evans* v. *Elliott*, 5 Ad. & El. 142; 2 Har. & Wol. 231; 6 Nev. & Man. 606; see *Gulliver* v. *Cosens*, 1 Com. B. Rep. 788; and ante, 339, 564.

(*f*) Per Coleridge, J., in *Knapman* v. *Dunning*, T. T. 1839, Bail Court. In that case the landlord so distrained, and the goods were replevied in the name of the tenant, no assignee having been then chosen; the validity of the bankruptcy being disputed, the Court refused to stay proceedings on the payment of one year's rent and costs, or to substitute the name of the assignee as plaintiff in lieu of the bankrupt.

(*g*) Bac. Abr. tit. *Replevin*, (C.)

(*h*) *Wilson* v. *Weller*, 1 Brod. & Bing. 57; 3 Moore, 294; and see *Wootton* v. *Harvey*, 6 East, 75; and *Rex* v. *Hoseason*, 14 East, 605.

(*i*) Anstr. 212.

trespass de bonis asportatis, is, that he can oblige the defendant to re-deliver the goods to him immediately, in case, upon making his avowry, they appear to be replevisable; but as he may more speedily have them delivered immediately after they are distrained, by application to the sheriff, the action in the detinet has long fallen into disuse, and is never brought unless the distrainer has eloigned (removed) the goods, so that the sheriff cannot get at them to make replevin (*k*).

For what Description of Chattels the Action lies.

Replevin lies for whatever is capable of being distrained, and for nothing else; for the action is the remedy of the party whose goods are distrained; therefore it does not lie for things feræ naturæ (*l*); nor deeds or charters; nor money; nor leather made into shoes; but if a mare in foal, or a cow in calf be distrained; and it happens to bring forth its young whilst it is in custody of the distrainer, a replevin lies for the foal or calf. It lies also for a ship; so for the sails of a ship; but no replevin lies for goods taken beyond the seas, though brought hither by the defendant afterwards. In those cases in which replevin does not lie, the party may bring an action of detinue to recover the deeds, goods, &c. in specie (*m*).

SECT. 2.—*By and against whom it lies.*

By and against whom Replevin may be brought.

It is a general rule, that whoever brings replevin ought to have the property of the goods in him at the time of the taking: but there are two kinds of properties; a general property, which every absolute owner hath, and a special property,—as goods pledged, or taken to manure his lands, or the like,—and for either of these replevin lies (*n*). If the goods of several persons be taken, they cannot join in replevin, but every one must have a separate action: tenants in common, therefore, should not join; but coparceners should join, for they make but one heir: and for the same reason so should joint-tenants (*o*). An executor may have replevin for goods taken in the lifetime of his testator (*p*). So if cattle or other goods of a feme sole be taken, and she afterwards intermarry, the husband alone may have replevin: but if they join, judgment will not be arrested after verdict, because the Court will presume them jointly interested (as they may be, if a distress be taken of goods, of which a man and woman were joint-tenants before their marriage), the avowry admitting the property to be in the manner in which it is laid. In replevying goods, however, which a wife holds as

(*k*) 2 Sell. Prac. 241.

(*l*) If animals, which are by nature *feræ naturæ*, have been reclaimed, as deer in a park, an action of replevin will lie for them; *Davies* v. *Powell*, Willes, 46.

(*m*) Bac. Abr. tit. *Replevin*, &c. (F).

(*n*) This remedy may be said to be of common right; for if a man by his deed grant a rent with a clause of distress, and grant further that the party shall keep the goods distrained against gages and pledges, until the rent be paid, yet shall the sheriff replevy the goods distrained; for it is against the nature of such a distress to be irreplevisable; Co. Litt. 145 b.

(*o*) Co. Litt. 145 b; Bull. N. P. 53.

(*p*) Bull. N. P. 53.

executrix, this action cannot be brought by either of them singly, but they must be joined (*q*). Replevin lies against him who takes the goods, and also against him who commands the taking; or against both. So it lies against him who takes damage feasant, if he detains after amends tendered (*r*).

SECT. 3.—*Procedure prior to Removal from Inferior Court.*

(a) *Commencement by Original.*

Original Writ of Replevin.

Replevin may be made, either by original writ of replevin, at common law, or by plaint, by the statute of Marlbridge, 52 Hen. III. c. 21. The original writ issued out of Chancery, and commanded the sheriff, upon pledges being given to prosecute, to make deliverance to the owner of the goods or chattels taken, and afterwards to do justice in respect of the matter in dispute in his own Court (*s*). This proceeding by original writ is now quite obsolete in this country (*t*).

(b) *Commencement by Plaint.*

History and Nature of the Proceeding by Plaint.

Formerly, when the party distrained upon intended to dispute the validity of the distress, he could adopt no other course by the common law than the original writ of replevin. Although this writ professed to give the sheriff more power for the quicker administration of justice, it was so tedious—was so incomplete—and altogether exposed both the landlord and tenant to so many inconveniences during the progress of the suit, as to render it a most incomplete means of executive process. Accordingly, at a very early period, the legislature much simplified the process: the statute of Marlbridge, 52 Hen. III. c. 21, enacting (without suing a writ out of Chancery), "that if the beasts of any man be taken, and wrongfully withholden, the sheriff, after complaint made to him thereof, may deliver them without let or gainsaying of him that took the beasts, if they were taken out of liberties: and if the beasts were taken within any liberties, and the bailiffs of the liberty will not deliver them, then the sheriff, for default of those bailiffs, shall cause them to be delivered." Now, therefore, when any man's goods are distrained or impounded, he may, upon application for the purpose to the sheriff, or to one of his deputies (*u*) appointed for the purpose,

(*q*) Bac. Abr. tit. *Replevin*, &c. (G).

(*r*) 2 Roll. 431, 1. 5; F. N. B. 19, (G). See ante, p. 562.

(*s*) F. N. B. 68, (D).

(*t*) Wilk. Replev. 7. The curious reader, who wishes for further information respecting the process in replevin, when commenced by original writ, which, though disused in this country, is still continued in Ireland, will find all the law respecting it in Gilbert's Distress, &c., in Com. Dig. tit. *Pleader*, *Replevin*, (3 K 1), and in 2 Inst. 140, 394 et seq.

(*u*) For the more speedy delivery of cattle taken by way of distress, the statute 1 & 2 Philip & Mary, c. 12, s. 3, provides, that the sheriff shall make at least four deputies in each county, dwelling not above twelve miles from each other, for the sole purpose of making replevins, under the penalty of 5*l.* for every month such deputies shall be omitted to be provided. In an action on a replevin bond, it was held, that the fact of the person who took the bond acting as replevin clerk was primâ facie evidence of his appointment; *Faulkner* v. *Johnson*, 1

upon giving pledges to return the distress if judgment be against him, have a replevin, by which his goods will be restored to his possession. The act of the sheriff or his deputy, in entering a plaint in replevin, seems to be merely ministerial: therefore it has been held, that although where a sheriff or his deputy neglects to enter a plaint in replevin in the County Court, the Court of Queen's Bench will not compel him to do so on motion (*x*); yet that perhaps they would grant a mandamus to enter the plaint.

Jurisdiction, 9 & 10 Vict. c. 95.

Until lately actions of replevin were generally commenced by plaint in the ancient County Courts, but now they must be brought in the Courts established under the statute 9 & 10 Vict. c. 95, amended by 12 & 13 Vict. c. 101, and they are to be brought without writ (*y*). The jurisdiction of the old County Courts in replevin being, by the 119th section of that statute, transferred from the old to the new County Courts (*z*), up to the plaint the proceedings are the same as before the 9 & 10 Vict. c. 95 (*a*). The County Court has jurisdiction whatever may be the value of the goods; and it has jurisdiction to try a replevin for illegal distress for rent, although the title to the premises may be in dispute (*b*).

(c) *Pledges in Replevin.*

Nature of Pledges in Replevin.

The sheriff must take pledges, by the common law, that the party replevying will pursue his action against the distrainer: for which purpose he puts in pledges to prosecute. As these pledges, however, were only nominal (John Doe and Richard Roe), for the security of the landlord, on recovering the distress after return was awarded, the sheriff was commanded by the statute of Westminster 2, 13 Edw. I. st. 1, c. 2, to take pledges (*c*) not only to prosecute the suit, but also to make return of the distress, if a return should be awarded; these latter description of pledges are called pledges de retorno habendo, and are in the nature of sureties. It follows, therefore, that money or cattle, being a pawn, are not pledges within this statute, and for this reason a sheriff has been adjudged to be liable to an action on the case for taking money as a pledge de retorno habendo; because

Dow. & Low. 346. So in an action against the sheriff for taking insufficient pledges; *Plumer* v. *Briscoe*, 11 Queen's B. Rep. 776. Whether proclamation is necessary to the appointment of the sheriff's deputies, under this statute, seems undecided; *Bowdon* v. *Hall*, 4 Queen's B. Rep. 840; 1 Gale & Mer. 54. The office of deputy is personal in the individual appointed, even although he may be in partnership with another person; therefore, where *A.* and *B.* were in partnership as attorneys, and *A.* alone was appointed replevin clerk to the sheriff, it was held, that an action for the expenses of preparing a replevin bond must be brought by *A.* alone, although it was executed in the office where he and *B.* carried on their joint business; *Brandon* v. *Hubbard*, 2 Brod. & Bing. 11; 4 Moore, 367.

(*x*) *Ex parte Boyle*, 2 Dowl. & Ryl. 13.

(*y*) See sects. 58 and 119; and post, Chap. IX., Sect. 3.

(*z*) *Edmonds* v. *Challis*, 7 C. B. Rep. 413; 6 Dowl. & Low. 581.

(*a*) 2 Instit. 139, 312; Gilb. on Dist. 92.

(*b*) *R.* v. *Raines*, 22 Law J., Q. B., 223.

(*c*) Although the statute mentions pledges in the plural, one pledge is enough; *Meyster* v. *Gray*, Cro. Car. 446; but if that pledge is not sufficient, it is at the peril of the sheriff; *Denbawd's case*, 10 Co. Rep. 502.

the money was not such a pledge as is directed by the statute (*d*). When a bond, instead of pledges, was taken by a sheriff to prosecute the action with effect, for wrongfully taking the plaintiff's gelding, and to make return thereof if return should be adjudged, it was held good (*e*). These latter pledges taken must not only be sufficient in estate, viz. capable to answer in value, but likewise sufficient in law, and under no incapacity; and therefore infants, &c., are not to be taken as pledges, neither are any persons politic, or bodies corporate. The sufficiency of the pledges is discretionary: and if the sheriff returns insufficient pledges, he shall answer for the price of the goods himself; for insufficient pledges are as no pledges (*f*). Sheriffs, however, gradually became remiss in their duty, and often neglected taking these pledges de retorno habendo; or, if any were taken, for the most part they were found to be indigent and irresponsible people (*g*). The statute 11 Geo. II. c. 19, s. 23, therefore, for the better securing the payment of rents and preventing frauds by tenants, enacted, "That to prevent vexatious replevins of distresses taken for rent, all sheriffs and other officers having authority to grant replevins may and shall, in every replevin of a distress for rent, take in their own names, from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (such value to be ascertained by the oath of one or more credible witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is hereby authorized and required to administer), and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded, before any deliverance be made of the distress." The statute is expressly confined to distresses for rent, and a rent-charge is within its meaning (*h*). When, therefore, the distress is not for rent, the pledges taken by the sheriff are according to the statute of Westminster 2, and *may* be by bond, and that too of the plaintiff himself only; for the sheriff being answerable for the sufficiency of the pledges, may take the security as he pleases, since it is at his own peril. In such case, although the bond is not assignable at law, the party may apply to the sheriff for the bond, and sue upon it in his name. On

(*d*) Imp. Gilb. Replev. 89.

(*e*) *Blackett* v. *Crissop*, 1 Lord Raym. 278.

(*f*) Co. Litt. 145; 2 Inst. 340.

(*g*) Before the passing the statute 11 Geo. II. c. 19, s. 23, the constant usage was to take a bond from the pledges in replevin on the statute Westminster 2, c. 2, the word "*plegii*" being holden to be synonymous with sureties, according to Holt and Treby, C. J., 1 Lord Raym. 278; see also Lutw. 687; Dalton, Sher. 438, ch. 113. But the sum in which the bond should be taken appears not to have been defined. To make the security more effectual by fixing the responsibility of the pledges, and allowing the bond to be assigned with a view to prevent vexatious replevins, was the object of the 23rd section of the statute 11 Geo. II. c. 19, which has rather modified and improved the former security, than created a new one. The pledges therefore required by the statute Westminster 2, c. 2, and the sureties by the 11 Geo. II. c. 19, are in effect the same, and in practice no more than one bond is ever taken.

(*h*) *Short* v. *Hubbard*, 2 Bing. 349; 9 Moore, 667.

the other hand, the pledges taken, when the distress is for rent, are governed by statute 11 Geo. II. c. 19, and *must* be by bond with two sureties, and ought to be in double the value of the goods distrained (*i*). The sheriff is responsible for the sufficiency of the sureties, unless reasonable inquiries have been made respecting them (*k*). By the statute 11 Geo. II. c. 19, s. 23, the sheriff is ordered, at the request and costs of the avowant, or person taking cognizance, to make an assignment to him of this bond (*l*), which enables him to sue upon it in his own name; and the Court where the action is brought may, by rule of Court, which shall have the effect of defeasance to the bond, give such relief to the parties as may be agreeable to justice. The replevin bond may be taken by any officer who has power to grant replevins (*m*).

(d) *Replevin, how made.*

Proceedings to replevy Chattels distrained for Rent.

In distress for rent, the statute 11 Geo. II. c. 19, s. 23, clearly and distinctly points out the course to be pursued; it directs sheriffs and other officers granting replevins, to take from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained, conditioned for prosecuting the suit with effect, and for a return of the goods. Although the Small Debts Act, 9 & 10 Vict. c. 95, s. 119, has taken from the sheriff the jurisdiction to hear and determine replevin suits, and has conferred it upon the new County Courts, he is still bound to make replevins, and to take bonds under the 11 Geo. II. c. 19, s. 23, to prosecute the suit with effect and *without delay* (*n*). The sheriff is authorized to assign the bond to the avowant, or person making cognizance; and if the bond be forfeited, the avowant may bring an action in his own name; and the Court may by rule give relief to the parties. When, therefore, in case of rent, the tenant means to replevy, he must, within five days after notice of the distress, take with him two housekeepers living in the city or county where the distress was made, and go to the sheriff's office of such city or county, or to the office of a deputy (*o*); and when there, he must enter into the bond with the two housekeepers as sureties, according to the statute. When this is done, the sheriff will direct a precept to one of his bailiffs, and the possession of the goods will be

(*i*) In *Miers* v. *Lockwood*, 9 Dowl. 975, the Court expressed disapprobation of the practice of taking a bond to a greater amount than double the value of the goods distrained, even though a condition was added to indemnify the sheriff, which it was admitted was a usual condition before the statute 11 Geo. II.

(*k*) *Hindle* v. *Blades*, 5 Taunt. 225; 1 Marsh. 27; *Jeffery* v. *Bastard*, 4 Ad. & El. 823; 6 Nev. & Man. 303; 2 Har. & Wol. 60; *Plumer* v. *Briscoe*, 17 Law J., N. S., Q. B., 158; 12 Jurist, 351.

(*l*) This assignment does not now require a stamp.

(*m*) *Thompson* v. *Farden*, 1 Man. & Gr. 535; 1 Scott, N. R. 275; 8 Dowl. 813.

(*n*) *Edmonds* v. *Challis*, 7 C. B. Rep. 413; 6 Dow. & Low. 581. In *Hellawell* v. *Eastwood*, 6 Exch. Rep. 295, a question was raised, but not decided, as to the power of courts to grant replevins independently of the power to try them.

(*o*) See ante, p. 664. note (*s*).

restored to the tenant, to abide the event of the suit in replevin (*p*). Upon the plaint being made, and pledges found, the sheriff or one of his deputies, as above, is bound to make replevin of the goods or cattle *distrained* (*q*): to do this, he may either grant a warrant, or he may by parol or precept command his bailiff to deliver the goods, that is, *to* make replevin of them (*r*). A service of notice of replevy by an infant is illegal and void (*s*). Notice of the replevin should be given to the distrainer in order to maintain an action for selling the goods after a replevin has been granted (*t*).

Proceedings to replevy Goods distrained in a Liberty.

The statute of Marlbridge does not empower the sheriff to replevy goods within a liberty, having a prescriptive right to grant replevin, until after a demand has been made on the bailiff of the liberty, and a refusal by him to comply with the demand (*u*). If the distress be made in a franchise or bailiwick, the sheriff is to direct the replevin to the bailiff thereof to deliver the goods upon pledges, and if he make no answer, or return that he will make no deliverance, or the like, then the sheriff may enter into the liberty, and make deliverance. But if the distress be taken *without* the liberty, and impounded *within* the liberty, then the sheriff may enter and make deliverance, and need not first make out a warrant to the bailiff of the liberty (*x*): because the caption, which is one of the points complained of in the replevin, was in the county, and *out* of the liberty; and therefore the right to make a deliverance ought to be in that officer within whose jurisdiction the cause of complaint first arose (*y*).

Authority of the Sheriff in making the Replevin.

To execute the replevin, the sheriff or his officer is expressly authorized by the statute Westminster 1, 3 Edw. I. c. 17, to break open a house, to make delivery of the cattle, &c.: for the practice in earlier times, of driving distresses into castles and strongholds, was so frequent, as to require this act of the legislature to put further power into the hands of the sheriff. And further to deter persons distraining, from refusing or neglecting to deliver the distress, the statute directs that the castle or stronghold should be razed or thrown down (*z*). But this exemplary punishment could not be inflicted upon the sheriff's return merely, it could not take place until judgment was obtained in a superior Court at the suit of the Queen (*a*). To execute a replevin, however, the sheriff may not only break open doors, but may call upon the

(*p*) 2 Sell. Prac. 158; Arch. Prac. 986, 8th edit.

(*q*) 2 Sell. Prac. 246. The sheriff is obliged to grant replevins in all such cases as are allowed by law; and the officer who takes the goods by virtue of a replevin, issuing for what cause soever, is not liable to an action of trespass; unless the party, in whose possession the goods were, claim property therein: and in all cases of misbehaviour by the sheriff, or other officers, in relation to replevins, they are subject to the control of the Queen's superior Courts, and punishable by attachment for such misbehaviour.

(*r*) Bull. N. P. 52.

(*s*) *Cuckson* v. *Winter*, 2 Man. & Ryl. 313.

(*t*) *Mounsey* v. *Dawson*, 6 Ad. & El. 752; 1 Nev. & Per. 763; Will. Wol. & Dav. 283.

(*u*) Ibid.

(*x*) 2 Inst. 149, 194.

(*y*) Gilbert's Distresses, &c. 100.

(*z*) Ibid. et seq. 200.

(*a*) 2 Inst. 194.

posse comitatus to help him: and by the letters-patent to the sheriff, every person, ecclesiastical or temporal, above fifteen or under seventy years of age, is bound to assist him in all things touching his office (*b*). If it be notified to him, who comes in aid of the sheriff or his officer, that a claim of property is made, he at his peril ought to desist; for if he take the goods away, he will be a trespasser ab initio (*c*). If the sheriff come to make replevin of beasts impounded in another man's soil, and the place be inclosed, and have a gate open to the inclosure, he cannot break the inclosure, and enter thereby, when he may enter by the open gate: but if the owner hinder him, so that he cannot go by the open gate for fear of death, he may break the inclosure and enter there.

Within what Time the Replevin must be made.

With respect to distresses for rent,—before the statute which authorized the sale of the goods,—and distresses for other than rent, at the present day, there is no particular time within which the replevin must be made; for as the distress could not be disposed of, it could be only kept as a pledge. Even with respect to distresses for rent subsequent to the statute, neither the removal of the distress from the demised premises after five days, nor an appraisement of the distress, takes away the tenant's right to replevy (*d*): for so long as the goods remain unsold, the tenant may replevy, although after the five days allowed by the statute (*e*).

Mode of ascertaining the Value of the Goods.

By the above-mentioned statute, 11 Geo. II. c. 19, s. 23, the sheriff, on taking a replevin bond, must ascertain the value of the goods distrained on oath: which must be sworn by some person acquainted with the goods and their value (*f*), before the person granting the replevin, who will require to be informed of the nature of the claim made, that he may refuse, if the case be not properly the subject of a replevin. Where the under-sheriff administered the oath to *A. B.* the broker, and there was also written on the margin of the replevin bond, "*A. B.* maketh oath that the value of the goods within specified is 49*l.* 16*s.*:" it was held, that this was a mere memorandum, and did not require an affidavit stamp (*g*).

Nature and Effect of the Replevin Bond.

The condition of the replevin bond is for prosecuting the suit with effect, which means *success* (*h*); and for duly returning the goods and chattels distrained, if a return be awarded: it is occasionally conditioned also for indemnifying the sheriff. Although it is usual to take the bond with two sureties, it seems, that if the bond be entered into by one surety only, it is within the statute, and available by the

(*b*) 2 Inst. 194.

(*c*) Bac. Abr. tit. *Replevin*, (E 4).

(*d*) *Jacob* v. *King*, 5 Taunt. 451; 1 Marsh. 135.

(*e*) *Anon.*, 1 Chit. 196, (*a*); and see *Griffiths* v. *Stephens*, 1 Chit. 196.

(*f*) *Middleton* v. *Bryan*, 3 Maule & Selw. 156.

(*g*) *Dunn* v. *Lowe*, 4 Bing. 193; 12 Moore, 407.

(*h*) *Turnor* v. *Turner*, 2 Brod. & Bing. 107; 4 Moore, 616; *Morgan* v. *Griffith*, 7 Mod. 380; per Lee, C. J. So the bond given under the County Courts Act, 9 & 10 Vict. c. 95, s. 121; *Tunnicliffe* v. *Widmot*, 2 Car. & Kir. 626.

sheriff against such surety (*i*). It has been questioned, whether a bond taken by the sheriff upon making replevin, but not in all points conformably to the directions of the statute 11 Geo. II. c. 19, be available and assignable; and whether the sheriff, taking a bond with sureties from a tenant replevying his goods distrained for rent, is not bound to pursue, in every respect, the terms of the statute. It has been held, however, that a bond conditioned to prosecute the action with effect, and to indemnify the sheriff, is good, and may be assigned and proceeded on in the name of the assignee, under the statute, although it do not require by the condition that the suit shall be prosecuted without delay, and although it contain an undertaking to indemnify the sheriff (*k*). A rent-charge is within the meaning of the statute; therefore, in a distress for such a rent the sheriff may take and assign a bond, as in a replevin for any other kind of rent; and a bond so taken by the sheriff, and conditioned for appearance at the next County Court, for prosecuting the plaint with effect, making a return if adjudged, and *indemnifying the sheriff from all charges and damages by reason of the replevin*, is authorized by the above statute (*l*). As the jurisdiction of the old County Courts in replevin is by the 119th section of the Small Debts Act, 9 & 10 Vict. c. 95, transferred to the new County Courts, a bond conditioned for appearing at the next County Court, and there to prosecute the suit with effect, is bad; it ought to require the suit to be prosecuted in the next *district* County Court with effect and *without delay* (*m*).

Proceeding to replevy Chattels distrained for other than Rent.

The sheriff, in all cases of distress for other than rent, usually takes a bond from the plaintiff, at the time the goods are delivered to him by virtue of the replevin, conditioned that he should prosecute his suit with effect, and return the goods; and it has been held, that the sheriff has a right to take such bond for his security under the statute of Westminster 2 (*n*).

(e) *Writ of Withernam.*

Writ of Withernam in Proceedings by Original.

As it frequently happened that the sheriff could not get at the cattle or goods taken, from their being secreted, or otherwise disposed of; in such case, where the proceeding was by original writ, he returned to the writ, to the alias or the pluries, that the cattle were eloigned (*o*), that is, that they were conveyed to places unknown to him, so that it was not in his power to obey the writ. Upon this return, it was usual to award another writ to the sheriff, directing him to take other cattle of the party distraining, of equal value with those eloigned, and deliver

(*i*) *Austen* v. *Howard*, 7 Taunt. 28, 327; 2 Marsh. 352; 1 Moore, 68; *Hucker* v. *Gordon*, 1 Cromp. & Mees. 58; 3 Tyr. 107.

(*k*) *Dunbar* v. *Dunn*, 10 Price, 54.

(*l*) *Short* v. *Hubbard*, 2 Bing. 349; 9 Moore, 667.

(*m*) *Edmonds* v. *Challis*, 7 C. B. Rep. 413; 6 Dow. & Low. 581.

(*n*) *Blackett* v. *Crissop*, 1 Lord Raym. 278.

(*o*) Salk. 581.

them to the plaintiff, until such time as the cattle first taken should be forthcoming, and this writ was called a capias in withernam (*p*), from the Saxon words "weder," other, and "naam," distress (*q*). If upon the first withernam, a nihil was returned, then an alias and pluries replevin was issued, and so on to a capias and exigent; for a capias and process of outlawry were held to lie upon a capias in withernam, upon the sheriff's special return of nulla bona on the withernam.

Writ of Withernam in Proceedings by Plaint.

If on the plaint, the sheriff, or the bailiff on the sheriff's precept, returned that the cattle, &c., were eloigned, the sheriff awarded an inquest of office: and if such eloignment was found true, a capias in withernam issued to take other cattle, which the sheriff was to keep till the defendant gaged deliverance (*r*). If on this withernam the bailiff returned that the other party had not anything, he had an alias and pluries, and so infinite; but he had no other remedy, because no capias could lie out of the Queen's Courts (*s*). If the sheriff would not award a withernam, the plaintiff might have a writ out of Chancery directed to him, rehearsing the whole matter, and commanding him to award a withernam; and he might have an alias, and afterwards a pluries, and an attachment against the sheriff, if he would not execute the Queen's command (*t*).

Nature of the Writ of Withernam.

The writ of withernam ought to rehearse the cause returned by the sheriff, for which he could not replevy the cattle or goods; for it does not lie upon a bare suggestion that the beasts are eloigned (*u*). The withernam is but mesne process, and cannot be an execution, because it is granted before judgment; it seems, however, that both the plaintiff and defendant may have a withernam.

Effect of the Writ of Withernam.

Although upon an elongata returned, the defendant's cattle are taken in withernam; yet upon his appearance (*x*), and pleading non cepit, or claiming property, the defendant shall have his cattle again; and if they are eloigned, a withernam against the plaintiff; for if the property or taking be in question, there is no reason that the plaintiff should have the defendant's cattle. So, although upon the withernam the cattle are restored to the party who eloigned them, yet he shall pay a fine for his contempt. Where cattle were taken on a withernam, although they were not in such case replevisable, upon satisfaction being made by the party, the usual course for the Court was to award a writ of restitution (*y*). Cattle taken in withernam may be worked, or, if cows, may be milked; for the party has them in lieu of his own: and, as the party is to have the use of the cattle, he is not to have any allowance or payment for the expenses he has been at in maintaining them.

(*p*) 1 Wms. Saund. 195 a, note [3]; Reg. 82 b; Com. Dig. tit. *Replevin*, (3 K 1).
(*q*) 2 Inst. 140.
(*r*) Imp. Gilb. Replev. 109.
(*s*) Ibid. 108.
(*t*) Bac. Abr. tit. *Replevin*.
(*u*) Ibid.
(*x*) Ibid.
(*y*) *Annesley* v. *Johnson*, Cro. Eliz. 162.

(f) *Procedure in the Inferior Court.*

Course of Procedure in the old County Courts.

Where the replevin is executed at the time the bailiff makes deliverance, he ought also to attach the defendant by his goods to make him appear at the next County Court day; for in this action the attachment is the first process, because the replevin complains of a tortious taking, which is in the nature of a trespass (*z*); a summons, however, is the more usual process in practice (*a*). The procedure up to this point may all take place out of Court, for the statute gives the sheriff power to replevy upon complaint made to him, which is construed to be immediately, and without waiting for his next Court (*b*). It has been decided, that until the plaint is entered in the County Court, there is no commencement, of which a superior Court can take notice (*c*). It has, however, been doubted, whether a replevin can be regularly granted without the plaint being first entered; but the construction of the Statute of Marlbridge (*d*) seems to have been too invariable to admit of a question. Proceedings in replevin cannot be carried on in the Hundred Court, Court Baron, or any other Court claiming a jurisdiction over such proceedings by prescription, unless by process of the Court after plaint entered: even this is doubtful. It is settled that replevin, however, lies by plaint in London (*e*).

Proceedings in the Courts established under 9 & 10 Vict. c. 95.

The proceedings being now taken in the County Courts established under the statute 9 & 10 Vict. c. 95 (*f*), which are Courts of Record (*g*), the plaint is to be entered in the Court holden for the district wherein the distress was taken (*h*). Replevin cannot be joined with any other form of action in these Courts (*i*). On entering a plaint in replevin, the plaintiff must specify and describe in a statement of particulars the cattle, or the several goods and chattels, taken under the distress, and of the taking of which he complains (*k*).

Pleadings and Practice in the old County Courts.

The pleadings in the old County Court are analogous to those in the Courts above, although, not being a Court of Record, by the statute 4 Anne, c. 16, the parties are not entitled to plead, avow or plead in bar several matters. For the same reason, in the cases specified by the statute, in which demurrers should be special in the superior Courts, they may be here always general. In the several County Courts there seems to be so much diversity of practice, and so little

(*z*) Imp. Gilb. Replev. 93.

(*a*) Wilk. Replev. 30.

(*b*) 2 Inst. 140.

(*c*) *Tesseyman* v. *Gildart*, 1 New Rep. 292.

(*d*) 2 Inst. 140. By this statute, 52 Hen. III. c. 21, the sheriff may hold plea in the County Court, on replevin by plaint, whatever may be the value of the subject in dispute, although in other actions he shall only hold plea where the matter is under 40*s.* value; 2 Black. Com. 149.

(*e*) *Hallett* v. *Birt*, 1 Lord Raym. 219.

(*f*) Amended by 12 & 13 Vict. c. 101, and 14 & 15 Vict. c. 101, and extended by 12 & 13 Vict. c. 61. See post, Chap. IX., Sect. 3.

(*g*) Sect. 3.

(*h*) Sect. 120, which enacts, "that in every such action of replevin, the plaint shall be entered in the Court holden under this act for the district wherein the distress was taken."

(*i*) *Mungeam* v. *Wheatley*, 6 Exch. Rep. 88.

(*k*) Rules of Practice for the County Courts, No. 25. See Archbold's Practice of the New County Courts, p. 124, 3rd edition, and this form, post, Book IV., Chap. VI., Sect. 2.

strictness observed, that it would be impossible to lay down any rules. It should be observed, however, that unless the declaration states the cause of action to have arisen within the jurisdiction of the Court, a writ of false judgment lies (*l*). If the taking be in right of the crown, or if anything touching the freehold come in question (*m*), or ancient demesne be pleaded, or if the distrainer claim property in the goods, and on a writ de proprietate probandâ they may be found to be his, the sheriff can proceed no further, but must return the proceedings into the Court of Queen's Bench or Common Pleas, to be there, if thought advisable, finally determined. A man cannot claim property in the County Court by his bailiff or servant, for if the claim be false, a fine will be imposed for the contempt: but in the Queen's Bench one may make cognizance and claim property by a bailiff; for there the bailiff is not liable to a fine. If the party have property, and omit to claim it before the sheriff, he may, notwithstanding, plead property in himself, or in a stranger, either in abatement or in bar.

Nature of the Writ de Proprietate probandâ.

If the defendant claim property, the sheriff cannot proceed in his County Court, for the question of property must be tried by writ. In this case, therefore, the plaintiff may have the writ de proprietate probandâ to the sheriff, who is to give notice to the parties of the time and place of executing it, for it is an inquest of office. None, however, but he who is party to the replevin shall have the writ de proprietate probandâ. This writ issues out of Chancery, Queen's Bench or Common Pleas. When it issues out of Chancery, it is an original, and goes upon the sheriff's return to the alias writ of replevin; when out of either of the other Courts, it is judicial, and granted on the return of the pluries, for the pluries is returnable only there, the original and alias giving no day, but being merely vicontiel (*n*). The sheriff is to return the claim of property on the pluries, before which time the writ de proprietate probandâ does not issue, for it recites the pluries. If it be found for the plaintiff, the sheriff is to make deliverance; if for the defendant, then he is to proceed no further. But being an inquest of office, the plaintiff may notwithstanding have a replevin to the sheriff, and if he return the claim of property, yet it shall proceed in the Common Pleas, where the property shall be put in issue and finally tried.

Sect. 4.—*Removal into Superior Court.*

In what Cases Replevin Causes are removed.

It has seldom happened that a replevin suit of any consequence has been decided in the inferior Court, as the suit might be removed at any time before final judgment (*o*), by either of the parties, into the Courts of Queen's Bench or Common Pleas, to be there determined, and that

(*l*) See Watson's Sheriff, 294.

(*m*) As if a title to the freehold is set up, even though an issue is taken on some other collateral matter; *Tinniswood* v. *Pattison*, 3 Com. B. Rep. 243.

(*n*) Bac. Abr. tit. *Replevin*, (E 4).

(*o*) *Beavan* v. *Prothesk*, 2 Burr. 1151.

without any actual cause shown. It has been, therefore, usual to carry it up, in the first instance, to Westminster Hall. There is this distinction, however, in the form of the writ of removal, that the one obtained by the plaintiff alleges no cause for the removal, whilst that sued out by the defendant has a mere formula of cause alleged. It is said that a replevin shall not be removed out of a Court Baron without cause, either by the plaintiff or defendant, for the prejudice that may thereby come to the lord (*p*).

8 & 10 Vict. c. 95.

With respect to replevin suits commenced in the County Courts, established under the statute 9 & 10 Vict. c. 95, it is enacted, s. 121, 'that in case either party to any such action of replevin shall declare to the Court in which such action shall be brought that the title to any corporeal or incorporeal hereditament, or to any toll, market, fair or franchise, is in question, or that the rent or damage, in respect of which the distress shall have been taken, is more than the sum of 20*l.*, and shall become bound with two sufficient sureties, to be approved by the clerk of the Court, in such sums as to the judge shall seem reasonable, regard being had to the nature of the claim and the alleged value or amount of the property in dispute, or of the rent or damage, to prosecute the suit with effect and without delay, and to prove before the Court by which such suit shall be tried that such title as aforesaid is in dispute between the parties, or that there was ground for believing that the said rent or damage was more than 20*l.*, then and not otherwise the action may be removed before any Court competent to try the same, in such manner as hath been accustomed (*q*)." A plaint for replevin and for an excessive distress having been entered in a County Court against a landlord and bailiff, the defendant, by leave of a judge, on affidavit that the rent exceeded 20*l.*, sued out a certiorari to remove the plaint into the Exchequer. The writ was returnable on the day the plaint stood for trial; and the defendants' attorney then presented the writ to the judge, and offered, on the part of one of the defendants, to make the declaration required by the 9 & 10 Vict. c. 95, s. 121, stating that the other defendant, the bailiff, was unable to make it. The defendant, the landlord, was too ill to attend, but he had executed a power of attorney to a third party authorizing him to sign and seal the bond required by the above section, and generally to perform all such acts about the conduct of the writ as he should think proper. The defendants' attorney tendered the bond, which was conditioned to prove in the superior Court that the rent exceeded 20*l.*, but the clerk of the Court did not approve of the sureties, in consequence of not having had notice in time to inquire into their sufficiency. The judge refused to allow the certiorari, and tried the cause on the ground of the

(*p*) Reg. 85 b; F. N. B. 70 (A); 2 Inst. 39; Doct. Plac. 356.

(*q*) See also sect. 127 as to this bond, and the case of *Tunnicliffe* v. *Wilmot*, post, Chap. IX., Sect. 3. The form of this bond is given, post, Book IV., Chap. VI., Sect. 2.

want of time to inquire into the sufficiency of the sureties, but he did not fix the amount for which they were to be responsible: held, 1st. That there was no ground for quashing the certiorari. 2ndly. That the judge was liable to an attachment for not receiving and returning the writ, although his disobedience was not wilful, but originated in an erroneous construction of an obscure statute. 3rdly. That the declaration required by the 121st section of the 9 & 10 Vict. c. 95, may be verbally made either by the attorney in the cause or the party; and that it is sufficient if made by one of several defendants, and that in this case the person named in the power of attorney was authorized, not only to sign and seal the bond, but also to make the declaration. 4thly. That the act of the judge in receiving the declaration is ministerial; that, after receiving it, he ought to fix the amount of the security; and that, until he has done so, the question as to the sufficiency of the sureties does not arise. 5thly. That the sections 1 and 2 of the 13 & 14 Vict. c. 61, do not apply to plaints in replevin, and therefore the bond was properly conditioned for proving that there was ground for believing that the rent exceeded 20*l.* and not 50*l.* 6thly. That a certiorari under the 121st section of the 8 & 9 Vict. c. 95, ought to be made returnable, so as to allow sufficient time for the preliminary inquiries which the section directs (*r*). The action of replevin seems to be regulated by the above section, and not by the 58th; and therefore, if neither party take steps to remove the action under the 121st section, the mere fact of title being in question at the trial does not take away the jurisdiction of the County Court (*s*). An application for a certiorari to remove an action of replevin into one of the superior Courts ought to be made to a judge at chambers, and not to the full Court (*t*).

Method of Removal to the Superior Courts.

The method of removing a replevin suit depends on the manner in which the suit was commenced below. When the replevin is commenced in the ancient County Court, which is not a Court of Record, by plaint, the cause is removed by the writ of recordari facias loquelam, commonly called a re. fa. lo.: this is an original writ issuing out of Chancery, is only applicable to a Court not of record, and is obtained either by the plaintiff or defendant as a matter of course (*u*). By the writ of re. fa. lo. the sheriff is commanded, that in his full county he cause to be recorded the plaint, which is in the same cause, without the Queen's writ, and that he have the record in the Court above on a general return day. The sheriff, having directed his warrant to two or more bailiffs to summon the defendant, makes his return to the writ (*x*). This return must be of the plaint itself, and no more, or positively that there is no plaint pending (*y*). A recordari facias

(*r*) *Mungean* v. *Wheatley*, 6 Exch. Rep. 88.

(*s*) *Yates* v. *Palmer*, 7 Dow. & Low. 283.

(*t*) *Bowen* v. *Evans*, 6 Dow. & Low. 193.

(*u*) Watson's Sheriff, 293. If made returnable in vacation, though by mistake, it is bad; *Wright* v. *Lewis*, 9 Dowl. 183; Wol. P. C. 42.

(*x*) Watson's Sheriff, 293.

(*y*) *Wright* v. *Lewis*, 8 Dowl. 514.

loquelam stays all further proceedings in the ancient County Court, though delivered after interlocutory judgment, if before final judgment (*z*). The writ of pone lies only where the suit is commenced by original, and is therefore gone into disuse. If the suit be commenced in other inferior Courts not of record, including Courts in ancient demesne, the suit is moved by writ of accedas ad curiam, which is a species of recordari (*a*). Where the replevin suit is in inferior Courts of record, it is moved by writ of certiorari (*b*); but it has been held, that a plaint in replevin cannot be removed from an ancient County Court in Wales into the Queen's Bench by certiorari (*c*). The writ of certiorari is the proper method of removing a plaint in replevin out of the new County Courts, and the removal of such plaints is regulated by the 121st section of the statute 9 & 10 Vict. c. 95 (*d*), and not by the 90th section (*e*), those Courts being Courts of Record (*f*). All the above writs, with the exception of, in some cases, the certiorari, to remove the suit from an inferior Court, are in their nature original writs, and issue out of Chancery.

Course of Proceeding on the Writ of Removal.

In order to sue out any of these writs, with a view to removing the suit, the party must make out a precipe and also a memorandum to the party to sue or defend, and upon giving them to the cursitor, he then makes out the writ. This must be carried to the under-sheriff of the county, who returns it of course. If the sheriff returns to the recordari, tardè, the party shall have an alias, &c. (*g*). By the recordari, nothing is removed but the plaint; even though the issue should be joined below; and the plaint may be removed, though the plaintiff has discontinued there. The plaint, when removed into the superior Court, is filed with the filazer of the county.

SECT. 5.—*Procedure in Superior Court.*

(a) *Compelling Procedure.*

Course of Proceeding to compel Appearance in the Superior Court.

If the plaintiff remove the plaint, he should, upon the return of the re. fa. lo., file it and the plaint, &c., with the filazer of the county, and search for the defendant's appearance: if the defendant have not appeared on or before the appearance-day of the return of the re. fa. lo.,

(*z*) *Beavan* v. *Prothesk*, 2 Burr. 1151. A judgment of non pros for the defendant in the sheriff's court for a return, and for a certain sum for costs, is not final, as it requires the intervention of a jury to assess the costs, as consequential upon the damages; but if the judgment be for a return only, it is final; the judgment having been pronounced on one day, but the specific sum given for costs not having in fact been ascertained until a later day, cannot be considered as a perfect judgment until the later day; *Wright* v. *Lewis*, Wol. P. C. 42; 9 Dowl. 183.

(*a*) Wilk. Replev. 26.

(*b*) Ibid.

(*c*) *Edwards* v. *Bowen*, 5 Barn. & Cres. 206.

(*d*) Amended by 12 & 13 Vict. c. 101.

(*e*) *Mungean* v. *Wheatley*, 6 Exch. Rep. 88.

(*f*) But see Arch. Pract. of the new County Courts, p. 125, 3rd edit.

(*g*) 2 Sell. Pr. 162; Arch. Prac. 989, 8th edit.

the plaintiff should serve him with a rule to appear, which may be had at the filazer's, and upon his non-appearance thereto sue out a pone per vadios. The pone is also got at the filazer's; a summons is made out thereon at the sheriff's office, and served upon the defendant by the officer. If no appearance be entered on or before the appearance-day of the return, get the sheriff to return nihil on the pone, and sue out a distringas, which may likewise be done at the filazer's, and proceed to levy thereon; the issues may be 4*l.*, next 8*l.*, and so on. If the defendant do not appear, proceed with other writs of distringas ad infinitum. If he do afterwards appear, he must pay the costs of these writs (*h*). If the defendant remove it, he must file the re. fa. lo. and return thereto with the filazer; and having entered an appearance, he must give a rule for the plaintiff to declare; and for want of declaration, when the rule is out, he may sign a non pros for not declaring, and immediately sue out a writ de retorno habendo (*i*). If the re. fa. lo. be not returned, so as to enable the party to get it filed, the sheriff must be ruled to return it.

Non pros for not proceeding, and Procedendo.

If the plaintiff, having removed the cause, do not proceed therein, or if the defendant having removed it, and after having served the plaintiff with a rule to declare, and demanded a declaration, the plaintiff do not declare or proceed therein, the defendant may sign a non pros, and judgment pro retorno habendo, and then sue out a writ pro retorno habendo, which may be obtained from the filazer (*k*). If the party suing out a re. fa. lo. do not get it returned and filed within two terms, the other party should apply to the filazer for a certificate that the same is not returned and filed, which will be a sufficient warrant for the cursitor to make out a writ of procedendo, by which the cause may be remanded to, and proceeded in by, the inferior Court (*l*). Or if either party having sued out a re. fa. lo. neglect to file it, the other party, for the sake of expedition, may, without waiting till the end of the second term, sue out another writ of the same nature and get it returned and filed, for removing the proceedings into the Court above (*m*). If after the plaintiff is non prossed, he do not sue out a writ of second deliverance, and to the writ de retorno habendo the sheriff return that the goods, &c., are eloigned, the defendant may then have a capias in withernam, and after that an alias and pluries, until it is executed. The capias in withernam, however, in this case is but mesne process to compel the plaintiff to declare (*n*); and it seems, that as soon as he has declared, be may obtain restitution of the goods taken under it upon motion (*o*).

(*h*) 2 Sell. Prac. 250; Arch. Prac. 991, 8th edit.
(*i*) F. N. B. 70 a.
(*k*) Arch. Prac. 992, 8th edit.
(*l*) Ibid. 989, 8th edit.
(*m*) Ibid.
(*n*) *Moor* v. *Watts*, 1 Lord Raym. 614; 12 Mod. 423.
(*o*) Noy, 50; 2 Salk. 582; Arch. Prac. 993, 8th edit.

(b) *Declaration.*

Time of Declaring.

When the proceedings are removed from the County Court, the re. *fa. lo.* being returned, and the appearance of the defendant entered, the plaintiff must declare de novo. The parties then go on to issue *in* the usual way. The declaration must be intituled of the day of the month and year on which it is delivered (*p*). Formerly a rule to declare in replevin might be given within four days after the end of the term in which the writ was returned, or afterwards (*q*). But now, by the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 53, rules to declare are unnecessary, and instead thereof a notice shall be substituted requiring the opposite party to declare within four days, otherwise judgment, &c.

General Form and Nature of the Declaration.

The declaration in replevin, as in other actions, must agree with the writ, so that if the writ be of *cattle*, and the declaration of *cattle and goods*, it is bad; so where in replevin the writ was in the detinet, and the declaration in the detinuit, it was thought to be a material variance; but the parties agreed to amend. The declaration complains against the defendant, wherefore he took the goods of the plaintiff, and unjustly detained them, against sureties and pledges, &c., until, &c. The old form of declaring against sureties (*r*) and pledges has been preserved to this day, from the old principle that the lord was entitled to keep the distress until the tenant offered gages and pledges; and if, notwithstanding this offer of gages and pledges, the distress was still retained, the tenant was obliged to resort to the replevin, in which he complained against the lord for the detention against gages and pledges (*s*). A distinction prevailed formerly as to declaring in the detinet, when the plaintiff sought to recover back the goods detained, as well as damages for the detention and unlawful taking; and the detinuit, in which the plaintiff, having already had the goods re-delivered to him, sought to recover damages only for the taking (*t*). The former mode has been long obsolete, and by the modern action of replevin, the plaintiff does in fact recover the goods and damages in the taking, just as much as in the action by the detinet (*u*).

Allegation of Venue, and Place and Time of Taking.

The venue in this action is local and material; and the place of taking, as well as the vill or parish, must be laid, or the defendant may demur (*x*); therefore the alleging the taking at *Dale*, or such a vill, is too general and uncertain (*y*); for the plaintiff cannot new assign as in trespass (*z*), and therefore greater certainty is required.

(*p*) See the rule Mich. Term, 3 Will. IV.; also *Topping* v. *Fuge*, 5 Taunt. 771.

(*q*) Arch. Prac. 992, 8th edit.

(*r*) Which were held by Holt, C. J., and Truby, C. J., in *Blackett* v. *Crissop*, 1 Lord Raym. 278, to mean gages.

(*s*) *Evans* v. *Brander*, 2 H. Black. 547; see Wilk. Rep. 41.

(*t*) *Petree* v. *Duke*, 2 Lutw. 1150.

(*u*) *Fletcher* v. *Wilkins*, 6 East, 283.

(*x*) *Reade* v. *Hawke*, Hob. 16; *Ward* v. *Lavile*, Cro. Eliz. 896; Moore, 678; *Potten* v. *Bradley*, 2 Moore & Pay. 78. And it would seem he may do so since the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 59.

(*y*) 8 Wentw. 142, 144.

(*z*) *Cockley* v. *Pagrave*, Freeman, 238.

The omission, however, is cured by pleading over, or after verdict (a). Where the cattle, however, are taken in one county and driven into another, the plaintiff may lay the venue in either at his election (b). The reason of this is, that where a defendant takes cattle wrongfully at first, the wrong is continued to any place where he had them afterwards in custody (c); and such a mode of laying the place is favoured by the Courts (d). The precise day is not material, and the plaintiff may declare for several takings, part at one day and place, and part at another day and place (e); for he need not show how many he took in one vill, and how many in another. Where the plaintiff declared for four oxen taken at divers times and places, and that delivery was made of two, but the other two were withheld to his damage of 10*s.*; this was held sufficient, without any severance as to the damages (f).

Allegation of the Description of the Chattels taken.

There has been some difference in the decisions respecting the certainty required in the declaration in replevin, it being formerly holden, that the plaintiff must be certain and particular in setting forth the number, kind and qualities of the cattle or goods distrained, because the sheriff could not otherwise tell how to make deliverance of the same. This doctrine was afterwards overruled in *Kimpson* v. *Nelson* (g); and it was held, that a declaration in replevin, being certain to a general intent, is sufficient, at least after verdict. Lord Hardwicke, upon the authority of the above-mentioned case, held the same doctrine (h): but it has been held since, that the declaration in replevin should describe with accuracy the number, and also, it should seem, the value of the goods taken; and must be more accurate than a declaration in trespass, as the subsequent judgment of retorno habendo and process of withernam depend entirely on the number, value and description of the goods taken (i). When the declaration stated that the defendant, in a certain dwelling-house, took divers goods and chattels of the plaintiff, of the value of 50*l.*, and unjustly detained the same, &c.; it was held to be bad for uncertainty, because the property was not specifically stated: and although the defendants had suffered judgment by default, and a writ of inquiry had been executed, the defect was held not to be cured (k). But where the declaration did not sufficiently specify the goods and chattels, the defect was held to be cured by an avowry justifying the taking of the said goods and chattels, even though the avowry was bad (l). It is not, however,

(a) *Potter* v. *North*, 1 Saund. 28 b, note 1; F. N. B. 19; 1 Doctr. Plac. 315; *Banks* v. *Angell*, 7 Ad. & El. 843; 3 Nev. & Per. 94; *Potten* v. *Bradley*, 2 Moore & Pay. 78.

(b) *Walton* v. *Kersop*, 2 Wils. 354.

(c) Per Wilmot, C. J., 2 Wil. 355.

(d) Per Chambre, J., *Abercrombie* v. *Parkhurst*, 2 Bos. & Pul. 480.

(e) F. N. B. 68.

(f) Bac. Abr. tit. *Replevin* (H).

(g) Ibid.

(h) *Berne* v. *Mallaire*, Cas. temp. Hard. 110; 2 Str. 1019.

(i) Per Gibbs, C. J., in *Pope* v. *Tillman*, 1 Moore, 388; 7 Taunt. 642.

(k) *Pope* v. *Tillman*, 7 Taunt. 642; 1 Moore, 388.

(l) *Banks* v. *Angell*, 7 Ad. & El. 843; 3 Nev. & Per. 94.

usual to insert the price of the cattle or goods taken (*m*): and the reason assigned is, because if the plaintiff obtains a verdict, he is entitled to damages only for the wrongful taking, and costs; but not to the value of the goods taken, as he is in trespass, for they were delivered to him when replevied. Although the reasoning which led to the decision in the case of *Pope* v. *Tillman*, seems to have been considered and disregarded in *More* v. *Clypsam* (*n*), the safest plan, perhaps, may be to specify the value of the goods or cattle taken.

Joinder of different Causes of Action.

The 41st section of the 15 & 16 Vict. c. 76, enacts, that causes of action, of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment.

Amendment.

The statute 3 & 4 Will. IV. c. 42, s. 23, does not extend to omissions in pleading, therefore in replevin for taking goods in a public-house and a brewery, where the avowry was as to the taking in the public-house only, the judge refused to amend by inserting the brewery (*o*).

(c) *Pleas.*

General Division of Pleas in Replevin.

The pleas in replevin have been divided into four sorts. 1. Pleas in abatement; 2. The plea of non cepit; 3. Pleas in justification; and 4. Avowries or cognizances.

Nature of Pleas in Abatement.

Strictly speaking, there are no pleas in abatement to replevin, for what are called pleas in abatement partake more of the nature of pleas in bar, and differ entirely from pleas in abatement in other actions; and, indeed, it is laid down by a great authority (*p*), that pleas in abatement differ from pleas in bar only in this—that in abatement they do not avow or acknowledge the caption and detention, which is the gist of the action; but they must go so far as to entitle the defendant to a delivery, or else they do not take away the force and effect of the writ of replevin, which is always executed by the delivery. As replevin by writ is, however, as before remarked, obsolete, these pleas in abatement do not of course occur in practice. If a feme sole, who is plaintiff, marries after plaint in the sheriff's court, and before the removal of the cause, and the re. fa. lo. is sued out by the defendant in the name of the feme sole, the defendant may nevertheless plead the marriage in abatement (*q*). In such a case, however, the writ may be amended by the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 76. If such a plea be used, and, in order to obtain a return of the beasts, an avowry or cognizance be stated, with the cause

(*m*) See the references to the precedents collected in note 1, to *Hoskins* v. *Robins*, 2 Saund. 320.

(*n*) All. 33; Sty. 71.

(*o*) *Bye* v. *Bower*, 1 Car. & Mar. 262; but see as to amendment, 15 & 16 Vict. c. 76, s. 222; and 17 & 18 Vict. c. 125, s. 96.

(*p*) Gilbert's Distress, &c. 146; see also *Bullythorpe* v. *Turner*, Willes, 475; *Presgrave* v. *Saunders*, 1 Salk. 5; 6 Mod. 81; *Butcher* v. *Porter*, ibid.; Cath. 243; Sell. Prac. 165.

(*q*) *Hollis* v. *Freer*, 2 Bing. N. C. 719; 3 Scott, 284; 2 Hodges, 4; 5 Dowl. 47.

for distraining alleged, the avowry cannot be traversed (r). Taking in another place is only matter in abatement, and the plaintiff may have a new writ without being put to his second deliverance (s).

Nature of the Plea of Non Cepit.

The plea of non cepit used, before the late rules, to be termed the general issue in replevin (t): but, although it was so called, it put in issue only the caption and detention, and not the property; for no evidence of property contrary to the declaration could be given under it. In replevin, upon non cepit, the only question for the jury to decide is, whether the defendant took the goods or chattels, and not whose they are (u): therefore, if the defendant claim property in himself, or a stranger, as he may do, though it ought to have been before the sheriff, it does not amount to the general issue, but it may be pleaded in bar or abatement: and if the plaintiff demur, the defendant shall have a return without avowing, for it appears that the beasts are not the plaintiff's. If the plaintiff prove that the goods were in the defendant's possession, at the place described in the declaration, this is sufficient under the plea of non cepit (x): for although the defendant originally took them at another place, yet if he took them wrongfully at first, the wrong is continued in every place where he afterwards detained them. In the case, therefore, of the defendant having possession of the plaintiff's chattels in the place mentioned in the declaration, only whilst he was leading them that way to the pound, the defendant should not plead non cepit (y), but should set out the matter specially. To distresses made by virtue of several statutes, the defendant is allowed to plead generally; as for poor's rates, by the 43 Eliz. c. 2, s. 19 (z); or for sewers' rates, by 23 Hen. VIII. c. 5, s. 11 (a).

Nature of the Plea of Cepit in alio Loco.

Where the defendant took the goods in another place than that mentioned in the declaration, if he plead non cepit, he may give the fact in evidence, and nonsuit the plaintiff (b); but the defendant cannot have a return of the goods under this plea; therefore, as in the case of pleas in abatement, if he wants a return, he must plead that he took the goods in some other place, describing it, and traverse the place laid in the declaration, and, in order to have a return, avow or make cognizance, showing his right to take the goods (c). This avowry is in the nature of a suggestion, to entitle the defendant to damages under the statutes 7 Hen. VIII. c. 4, s. 3, and 21 Hen. VIII. c. 19, s. 3, for without such a suggestion the defendant is not within

(r) 1 Wms. Saund. 347, n. 1.
(s) Bac. Abr. tit. *Replevin* (I).
(t) Ibid.
(u) Bac. Abr. tit. *Replevin* (I); Gilb. Dist. 149.
(x) *Walton* v. *Kersop*, 2 Wils. 354.
(y) *Abercrombie* v. *Parkhurst*, 2 Bos. & Pul. 480; see 1 Saund. 387, n. 1.
(z) Co. Litt. 283 a.
(a) The defendant may also plead the Statute of Limitations, 21 Jac. I. c. 16, s. 3; but it must be in the mode pointed out by Mr. Serjeant Williams, *Birks* v. *Trippel*, 1 Saund. 33 f, note (2), actio non accrevit infra sex annos; *Arundel* v. *Frail*, 1 Sid. 81.
(b) *Johnson* v. *Woollyer*, 1 Str. 507; *Ass.* 2 Mod. 199.
(c) In the mode pointed out in 1 Wms. Saund. 347, note 1.

the statutes, and for this reason it is that such suggestions are not traversable (*d*).

Nature of Pleas in Justification.

There are two kinds of pleas in justification,—those which disaffirm property in the plaintiff: as if the defendant acknowledge the caption, and plead property in himself, it is a good bar; because it confesses the caption, which is the gist of the action, but avoids the injustice thereof, by showing that he had a right to take them: so if the defendant confess the caption, and plead property in *T. S.*, it is in bar of the action, as well as in abatement of the writ; for it shows not only that the plaintiff had no right to a deliverance upon the writ, but also that he had no cause to complain of the caption and detention against his pledges, which is in bar of the action; and this is not only a justification to cover the defendant from damages, but for the return of the beasts; because he does not admit property in the plaintiff, but disaffirms it, and therefore the beasts ought to come back to the defendant, who has a right to retain them against every one but *T. S.* (*e*); the plea, consequently, gives a return, without a cognizance pro retorno habendo (*f*). Of the second kind are those which affirm property in the plaintiff. These cover the defendant from damages only because the plaintiff is entitled to his chattels, as having property in them; and the defendant in such pleas, not making title to the chattels, as a pledge to answer any demand, he ought to have them back, but may cover himself from damages for the caption only (*g*). This plea might occur in case of a distress being made for personal services, on the tenant dying, the replevin being sued out by the executors (*h*).

(d) *Avowries and Cognizances for Rent.*

Nature of Avowries and Cognizances generally.

Having treated of the several kinds of pleas, which but rarely occur in practice, we now come to the consideration of the avowry and cognizance, which form the most difficult portion of the pleadings in replevin. In the avowry or cognizance is set forth, as in a declaration, the nature and merits of the defendant's case, to show that the distress taken by him was lawful, and to entitle him to a judgment de retorno habendo. The technical difference between an avowry and a cognizance is this: where the action is against the principal or landlord, he makes avowry,—that is, he *avows* taking the distress in his own right: where, on the other hand, it is against the bailiff or servant, he makes *cognizance*,—that is, he acknowledges the taking in right of the principal or landlord; and where it is against both, the one avows, and the other makes cognizance (*i*). An avowry or cog-

(*d*) *Anon.*, 1 Salk. 94; see 1 Saund. 347, note 1.

(*e*) Imp. Gilb. 150; *Crosse* v. *Bilson*, 6 Mod. 103; *Butcher* v. *Porter*, 1 Salk. 94; *Parker* v. *Meller*, 1 Lord Raym. 217.

(*f*) Bro. Abr. tit. *Replevin*, pl. 3; *Presgrave* v. *Saunders*, 6 Mod. 81; 1 Salk. 5.

(*g*) Imp. Gilb. Replev. 151.

(*h*) Rol. Abr. 319; Imp. Gilb. Replev. 151.

(*i*) Wilk. Replev. 51.

nizance is in the nature of a declaration, and the avowant is in the nature of a plaintiff: this appears from his being called an "actor," which is a term in the civil law signifying plaintiff; from his being entitled to have judgment de retorno habendo, and damages, as plaintiff; and from the plaintiff being able to plead in abatement or in bar several matters to the avowry. All which things showing that an avowry must be in the nature of a declaration, it follows that it need not contain an averment of verification, which would be the case if it were in the nature of a plea to the declaration (*k*).

Object and Effect of Avowries and Cognizances.

The object of an avowry is to enable the defendant to obtain a return of the goods distrained, if upon the face of his pleading he show that he is entitled to the return; for in all cases,—except where the defendant claims property in the goods,—he must make an avowry, in order to entitle himself to a return. It is in this respect that a distinction is to be observed between an avowry and a justification, as an avowry always goes for a return, and therefore shows a right subsisting at the time of the avowry; but a plea of justification does not always go for a return; as where the original taking was lawful, but is not so at the time of the plea pleaded (*l*). In one respect, however, there is no difference between the avowry and a justification; for, generally speaking, whatever is set forth in either must be maintained. In replevin against the master, and bailiff or servant, if the bailiff makes cognizance as bailiff, and the master pleads that he did not take, the servant shall not have any return upon his cognizance, for by the master's plea it is changed into a justification (*m*). An avowry or cognizance for rent admits the property of the goods in the plaintiff: but if the plaintiff's plea subsequently shows the property of the goods to be in another, the plaintiff cannot maintain the action (*n*).

General Requisites of Avowries and Cognizances.

A man is not obliged to justify a distress for the cause which he happens to assign at the time it was made: if he can show that he had a legal justification for what he did, that is sufficient. A man may therefore distrain for one thing, and avow for another: thus he may distrain for rent, and avow for heriot service (*o*). So if a man take a distress for a thing, for which he had good cause of distress, and also had good cause of distress for another thing; if a replevin be brought, he may avow for which he pleases. An avowry being in the nature of a declaration, it is sufficient if it be certain to a common intent. It should, however, show with certainty the place, day and number of cattle or goods taken, to entitle the avowant to a writ of inquiry of damages: it should also show a sufficient claim of right to distrain by the avowant against the plaintiff, who claims property in

(*k*) Bac. Abr. tit. *Replevin* (A).
(*l*) 1 Esp. N. P. 353.
(*m*) Bac. Abr. tit. *Replevin* (I).
(*n*) *Clarke* v. *Davis*, 7 Taunt. 72; 2 Marsh. 386.
(*o*) *Crowther* v. *Ramsbottom*, 7 Term Rep. 654; *Gwinnett* v. *Phillips*, 3 Term Rep. 643; see also *Wootley* v. *Gregory*, 2 You. & Jerv. 536.

the distress (*p*). If one distrain for rent, and before the avowry the estate on which it was reserved determine, the avowry shall be as if the estate on which it was reserved had continued, for the avowant is to have the rent notwithstanding; but if the distress were for a personal service, the defendant must have a special justification, for he cannot have the service in specie, when the estate is determined. In a cognizance for double rent, under the statute 11 Geo. II. c. 19, s. 18, the terms of the tenancy, and of the notice to quit that was given, should be clearly shown (*q*). In replevin, a cognizance of the whole, and a justification for part, is bad; for if a distress be entire, and it is wrong in part, it is bad for the whole. It would seem that the plaintiff in replevin will not be allowed to reply to a cognizance by traversing the facts of the tenancy, and the rent being in arrear, and also the authority to distrain as bailiff (*r*).

Avowries by Persons jointly interested.

Where one is not sole seised, or has not sole title to the entire rent, he cannot avow alone, for such avowry would be bad: therefore parceners must join in an avowry or cognizance for rent; for they make but one heir, and the rent is an entire inheritance (*s*). Joint-tenants also should join. One tenant in common cannot avow the taking of the cattle of a stranger upon the land damage feasant, without making himself bailiff or servant to his companion: for if one were to distrain without the other, as there could not be a double satisfaction for the same injury, the other would have no remedy; as to any supposed hardship in one denying his consent to the other avowing as bailiff to him, if he dislikes his situation he may put an end to the tenancy by making partition (*t*). An avowry by one of several co-heirs in gavelkind, in his own right, with a cognizance as bailiff of the other co-heirs, is sufficient, without averring an authority to distrain from the other co-heirs (*u*). If in replevin against two, they make several avowries, each in his own right, both avowries will be abated: for if both the issues should be found for the avowants, the Court could not give judgment severally for the same thing.

Avowries by Husband and Wife.

An avowry by a husband alone in his own name, for rent due in right of his wife, is good, if it appear upon the record that *he* was entitled to make the distress (*x*): where, therefore, there were three avowries, first by *E. W.* and *J. T.* for rent due to them from the plaintiff as tenant to them; secondly, by *E. W.* and *J. T.*, in their own right, for rent due to them from the plaintiff as tenant of the premises generally; and lastly, by *E. W.* and *J. T.* and Ann his wife, in right of the said Ann for rent due to *E. W.* and *J. T.* and Ann his wife,

(*p*) See, however, the provisions of the 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96, as to amendments.

(*q*) *Humberstone* v. *Dubois*, 10 Mees. & Wels. 765; 2 Dowl. N. S. 506.

(*r*) *Trent* v. *Hunt*, 9 Exch. Rep. 14.

(*s*) *Stedman* v. *Page*, 1 Salk. 390; 5 Mod. 141.

(*t*) Bac. Abr. tit. *Replevin* (K); *Culley* v. *Spearman*, 2 H. Black. 386.

(*u*) *Leigh* v. *Shepherd*, 2 Brod. & Bing. 465; 5 Moore, 297.

(*x*) *Wise* v. *Bellent*, Cro. Jac. 442.

in right of the said Ann, from the plaintiff as tenant to *E W.* and *J. T.* and Ann his wife, in right of the said Ann; it was held, after a declaration in ejectment served on the plaintiff, on the demise of *E. W.*, *J. T.* and Ann his wife, to be supported by evidence of an attornment from him to them (*y*). However, an avowry by husband and wife for rent due to the wife alone before the coverture, was held to be good, the supposed inconsistency being mere matter of form; for the avowry being for rent in arrear, to say that it was in arrear to him and his wife, is but surplusage (*z*). If there be a lessee for years, and the reversion descend on a married woman, and afterwards the rent be in arrear, and the husband distrain, and the lessee bring replevin; the husband ought to avow in the name of himself and his wife, and not in the name of himself only, for the avowry is to be made according to the reversion, which is in the wife (*a*).

Avowries by Executors and Administrators.

By statute 3 & 4 Will. IV. c. 42, s. 37, executors or administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for arrears due to the lessor or landlord in his lifetime, as he might have done, even after the termination of the tenancy, if not more than six months have elapsed, and the possession continue; and they of course may also avow for such distresses. This enactment is merely an extension of the previous right which was given to personal representatives, by statute 32 Hen. VIII. c. 37, under which it was held, that where to a declaration of replevin, for taking the plaintiff's goods, the defendant made cognizance as bailiff of an executrix under the statute, for arrears of rent incurred in the lifetime of the testator; such cognizance need not set out the title of the testator, nor show that the executrix was entitled to distrain under that statute; and that at all events it could not be objected to after verdict (*b*). Where the avowry was as administratrix, of rent to which the defendant was entitled in her own right, she nevertheless had judgment, that part respecting the claim as administratrix being rejected as surplusage (*c*).

Allegation of Title in Avowries and Cognizances for Rent.

There was a considerable degree of nicety and difficulty in the avowry or cognizance at common law. It was necessary to show—the seisin of the defendant, or of some person from whom the reversion came to him,—the quantity of estate which he was seised of,—that he made a lease to the plaintiff for life, or years, or at will,—and the descent or grant of the reversion to the defendant. It was thus often difficult and impracticable, in the sub-grantee of a long term, to deduce the title down to himself from the first grantee; and the merits of the case were constantly avoided, by the plaintiff traversing

(*y*) *Gravenor* v. *Woodhouse*, 9 Moore, 148.
(*z*) *Bowles* v. *Poore*, Cro. Jac. 283.
(*a*) Bac. Abr. tit. *Replevin* (K).
(*b*) *Martin* v. *Burton*, 1 Brod. & Bing. 279; 3 Moore, 608.
(*c*) Hob. 208; Bac. Abr. tit. *Replevin* (K).

some part of the title stated (*d*). In the case therefore of avowries or cognizances for rent, it was enacted by the statute 11 Geo. II. c. 19, s. 22, that the defendant in replevin need not set out his title: for it declares, "that it shall and may be lawful to and for all the defendants in replevin to avow or make cognizance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for accrued, which rent was then and still remains due," "without further setting forth the grant, tenure, demise or title of such landlord or landlords, lessor or lessors;" "and if the plaintiff or plaintiffs in such action shall become nonsuit, discontinue his, her or their action, or have judgment given against him, her or them, the defendant or defendants in such replevin shall recover double costs of suit." The defendant may avow in this general manner, whether the plaintiff be tenant or not, for the words of the statute are in the disjunctive, "plaintiff in replevin or other tenant." But the statute does not extend to an avowry for a rent-charge (*e*); nor to an avowry for heriot custom (*f*); and it has been held in a case which arose on the corresponding Irish statute, that neither that nor the English statute applied to a case where the defendant had no reversion (*g*). So the owner of a rent-charge in lieu of tithes distraining under the 81st section of the 6 & 7 Will. IV. c. 71, and obtaining judgment in replevin, is not entitled to double costs under the 11 Geo. II. c. 19, s. 22, not to the "full and reasonable indemnity as to costs" substituted for double costs by the 5 & 6 Vict. c. 96, s. 2 (*h*). In an avowry on the statute the defendant must show a privity existing between himself and the tenant on the land; and where the defendant avowed that certain persons to the defendant unknown held the close as tenants to the defendants, under a demise from *A.* to *B.* for a term unexpired, and that the interest of *B.* in the term had vested in these persons unknown, and that the rent was in arrear to the defendant; it was held, that the avowry was not good under the statute 21 Hen. VIII. c. 19, nor under the statute 11 Geo. II. c. 19 (*i*). The statute 11 Geo. II. c. 19, was made for the benefit of landlords, so

(*d*) 2 Saund. 284, c, d, note (3). In an avowry for a distress for rent, the avowant was to show a seisin; and such seisin by the statute 32 Hen. VIII. c. 2, must be alleged within fifty years before the making of the avowry or cognizance; and though by statute 21 Hen. VIII. c. 19, the lord need not avow upon any person in certain, yet he must allege seisin by the hands of some tenant in certain, within fifty years. Where the commencement of the rent appears, seisin is not material. The statute 32 Hen. VIII. c. 2, which limits an avowry or cognizance for rent, suit or service, to a possession of fifty years next before making the avowry, &c. does not extend to a new rent created by act of parliament.

(*e*) *Bulpit* v. *Clarke*, 2 New Rep. 56; *Lindon* v. *Collins*, Willes, 429; *Loyd* v. *Winton*, 2 Wils. 28; *The Leominster Canal Company* v. *Cowell*, 1 Bos. & Pul. 213; *The Leominster Canal Company* v. *Norris*, 7 Term Rep. 500.

(*f*) *Loyd* v. *Winton*, 2 Wils. 28.

(*g*) *Pluck* v. *Digges*, 2 Dow. & Cl. 180.

(*h*) *Newnham* v. *Bever*, 8 C. B. 560.

(*i*) *Banks* v. *Angell*, 7 Ad. & El. 843; 3 Nev. & Per. 94.

that after the tenant had enjoyed the land, he should not be allowed to pry into the lessor's title: the term of the contract must, however, be truly stated in the avowry (*k*).

Allegation of Amount of Rent due.

Where, in an avowry for rent, it turned out that less rent was due than was avowed for, Lord Ellenborough stated that there had been no case since the statute 11 Geo. II. c. 19, s. 22, in which the avowant had not been holden to be entitled to recover for so much rent as was due: and therefore where the defendant in replevin avowed for two years and a quarter's rent, and proved a tenancy for two years only, he had a judgment pro ratâ (*l*): so where the defendant avowed for half a year's rent, he had judgment for a quarter only, which was due (*m*). In an old case the same rule was held; and it was decided, that if the defendant avow for more than is due, though the avowry is for that reason bad, yet it may be cured: thus where the defendant avowed for rent due at Michaelmas, and the distress appeared to have been made on the 26th of September, which was three days before Michaelmas; it was held, that though the avowry was bad (for the judgment is to have a return irreplevisable, till all the rent avowed for is paid, and so would be for more than was due), yet that the defendant might, before judgment, abate his avowry for so much as was claimed to Michaelmas, and take judgment for the rest (*n*). It may, therefore, be seen that an avowant may at any time before judgment abate his own avowry for part of the rent distrained for, but not after judgment: so where an avowry is made for several rents, and it appears that part is not due, yet the whole avowry shall not abate (*o*). But an avowry for rent in arrear for one year, ending on the 29th of September, 1851, is not supported by proof that no rent was due from the year ending the 29th of September, 1851, but that a portion of the previous year's rent was due (*p*). Where in replevin *A.* avowed for a rent-charge, due in 1660, and afterwards distrained, and avowed for another part of the same rent-charge, which became due before that year, and which was against a different tenant; it was held, by three judges against a fourth, that the avowant was not estopped by his first avowry, in the same manner that a lessor is by giving an acquittance for the last gale of rent; but that he might at his leisure avow for part of his rent at one time, and for part at another, in the same manner as the lord may command his bailiff to distrain for so much rent, and afterwards for the sum due before. Where in an avowry for rent, and so many hens for quit rent, the avowant had a verdict for the whole, and it afterwards appeared upon the face of the avowry that the hens were not due at the time of the distress; the avowant had

(*k*) *Syllivan* v. *Stradling*, 2 Wils. 208.
(*l*) *Forty* v. *Imber*, 6 East, 434.
(*m*) *Harrison* v. *Barnby*, 5 Term Rep. 248.
(*n*) *Richards* v. *Cornforth*, 2 Salk. 580; 5 Mod. 264; Comyn, 42.
(*o*) Bac. Abr. tit. *Replevin* (C).
(*p*) *Roskruge* v. *Caddy*, 22 Law J., Exch., 16.

leave to release his damages as to them, and take judgment for the rent, with his costs. Generally, however, an avowry for part of a rent or penalty is bad, unless it show how the remainder was discharged, for otherwise there may be another distress and avowry for the residue (*q*). It is not necessary to aver that the rent still remains due (*r*).

Allegation of Authority in a Cognizance.

The fact of being bailiff should be correctly stated, as it has been decided to be traversable (*s*). It has indeed been laid down by one writer of considerable celebrity (*t*), that if the defendant make cognizance as bailiff to *A.*, the plaintiff cannot traverse that he is his bailiff, for it is a matter of which by no intendment he can have knowledge; but if in bar of the avowry, the plaintiff pleads that another had made cognizance, as bailiff to *A.*, for the same cause, and was barred, he need not show that it was with the privity of *A.*, for it shall be intended: and if in truth it was without, the defendant may traverse his being ever his bailiff. A cognizance as bailiff of an executor is proved, by a distress made in the name of the testator and by his command, but shortly after his death, with a subsequent recognition of it by his executor (*u*).

Allegation of Terms of Tenancy and Premises.

The statement of the fact of tenancy, and of the terms of the tenancy,—both as to period of time and amount of rent,—and the description of the premises, should be accurate; for if there is any material variance between the allegation and proof, it is fatal. It has been held, however, that the want of a precise allegation, that the plaintiff was tenant to the avowant, is not fatal, if it can otherwise be collected from the avowry that he was so (*x*); but if the defendant in replevin avow in a contract for 110*l.* rent, and prove a demise at 15*s.* an acre, amounting to 111*l.*, it is a fatal variance (*y*). Where an avowry alleged a demise by the avowant, and it appeared that the plaintiff had come in under three persons who had conveyed to the avowant, but only two of them had executed the deed, it was held a fatal variance (*z*). Where in replevin the defendant avowed for rent, in arrear for a dwelling-house with the appurtenances, and it appeared in evidence that the plaintiff merely occupied the upper part of the house, and that the shop and yard were in the occupation of other tenants; it was held to be no variance (*a*). Again, where in replevin for illegally distraining the plaintiff's growing corn in four closes, the defendants avowed the distress for rent in arrear, averring that the plaintiff held the closes at and under a certain yearly rent; to which the plaintiff pleaded that he did not hold in manner and form as alleged; proof that the plain-

(*q*) *Holt* v. *Samback*, Cro. Car. 103.
(*r*) *Clarke* v. *Davies*, 7 Taunt. 72; 2 Marsh. 386.
(*s*) *Trevilian* v. *Pyne*, 11 Mod. 112, per Trevor, C. J.; see also 1 Saund, 347 c, note 2).
(*t*) Bac. Abr. tit. *Replevin* (I).
(*u*) *Whitehead* v. *Taylor*, 10 Ad. & El. 210; 2 Per. & Dav. 367. See ante, Book II., Chap. II., Sect. 4, (c), p. 381.
(*x*) *Innes* v. *Colquhon*, 7 Bing. 265; 5 Moore & Pay. 63.
(*y*) *Brown* v. *Sayce*, 4 Taunt. 320.
(*z*) *Philpott* v. *Dobbinson*, 3 Barn. & Ald. 104; 3 Moore & Pay. 320.
(*a*) *Page* v. *Chuck*, 10 Moore, 264.

tiff held the four closes, and two others, at the rent stated in the avowry, was held no variance (*b*). A fatal variance of this description could not be amended under the statute 9 Geo. IV. c. 15 (*c*). Such an amendment may now, however, be made under the statutes 3 & 4 Will. IV. c. 42, s. 23 (*d*), and under 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96. Where the defendant avowed for three quarters' rent at a yearly rent of 115*l.*, payable quarterly, and the chief contest at the trial was whether the rent was 115*l.* or 100*l.* only, and the jury found that it was 115*l.*, but that it was payable half-yearly, the Court allowed an amendment of the avowry under the latter statute (*e*). If an assignee of the reversion of part of premises demised, avow under the statute 11 Geo. II. c. 19, for the entire rent, or for an improper proportion, the avowry may be amended at nisi prius, either by converting it into an avowry at common law, when the apportionment may be made by the jury, or by leaving it an avowry under the statute, and describing the rent in the proportionate value (*f*). Where an avowry was for rent due at new Michaelmas, and the proof was of a holding from old Michaelmas, and the judge at nisi prius refused to amend, the Court refused to give judgment for the defendant under this statute (*g*).

Avowries for Rent Nomine Pœnæ.

Where a penalty is annexed to the non-payment of rent, and distress given for it, a demand must be laid. Accordingly, where the avowry was for rent, and a nomine pœnæ, and no demand was alleged, the avowry was held to be clearly ill for the nomine pœnæ, but good for the rent; and the defendant had a return for that (*h*). However, where the issue was on a collateral matter, viz. non concessit, though no demand of the nomine pœnæ was laid, it was held to be cured by a verdict (*i*). An avowry on a demise at an increased rent, for every acre of the land which should be converted into tillage, is supported by evidence of a lease for a term of years, with a covenant to pay the increased rent for every acre which should be so converted "during a part of the term" (ex. gr.) for the last three years of the term granted to the lessee (*k*). By the 81st section of the Common Law Procedure Act, 15 & 16 Vict, c. 76, plaintiffs and defendants in *any* action may plead as many several matters as they shall think necessary to sustain the action in defence; and by sect. 83, "all objections to the pleading of several pleas, replications or subsequent pleadings, or several avowries or recognizances, on the ground that they are founded on the same ground of answer or defence, shall be heard upon the summons to plead several matters."

Pleading several Matters.

(*b*) *Hargrave* v. *Shewin*, 9 Dowl. & Ryl. 20.

(*c*) *Ryder* v. *Malbon*, 3 Car. & Pay. 594.

(*d*) See post, 767.

(*e*) *Gayler* v. *Farrant*, 4 Bing. N.C. 286; 1 Arn. 101; 5 Scott, 701; 6 Dowl. 426; and see *Gregory* v. *Duff*, 13 Queen's B. Rep. 608.

(*f*) *Roberts* v. *Snell*, 1 Man. & Gr. 577.

(*g*) *Knight* v. *M'Doswall*, 12 Ad. & El. 438; 4 Per. & Dav. 168. But see 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96, as to amendments.

(*h*) Hob. 133.

(*i*) Hut. 42.

(*k*) *Roulson* v. *Clarke*, 2 H. Black. 563.

(e) *Avowries and Cognizances Damage Feasant.*

What must be alleged in Avowries and Cognizances Damage Feasant.

Avowries and cognizances damage feasant are not within the statute 11 Geo. II. c. 19, s. 22; and therefore the title of the avowant must be traced down correctly; and the defendant must show that the place *where*, &c., is his freehold, or the freehold of the person under whom he makes cognizance: and if he says that he himself, or that person was seised, he must say of what estate, in fee tail, or for life. So the bailiff who distrains damage feasant in right of his principal, whatever be his title, even a devisee, must set forth what estate he had; it is not sufficient to say in general that he was seised (*l*). In one case, where this rule was attempted to be overturned, and the defendant pleaded that he was possessed of a messuage, with the appurtenances, and being so possessed, was lawfully entitled to common of pasture, &c., the plea was held ill on demurrer (*m*). The general rule, indeed, in pleading is, that where a title is made under an estate in fee, it may be alleged generally; but when under a particular estate, the commencement of that estate must be shown—as that such a one was seised in fee and demised,—because the seisin in fee may be traversed, and any of the mesne assignments are traversable (*n*). One tenant in common cannot avow alone for taking cattle damage feasant, but he ought also to make cognizance as bailiff of his companion (*o*). Where replevin was of cattle taken in *A.*, and the defendant avowed the taking in *A.*, under a demise of certain premises, of which *B.* was parcel, and because the cattle were damage feasant in *B.*, he took them and drove them through *A.*, in his way to the pound; upon general demurrer, the avowry was held to be well pleaded (*p*). Two avowries, one stating the locus in quo in *A.*, the other stating it in *B.*, are allowable (*q*).

(f) *Subsequent Pleadings.*

What may be pleaded in Bar to Avowries for Rent.

Non demisit; non tenuit; nothing in arrear; nothing in arrear for part of the rent, and tender of the residue; are good pleas in bar to an avowry for rent. A tender and refusal may be pleaded to an avowry, without bringing the money into Court; because if the distress were not rightfully taken, the defendant must answer the plaintiff his damages (*r*): but proof of the tender must accord with the allegation; for proof of a tender of a less sum will not support a plea in bar of a greater, although no more rent was due than the sum proved to have been tendered (*s*). That the avowant afterwards used or sold the cattle or goods distrained, may also be pleaded (*t*). Nil habuit in

(*l*) Bac. Abr. tit. *Replevin*, &c. (F).
(*m*) *Hawkins* v. *Eccles*, 2 Bos. & Pul. 359.
(*n*) *Dally* v. *Silby* (*in error*), 1 Bro. Parl. Cas. 525.
(*o*) *Culley* v. *Spearman*, 2 H. Black. 386.
(*p*) *Abercrombie* v. *Parkhurst*, 2 Bos. & Pul. 480.
(*q*) *Evans* v. *Davies*, 8 Ad. & El. 362; 1 Will. Wol. & Hod. 360; 3 Nev. & Per. 464.
(*r*) Bull. N. P. 60.
(*s*) *John* v. *Jenkins*, 1 Cromp. & Mees. 227; 3 Tyr. 170.
(*t*) Com. Dig. tit. *Pleader* (K 19).

tenementis is no plea in bar to an avowry under the statute 11 Geo. II. c. 19 (*u*); and where there was a plea to an avowry for a distress for rent in arrear, "that before the lessors had anything in the premises, and before they (claiming title under a pretended agreement between them and one *A. B.*) demised them to the lessee, *A. B.* had mortgaged them in fee to *C. D.*, that the mortgage being forfeited, and notice of the forfeiture being given to the lessee, and he having been required to attorn, did attorn to *C. D.*, when he distrained for the rent, which the lessee paid him, to prevent the goods from being sold under the distress;" it was held, that such plea was bad on special demurrer, as it amounted in substance merely to a plea of nil habuit in tenementis (*x*). But to an avowry for rent, a plea that before the defendant had any interest in the premises they were mortgaged in fee; that the mortgagor remained in possession and demised to the defendant; that the defendant demised to the plaintiff; that afterwards, the mortgage money being still due, and the rent avowed for in arrear, the mortgagee gave notice to the plaintiff to pay the rent to him, and threatened, in case of non-payment, to put the law in force; wherefore the plaintiff necessarily paid the rent to the mortgagee; is good, being a plea of payment, and not of nil habuit in tenementis (*y*). The plaintiff in replevin may plead in bar to the defendant's avowry or cognizance, that he did not hold it as tenant, even with a plea of infancy (*z*): but where there was a cognizance for rent in arrear, under a demise from *W.*, and it appeared by the lease that *W.* was a receiver in Chancery "in a cause wherein *A.* was plaintiff and *B.* defendant;" and the reddendum was to *W.* or any future receiver; it was held, that the lessee could not plead non tenuit (*a*). The plea in bar de injuriâ suâ propriâ absque tali causâ to a cognizance for rent in arrear, has been held to be bad upon special demurrer (*b*); yet it has been held, that such a plea was proper after an avowry for a distress made for a poor's rate (*c*). It has been laid down, that a plaintiff may plead in bar to an avowry de son tort, with a traverse that the locus in quo is parcel of the tenements alleged to be held (*d*). As the cattle of a stranger cannot in some cases be distrained, unless they are levant and couchant, a plea in such a case must show the circumstances; for a plea that the cattle "were not levant and couchant in the close in which, &c." has been held bad on demurrer, for not showing the circumstances under which the cattle came upon the close, so as to entitle them to be privileged from distress (*e*). Where an avowry

(*u*) *Syllivan* v. *Stradling*, 2 Wils. 208.

(*x*) *Alchorne* v. *Gomme*, 2 Bing. 54; 9 Moore, 130.

(*y*) *Johnson* v. *Jones*, 9 Ad. & El. 809; 1 Per. & Dav. 651; see also *Doe* d. *Higginbotham* v. *Barton*, 11 Ad. & El. 307; 3 Per. & Dav. 194.

(*z*) *Wilson* v. *Ames*, 1 Marsh. 74.

(*a*) *Dancer* v. *Hastings*, 4 Bing. 2; 12 Moore, 34.

(*b*) *Jones* v. *Kitchin*, 1 Bos. & Pul. 76.

(*c*) *Bardons* v. *Selby* (*in error*), 9 Bing. 756; 3 Moore & Scott, 280; 1 Cromp. & Mees. 500, *S. C.*; *Selby* v. *Bardons*, 3 Barn. & Adol. 2.

(*d*) Com. Dig. tit. *Pleader* (3 K 16).

(*e*) *Jones* v. *Powell*, 5 Barn. & Cres. 64; 8 Dowl. & Ryl. 416.

stated that the defendant held the premises at a certain yearly rent, to wit, the yearly rent of 72*l.*, and the plaintiff pleaded, first, non tenuit; and secondly, riens in arrere; and the first plea was found for the plaintiff; it was held, that the second plea became thereby immaterial; but that if any verdict was entered upon it, it must be entered for the plaintiff(*f*). The Statute of Limitations, 3 & 4 Will. IV. c. 27, s. 2, is a good plea in bar to an avowry for some sorts of rent (*g*). But it has been held, that this bar may be given in evidence under the plea of non tenuit (*h*).

When Set-off and Payment may be pleaded in Bar.

The statutes of set-off do not extend to the action of replevin (*i*); therefore a plaintiff in replevin cannot plead in bar a set-off to an avowry for rent (*k*). Neither can a mutual demand be given in evidence, where the defendant justifies under a distress. Yet it is said, that he may plead a mutual debt of more than the rent, by way of special plea to the avowry; and a plea in bar that the tenant had let other property to the landlord at a larger rent, and that it had been agreed that the two rents should be set-off against each other, has been considered good(*l*). At all events payment may be pleaded(*m*); therefore, to an avowry for rent, the tenant may plead payment of a ground rent to the original landlord, which he paid to protect himself from a distress; for it is a payment of so much to the immediate landlord (*n*). So to an avowry for rent, the plaintiff in replevin may plead payment of an annuity, secured out of the lands demised previously to the demise to him, for the arrears of which the grantee of the annuity had threatened to distrain (*o*). And as such a plea, as well as a plea of payment to a ground landlord or other incumbrancer, amounts to a plea of riens in arrere, it ought to be so pleaded. The ground of the above decisions is, that the compulsory payment by the tenant of ground rent or other like charge is in truth a partial eviction, and the landlord is presumed to authorize the payment by the tenant of his rent to those who have a claim on the land paramount to his own, and against which (as being a partial eviction) he is bound to protect the party holding under him (*p*). One who is sued for rent may avail himself of part payment of money obtained under a distress,

(*f*) *Cossey* v. *Diggons*, 2 Barn. & Ald. 546.

(*g*) See *James* v. *Salter*, 3 Bing. N. C. 544; 4 Scott, 168; 3 Hodges, 70; *Grant* v. *Ellis*, 9 Mees. & Wels. 113; ante, 377; and post, Chap. VII., Sect. 4, (b); see *Paget* v. *Foley*, 2 Bing. N. C. 679; 2 Hodges, 32; 3 Scott, 120, as to the 42nd section of statute 3 & 4 Will. IV. c. 27.

(*h*) *Owen* v. *De Beauvoir*, 16 Mees. & Wels. 547; affirmed on error in Exch. Cham. *De Beauvoir* v. *Owen*, 5 Exch. Rep. 166.

(*i*) *Laycock* v. *Tuffnell*, and *Graham* v. *Vaine*, 1 Tidd's Prac. 664.

(*k*) *Laycock* v. *Tuffnell*, 2 Chit. 531; *S. P. Sapeford* v. *Fletcher*, 4 Term Rep. 511.

(*l*) *Curtis* v. *Wheeler*, 4 Car. & Pay. 196; *S. C.* and not *S. P.* 1 Mood. & Malk. 493; see also *Wilson* v. *Sewell*, MS. post, Chap. VIII., Sect. 2.

(*m*) *Absolam* v. *King*, Barnes, 450; Bull. N. P. 181.

(*n*) *Sapeford* v. *Fletcher*, 4 Term Rep. 511; see also *Johnson* v. *Jones*, 9 Ad. & El. 809; 1 Per. & Dav. 651; *Graham* v. *Allsopp*, 2 Exch. Rep. 186.

(*o*) *Taylor* v. *Zamira*, 6 Taunt. 524; 2 Marsh. 220; and see *Graham* v. *Allsopp*, 2 Exch. Rep. 186.

(*p*) *Jones* v. *Morris*, 3 Exch. Rep. 742.

or of a judgment against him in a County Court for the same rent, but not under never indebted (*n*). If the giving of a promissory note be pleaded in bar to an avowry for rent, it must be shown that the note was accepted in satisfaction, or that by special agreement, or from other circumstances pleaded, the right to distrain was suspended (*o*). Where a plea in bar in replevin to a cognizance for a distress for rent stated, that divers sums had been from time to time duly assessed on the premises for land-tax and paid by the plaintiff, wherefore he deducted the amount of the tax, which the defendant, as landlord, was liable to bear in respect of rent; it was held, that this plea was bad; first, in not stating the specific periods for which the respective sums were assessed or paid; and, secondly, in not stating that the payment was made after the rent distrained for had accrued, or was then accruing due (*p*). Where, to an avowry in replevin for rent in arrear, the plaintiff pleaded in bar payments for land-tax and paving rates for six successive years, in order to avoid a distress, and that the sums so paid by him exceeded the amount of the rent distrained for; it was held, that such a plea was bad on demurrer, as the tax and rates should have been deducted by the plaintiff from the rent of the current year; and as the plea in substance amounted and was equivalent to a set-off (*q*).

What is a Departure in a Plea in Bar.

In replevin for taking and detaining cattle, to an avowry for rent in arrear, a plea that after the distress, and before the impounding, a tender of the rent was made and refused, and the cattle were distrained, as in the declaration stated, is no departure, for that detention is a new taking (*r*). Where the replevin was for taking the plaintiff's goods and chattels, to wit, a lime-kiln; and there was an avowry for rent, and a plea in bar, that the lime-kiln was affixed to the freehold; the Court held, that the plea in bar was bad, because it was a departure from the declaration, which had treated the lime-kiln as a chattel (*s*).

What may be Pleaded in Bar to Avowries, &c. Damage Feasant.

The plaintiff may plead in bar "tender of amends" to an avowry or cognizance damage feasant (*t*). To an avowry that the freehold was in the defendant, or the party under whom he makes cognizance, the plaintiff may plead in bar that it is his freehold, or the freehold of *A.*, and that by license he put his cattle there; or a special title by devise, fine, or demise (*u*).

Replications and subsequent Pleadings.

The pleadings in replevin, subsequent to the plea in bar, vary with the particular circumstances of each individual case. In general, how-

(*n*) *Harmer* v. *Bean*, 3 Car. & Kir. 307.

(*o*) *Davis* v. *Gyde*, 2 Ad. & El. 623; 1 Har. & Wol. 50; 4 Nev. & Man. 462.

(*p*) *Stubbs* v. *Parsons*, 3 Barn. & Ald. 516.

(*q*) *Andrew* v. *Hancock*, 1 Brod. & Bing. 37; 3 Moore, 278.

(*r*) *Evans* v. *Elliott*, 5 Ad. & El. 142; 2 Har. & Wol. 231; 6 Nev. & Man. 606.

(*s*) *Niblet* v. *Smith*, 4 Term Rep. 565.

(*t*) Com. Dig. tit. *Pleader* (3 K 32); see also ante, 564.

(*u*) Com. Dig. tit. *Pleader* (3 K 22).

ever, they are similar to those in other actions, with the exception that they bear a name applicable to those of one stage later in the course of proceeding.

(g) *Demurrers.*

Nature and Effect of Demurrers in Replevin.

Demurrers to the declaration are not usual in practice, except where the place is omitted (*x*). Where the defendant demurred to the declaration, without adding any suggestion in the nature of an avowry praying a return, and the plaintiff signed judgment for want of an avowry; on a rule to set aside the judgment, it was contended that the demurrer not being accompanied with an avowry, was a discontinuance; because, although when the defendant pleads any plea which takes away the plaintiff's right to the goods, he need not avow (*y*); yet that in other cases he must, or it is a discontinuance; for such plea does not lead to a termination of the suit: the Court, however, said "the only question was, whether the demurrer was frivolous or not; and thinking it was so, they would not hold it to be a discontinuance (*z*)."

(h) *Issue, Evidence, and Trial.*

Course of Proceeding to Issue and Trial.

If the plaintiff plead to the avowry or cognizance, the issue may be made up in the ordinary way by either party (*a*); and after giving notice of trial, the plaintiff, or if he neglect to do it, the defendant may make up the nisi prius record, enter the cause for trial, and proceed as in ordinary cases. And as both parties are considered plaintiffs, when the record is carried down for trial by the defendant (which is usually the case), it is not necessary to have the proviso in the jury process, as in cases of trial by proviso, although in practice it is usually inserted (*b*). As either party is at liberty to carry the cause down for trial, the defendant in replevin was not, under the old practice, entitled to move for judgment as in case of nonsuit, under stat. 14 Geo. II. c. 17, s. 1 (*c*). If, however, the defendant gives notice of trial, and does not proceed, the Court will give costs against him (*d*).

Evidence in Replevin to prove Title.

In an action of replevin, the landlord's title, under which the tenant has gained possession of the premises, cannot be disputed (*e*); although the tenant is prepared with evidence to show that the premises have been fraudulently conveyed to the landlord, and that the actual title

(*x*) Wilk. Replev. 61.
(*y*) 2 Lev. 92.
(*z*) *Serres* v. *Dodd*, 2 New Rep. 405. As to the abolition of special demurrers and as to demurrers generally, see 15 & 16 Vict. c. 76, ss. 50, 51, 80, 89; and Rules of Hil. Term, 1853, plac. 14, 15, 17.
(*a*) Arch. Pract. 1000, 8th ed.
(*b*) Ibid.
(*c*) *Shortridge* v. *Hiern*, 4 Term Rep. 400; *S. P. Jones* v. *Concannon*, 5 Term Rep. 661; *Eggleton* v. *Smart*, 1 W. Black. 375; and see *Rees* v. *Morgan*, 3 Term Rep. 349.
(*d*) This statute, as far as relates to judgment as in case of a nonsuit, is repealed by 15 & 16 Vict. c. 76, s. 100, and another mode of proceeding substituted.
(*e*) See ante, Book I., Chap. IV., Sect. 19, pp. 171, 172; Book III., Chap. III., Sect. 1, (b), pp. 614, 615; and post, Chap. VI., Sect. 12, (a).

is vested in another person (*e*). So, where a tenant was let into possession by a person who had no title, but who afterwards told the tenant that another was his landlord, and that the rent was to be paid to him, and the tenant accordingly paid him rent, the tenant was not entitled to set up the title of a third claimant to the property (*f*). Where *A.* took a lease of premises in writing in his own name, but actually as agent for *B.*, under whom he afterwards occupied a part, *B.* may distrain on him, and in replevin *A.* cannot set up the lease to himself (*g*). Where disputes arose between a lessor and a third person as to the right of the land, and they agreed to submit to the opinion of a barrister, who decided in favour of the third person, of which notice was given to the tenant, it was held to be a question for the jury, in an action of replevin for a distress made by the original lessor, whether by his acts he had not admitted his title was at an end (*h*). If an under-lessee has been evicted by the lessor for breach of condition in the original lease, but continues in possession on a new agreement with the lessor, after which he is distrained on by the lessee, he may prove these facts, on a plea of non tenuit, in replevin (*i*). Proof of payment of rent to the avowant is primâ facie evidence that he is the owner of the land; but in a case where the plaintiffs did not originally receive the possession of the land from the avowant, it is competent to the plaintiff to rebut the title of the avowant, by showing that he paid rent, under circumstances which did not entitle the avowant to the rent; and such evidence may be given on the issue non tenuit modo et formâ; for where a tenant, by mistake or misrepresentation, pays rent to a person not entitled to demand it, he is not precluded by such payment from giving evidence in replevin, on a plea of non tenuit, against the supposed landlord, to show that the latter is not entitled to the rent (*k*). An acknowledgment of title by a tenant, in one who claims as heir at law of the person under whom the tenant had previously held, will not preclude the latter from calling in question the title of the claimant under a plea of non tenuit, if it appear that such acknowledgment proceeded from a misrepresentation or misapprehension of the nature of the title set up (*l*). It is laid down in one nisi prius decision, that, under the issue of riens in arrere in replevin, the plaintiff may controvert the holding as claimed by the defendant in his avowry (*m*). Letters of a party, under whom a plaintiff in replevin does not claim, are inadmissible in evidence to affect the title of the latter (*n*).

(*e*) *Parry* v. *House*, Holt, 489.

(*f*) *Hall* v. *Butler*, 10 Ad. & El. 204; 2 Per. & Dav. 374.

(*g*) *Clarke* v. *Waterton*, 2 Mood. & Rob. 87.

(*h*) *Downs* v. *Cooper*, 1 Gale & Dav. 573; 2 Queen's B. Rep. 256.

(*i*) *Hopcraft* v. *Keys*, 9 Bing. 613; 2 Moore & Scott, 760.

(*k*) *Rogers* v. *Pitcher*, 6 Taunt. 202; 1 Marsh. 541.

(*l*) *Gregory* v. *Doidge*, 3 Bing. 474; 11 Moore, 394; and see *Claridge* v. *Mackenzie*, 4 Man. & Gran. 143; 4 Scott, N. R. 796.

(*m*) *Hill* v. *Wright*, 2 Esp. 669.

(*n*) *Halford* v. *Dillon*, 4 Moore, 381; and see *Betham* v. *Benson*, Gow, 45.

Evidence on other Points.

In replevin, where a tender is pleaded, and a subsequent demand and refusal replied, the demand must be made by, and the refusal be to, the defendant; if the proof is of a tender made to one sent or authorized by him, the evidence does not support the issue (*o*). Where an avowry was for rent, due at new Michaelmas, and the pleas were a tender and non tenuit, it was held, that proof of a tender, nothing being said as to the terms of the holding, did not support the issue for the defendant on the other plea (*p*). A plea of non cepit does not put the plaintiff to proof of property in the goods (*q*). The admissions of a wife, who carries on business in a shop in her husband's absence, as to the terms of the tenancy, are not evidence against him (*r*).

(i) *Judgment.*

Judgment for Plaintiff on Verdict.

If a verdict be found for the plaintiff, the jury assess the damages as on a verdict for plaintiff in trespass; for as the action is always brought in the detinuit, the damages are given for the injury the plaintiff has sustained by the taking only (*s*). The reason of this is, that as the plaintiff has the possession and use of the cattle pending the suit, if he have judgment, it can only be for damages. It seems to be extremely doubtful whether a writ of inquiry in replevin can be granted after verdict, though imperfect (*t*). In one case a writ of inquiry was granted after a defective verdict in replevin of a distress for a poor's rate (*u*): and where there was a nonsuit, and retorno habendo awarded, it was held, that the avowant might execute a writ of inquiry after a writ of second deliverance (*x*).

Judgment for Plaintiff by Default or on Demurrer.

If there be judgment for the plaintiff upon a relictâ verificatione, cognovit actionem, nil dicit, &c., or for want of a replication to his plea in bar to the avowry, or upon a demurrer, a writ of inquiry of damages shall be awarded; or at the request of the plaintiff, by the assent of the defendant, the Court may assess the damages without such writ (*y*): but if there be judgment for the plaintiff, by default after appearance, there shall be a special writ of inquiry for the value of the goods or cattle, and damages. Where the taking was lawful, the damage shall be only for the detainer; as where goods are taken damage feasant, and detained after amends tendered. The judgment for the plaintiff on demurrer is the same as in the action of trespass (*z*).

Judgment for Defendant at Common Law.

If the verdict be found for the defendant, the jury at common law find the issues specially for the defendant, and the judgment is, that he have a return of the goods irreplevisable. The judgment for the

(*o*) *Pimm* v. *Grevill*, 6 Esp. 95.
(*p*) *Knight* v. *M'Dowall*, 12 Ad. & El. 438; 4 Per. & Dav. 168. As to proof of the terms of tenancy, see ante, 631.
(*q*) *Dover* v. *Rawlings*, 2 Mood. & Rob. 544.
(*r*) *Meredith* v. *Footner*, 11 Mees. & Wels. 202.
(*s*) Arch. Prac. 1000, 8th ed.
(*t*) *Freeman* v. *Archer* (*Lady*), 2 W. Black. 763.
(*u*) *Dewell* v. *Marshall*, 3 Wils. 442.
(*x*) *Cooper* v. *Sherbrooke*, 2 Wils. 116.
(*y*) 2 Sell. Prac. 272.
(*z*) Arch. Prac. 1000, 8th ed.

defendant pro retorno is irreplevisable, because the merits of the cause are decided by the verdict; and as since the statute of Westminster 2, c. 2, respecting second deliverance, the distress returned must be necessarily irreplevisable, a judgment is good at common law, though the return be not adjudged irreplevisable (*a*).

Judgment for Defendant on the Statutes of Hen. VIII.

By the statutes 7 Hen. VIII. c. 4, s. 3, and 21 Hen. VIII. c. 19, s. 3, if the distress had been either for rent, customs, services or damage feasant, and the defendant obtain a verdict, or the plaintiff be nonsuit or otherwise barred, the defendant shall recover "his damages and costs against the said plaintiff, as he should have done if he had recovered therein." And on verdict, as the damages are assessed by the jury who try the cause, the judgment is final for the defendant to recover the damages so found (*b*). The judgment after verdict for the defendant need not express the return to be irreplevisable, because now it necessarily must be so, since the statute of Westminster 2: therefore a judgment in replevin, "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury," &c., is good; either as a judgment at common law, though the return be not adjudged irreplevisable, or as a judgment under statute 21 Hen. VIII. c. 19, which entitles the defendants to damages and costs; but not under statute 17 Car. II. c. 7 (*c*). Neither the statute 21 Hen. VIII. (nor that of 43 Eliz. c. 2, if the defendant avow as overseer for a distress for a poor's rate) tie the inquisition up to the same jury as are returned or impanelled, as the statute 17 Car. II. c. 7, does: if, therefore, there is a verdict for the plaintiff, the jury usually assess the damages; or the jury after verdict may be dismissed, and damages be assessed by the Court, with the defendant's consent. After verdict for the defendant, if the jury do not assess the damages, and the goods be detained, the defendant may make a suggestion thereof upon the roll, whereupon a writ shall go to inquire of the value of the goods and damages: upon which he shall have judgment for both (*d*).

Judgment for Defendant on Non pros.

If the plaintiff do not declare within four days after the service of the rule to declare, and a declaration has been demanded, when those periods have severally expired, the defendant may sign judgment of non pros. (*e*). This judgment is at common law, that the defendant have a return of his goods replevied, and his costs. The plaintiff, however, may obtain his chattels again under a writ of second deliverance, by the statute of Westminster 2 (13 Edw. I. st. 1), c. 2; and if, upon the proceeding in the writ of second deliverance, the defendant have a judgment, either upon verdict, demurrer, or after non pros., it is

(*a*) *Gammon* v. *Jones* (*in error*), 4 Term Rep. 509.
(*b*) 1 Saund. 105 b, n. (3).
(*c*) *Gammon* v. *Jones* (*in error*), 4 Term Rep. 509.
(*d*) 2 Sell. Prac. 271; *Dewell* v. *Marshall*, 3 Wils. 442.
(*e*) Arch. Prac. 992, 8th ed.

for a return irreplevisable, and he shall have a judgment de retorno habendo (*f*); which being executed, the plaintiff cannot have any further writ of deliverance. The defendant, by the statute 21 Hen. VIII. c. 19, after the entry of judgment of non pros. upon the roll, adds an award of a writ of inquiry, to ascertain the damages, as in ordinary cases, upon a judgment by default (*g*). If there has been no avowry, the Court will set aside a writ of inquiry obtained and the inquisition thereon; for the avowry, being in the nature of a declaration, is the only ground of an inquiry for the defendant in replevin (*h*).

Judgment for Defendant on Demurrer.

The judgment upon demurrer for the defendant is exactly the same as on non pros.; and an inquiry of damages and costs under the 21 Hen. VIII. is awarded in the same manner: and after a judgment on demurrer, no writ of second deliverance lies (*i*). Where judgment is given on demurrer for the avowant in replevin, fifteen days' notice of executing the writ of inquiry should be given to the plaintiff, as in the case of a nonsuit on the statute 17 Car. II. c. 7 (*k*).

Enactment of Statute 17 Car. II. as to Defendant's Judgment.

The proceedings with regard to the judgments obtained by defendants who have distrained for rent, have been materially simplified and altered by the statute 17 Car. II. c. 7 (*l*). That statute, in section 2, enacts, "That whensoever any plaintiff in replevin shall be nonsuit before issue joined, in any suit of replevin by plaint, or writ lawfully returned, removed, or depending in any of the King's Courts at Westminster, that the defendant making a suggestion in nature of an avowry or cognizance for such rent, to ascertain the Court of the cause of distress, the Court upon his prayer shall award a writ to the sheriff of the county where the distress was taken, to inquire by the oaths of twelve good and lawful men of his bailiwick, touching the sum in arrear at the time of such distress taken, and the value of the goods or cattle distrained; and thereupon, notice of fifteen days shall be given to the plaintiff or his attorney in Court of the sitting of such inquiry; and thereupon the sheriff shall inquire of the truth of the matters contained in such writ by the oaths of twelve good and lawful men of his county; and upon the return of such inquisition, the defendant shall have judgment to recover against the plaintiff the arrearages of such rent, in case the goods or cattle distrained shall amount unto that value; and in case they shall not amount to that value, then so much as the value of the said goods and cattle so distrained shall amount unto, together with his full costs of suit, and shall have execution thereupon by fieri facias or elegit, or otherwise, as the law shall require: and in case such plaintiff shall be nonsuit after cognizance or avowry made, and issue joined, or if the verdict shall be given against such plaintiff, then the

(*f*) 2 Inst. 341.
(*g*) Arch. Prac. 993, 8th ed.
(*h*) Bac. Abr. tit. *Replevin* (L).
(*i*) Arch. Prac. 993, 8th ed.
(*k*) *Burton* v. *Hickey*, 6 Taunt. 57; 1 Marsh. 444.
(*l*) Extended by 19 Car. II. c. 5, to the Counties Palatine and to Wales.

jurors that are impanelled, or returned to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the sum of the arrears, and the value of the goods or cattle distrained; and thereupon the avowant, or he that makes cognizance, shall have judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, together with his full costs, and shall have execution for the same by fieri facias or elegit, or otherwise, as the law shall require." Section 3 gives the like remedy to the avowant or party making cognizance for any rent, upon a judgment given for him upon demurrer. Section 4 enables the party or his representatives to distrain again for the residue of the arrears, in case the value of the cattle, &c., taken by the first distress, shall not be the full value of the arrears distrained for.

This statute does not take away or alter the judgment at common law; it only gives a further remedy to the avowant. So that after a non pros. the defendant may still enter his judgment pro retorno: but it is better to make a suggestion, and proceed by writ of inquiry; because if the plaintiff sue out a writ of second deliverance, it will operate, as has been observed, as a supersedeas of the retorno habendo, but not so to the writ of inquiry. By this statute, the legislature intended that the proceeding by writ of inquiry, fi. fa. and elegit should be final for the avowant to recover his damages; and that the plaintiff should keep his cattle, notwithstanding the course of awarding a *retorno* habendo, which is the right judgment, and is still entered up as before the statute (*m*). It was held formerly, that if the avowant obtained a verdict, he must either have judgment and execution for the sum settled by the jury pursuant to this statute, or he must take the usual remedy by the writ de retorno, and proceed under the 11 Geo. II. c. 19 (*n*); and this opinion seems to have rather extensively prevailed; but, it has been decided, that if the defendant do not issue execution on his judgment under the statute, or if the sum recovered be not paid before action brought, he may still proceed on the replevin bond as a further and better security (*o*). It is always at the election of the defendant, whether he will proceed upon the statute or not (*p*). On an avowry or justification of a taking as a distress for the whole rent, a jury may find a verdict for the sum due upon an apportionment (*q*). An avowry stated that the plaintiff held the premises as tenant to defendants under a demise, *subject to certain rents, provisions, conditions and stipulations* that plaintiff should not, during the tenancy, sell hay produced on the premises off the premises, *under a penalty* of 2*s.* 6*d.* per yard of hay sold, *to be recovered by distress, as*

(*m*) Sell. Prac. 269.

(*n*) *Coombs* v. *Cole*, H. 10 Geo. II. B. R. H. 352; cited Com. Dig. tit. *Pleader* (3 K 31).

(*o*) *Turnor* v. *Turner*, 2 Brod. & Bing. 107; 4 Moore, 606.

(*p*) *Rees* v. *Morgan* (*in error*), 3 Term Rep. 350.

(*q*) *Neale* v. *Mackenzie*, 2 Cromp. M. & Ros. 84; 1 Gale, 119; 5 Tyr. 1106.

for rent in arrear. The plaintiff having sold hay off the premises, and having been distrained or brought replevin, in which the defendants obtained a verdict and had judgment, under statute 17 Car. II. c. 7, for 54*l.*, as arrearages of rent: it was held, on error, in the Exchequer Chamber, that the legal operation of the agreement was to create a penalty recoverable by distress as for rent, but not a rent, and therefore that the judgment under the statute 17 Car. II. c. 7, was bad (*r*). The instrument stated in the plea either created a rent-service, or more probably amounted to a grant, with a license from the grantee to the reversioner to distrain as for a rent (*s*). A sum payable nomine pœnæ for selling hay, &c., contrary to agreement between landlord and tenant, the amount being measured by the quantity of hay sold, may be a rent-service (*t*).

Proceedings under 17 Car. II. c. 7, where Plaintiff is Non-prossed.

Where the plaintiff is non-prossed, the defendant, after entering the judgment for a return—which must still be entered, although it is never executed (*u*)—may by 17 Car. II. c. 7, s. 2, make a suggestion on the roll, in the nature of an avowry or cognizance, and pray a writ of inquiry to be directed to the sheriff of the county where the distress was taken, to inquire of the rent in arrear at the time of the distress, and also of the value of the distress: then follows on the roll the award of the writ of inquiry (of the execution of which fifteen days' notice must be given to the plaintiff or his attorney) (*x*): then the sheriff's return of the finding of the inquest: and lastly, an entry of final judgment (*y*). When the plaintiff is non-prossed, after the defendant has avowed, the entry of a suggestion in nature of an avowry must of course be omitted, and the prayer for a writ of inquiry must follow on the roll the judgment for a return (*z*). The judgment under the statute on demurrer is the same, but no writ de retorno habendo issues: and in the judgment after verdict, the jury find the amount of the rent in arrear, and the value of the things distrained.

Proceedings where there is a defective finding by the Jury.

Where the judgment is for the defendant after verdict, if the jury have omitted to inquire at the trial as the statute directs, it must be entered up as at common law, as a judgment pro retorno habendo: but if the jury have assessed damages, but not the amount of the rent, &c., it may be entered as a judgment under 21 Hen. VIII. c. 19; and the Court will permit the defendant to amend his judgment, if entered as under the statute, and not warranted thereby, by making it a common law judgment (*a*). Such omission on the verdict cannot be supplied by a writ of inquiry (*b*): for if the jury who tried the cause

(*r*) *Pollitt* v. *Forrest*, 11 Queen's B. Rep. 949.
(*s*) Ibid.
(*t*) Ibid.
(*u*) 2 Wils. 117; Carth. 253.
(*x*) *Burton* v. *Hickey*, 6 Taunt. 57; 1 Marsh. 444.
(*y*) Arch. Prac. 994, 8th ed.
(*z*) Arch. Prac. 998, 8th ed.
(*a*) 2 Sell. Prac. 171; *Gammon* v. *Jones* (*in error*), 4 Term Rep. 509; Carth. 253; *Cooper* v. *Sherbrooke*, 2 Wils. 116.
(*b*) *Sheape* v. *Culpepper*, 1 Lev. 255; 1 Sid. 380; *Herbert* v. *Waters*, 1 Salk. 205; *Kinaston* v. *Mayor of Shrewsbury*, Cas. temp. Hardw. 297, 298; *Rees* v. *Morgan*, 3 Term Rep. 349.

omit to make the necessary inquiries, no other jury can afterwards make it. The defendant cannot enter his judgment according to the statute, and proceed to execution by fi. fa. or ca. sa, but must resort to his common law judgment, and sue out his writ de retorno habendo: and this if the jury omit to inquire *either* of the rent or the value of the goods, for they must assess both, as the statute must be strictly complied with. This only applies to cases of rent within the statute, and not to those of nonsuit in other cases: indeed Lord Hardwicke has laid it down, that in every case, unless where the Court is tied up by this statute, a writ of inquiry may be granted in order to do complete justice (*c*). Where in replevin the plaintiff avowed for a year's rent, and there was a verdict for the defendant, but no value found by the jury; and a writ of inquiry was moved for under the statute 17 Car. II. c. 7, to ascertain the rent in arrear and the value of the cattle; Gould, J., doubted whether it could be granted, to supply a defective verdict in case of rent: though after judgment by default it would certainly lie; and added, that *Burrows's* note of *Andrews* and *James* (*d*) appeared to be a judgment by default: however, no cause being shown, the rule was made absolute (*e*). Where the defendant made cognizance of rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed, without finding either the amount of the rent in arrear, or the value of the cattle distrained, and judgment was entered for the damages assessed, the Court permitted the defendant to amend his judgment, and to enter a judgment of pro retorno habendo, after a writ of error brought (*f*). The distinction should be observed, that by the statute 17 Car. II. c. 7, in case of nonsuit or non pros. before issue joined, the defendant may enter a suggestion upon the record, in the nature of an avowry or cognizance, and thereupon sue out a writ of inquiry; but in case of a nonsuit at the trial, or of a verdict for the defendant, the jury at the trial must inquire of the rent in arrear, and the value of the goods distrained (*g*).

(j) *Execution.*

Execution to have a Return of the Goods.

The defendant may obtain his judgment for a return of the goods, by suing out a writ de retorno habendo. This writ is issued by the filazer in the Queen's Bench, and the prothonotary in the Common Pleas (*h*): and by it the sheriff is commanded to take from the plaintiff the goods that were replevied. If to this the sheriff return that the goods were eloigned; upon the writ and return being filed, a capias in withernam is issued to the sheriff, and if the plaintiff have no goods or

(*c*) *Vaughan* v. *Norris*, Ca. temp. Hardw. 138.
(*d*) M. 24 Geo. II. B. R.
(*e*) *Freeman* v. *Archer* (*Lady*), 2 W. Black. 763.
(*f*) *Rees* v. *Morgan* (*in error*), 3 Term Rep. 349.
(*g*) 2 Sell. Prac. 269.
(*h*) Wilk. Replev. 109.

cattle, the sheriff must return nihil, and the defendant may thereupon sue out a scire facias against the pledges, or against the sheriff, either if the pledges be insufficient, or if no pledges were taken (*i*). Where the defendant has judgment for a return irreplevisable, if the owner of the cattle or goods tenders all that is due on the judgment, and it is accepted, he shall have a writ of delivery for the goods; so if he tenders the whole upon the judgment which is ascertained upon the avowry, and it is refused, he shall have detinue (*k*). Now, however, a less circuitous practice has been adopted; for upon the return of an "elongata" to the writ de retorno habendo, it is no longer necessary to sue out a withernam, or a scire facias against the pledges or sheriff; but an action upon the case may be brought against the sheriff immediately, if he have taken either insufficient pledges, or no pledges at all (*l*). If the plaintiff in replevin be nonsuited, the defendant is not bound to have his damages assessed by the jury, under statute 17 Car. II. c. 7, or to take the earliest moment to prosecute his writ de retorno habendo. He may also again distrain the same goods for rent subsequently accrued, previously to his executing his retorno habendo, without waiving his action against the sureties in the bond (*m*). Where the plaintiff in replevin dies after declaration, and before avowry, no retorno habendo can be issued (*n*).

Execution to recover Damages and Costs.

The plaintiff may have execution for the damages and costs, by either of the usual writs of execution, viz. a fieri facias, a capias ad satisfaciendum, or an elegit; and if the defendant have judgment under the statute 17 Car. II. c. 7, he may have execution by the same writs (*o*). The term "full costs" in section 3 of this statute has the same meaning as ordinary "costs" (*p*). In an action of replevin in respect of a distress for arrears of a rent-charge, where both the plaintiff and defendant had taken down the record for trial, and the defendant obtained a verdict; it was held, that under the above statute the defendant was entitled to the costs of taking down the record, but not to the costs of making the distress (*q*).

(k) *Practice.*

Payment of Money into Court.

After an avowry for rent in arrear, the plaintiff may pay into Court the rent for which the defendant avows, because the demand is certain: but not where the damages are unliquidated (*r*). If the grantee of a rent-charge avow upon several under-tenants for the same rent, the Court will, upon a tender pleaded by the under-tenants, make an order that the payment of the rent into Court in one action shall serve

(*i*) 1 Saund. 195 a, note (3).
(*k*) 2 Sell. Prac. 273.
(*l*) *Braddyll* v. *Ball*, 1 Bro. Ch. Ca. 427; 1 Saund. 195 b, note (3).
(*m*) *Hefford* v. *Alger*, 1 Taunt. 218.
(*n*) *Cutfield* v. *Corney*, 2 Wils. 83.
(*o*) Arch. Prac. 1002, 8th ed.
(*p*) *Jamieson* v. *Trevelyan*, 24 Law J., Exch., 74.
(*q*) Ibid.
(*r*) *Vernon* v. *Wynne*, 1 H. Black. 24.

for all (s). Although a man cannot proceed for damages upon a plea of tender after taking the money out of Court, yet in a plea of tender to an avowry for rent, the plaintiff need not bring the money into Court (t). A defendant may pay money into Court as to part of the distress, for the purpose of abandoning his distress as to that part, and may avow as to the residue (u).

Staying Proceedings.

The Court will not stay proceedings in an action of replevin, on the application of the plaintiff, unless upon payment of the rent in arrear, together with all costs, though the arrears were tendered before in person, with costs up to that time (x): nor upon payment of costs on the application of the defendant (y). In one case the proceedings in replevin were stayed, after cognizance and plea in bar, upon payment of the costs of the action and distress, and replevying, and delivering up the replevin bond to be cancelled, there being no special damage (z). Where the avowry is for damage feasant, the proceedings cannot be stayed; because the Court in such case have no rule to guide them in ascertaining the damages.

Amendment.

The statute 3 & 4 Will. IV. c. 42, s. 23, does not extend to the amendment of omissions in pleading. Therefore, in replevin for taking goods in a public-house and a brewery, where the avowry was as to the taking in the public-house only, the judge at the trial refused to amend by inserting the brewery (a).

Other Matters.

Although an avowant is an actor, he cannot have a rule to discontinue; for it is the plaintiff's suit notwithstanding (b). After issue joined upon a plea in bar to an avowry, the Court will not suffer the plea to be withdrawn, and the avowry confessed without consent, for the avowant will lose his costs (c). A plaintiff in replevin is not entitled to security for costs, although the defendant is in insolvent circumstances (d). In replevin, where the verdict is for the plaintiff, the Court will not grant a new trial, even on payment of costs, without very clear grounds, for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties (e).

SECT. 6.—*Writs of Recaption and Second Deliverance.*

Nature and Object of the Writ of Recaption.

The return of the chattels distrained to the defendant, in case of an avowry for rent, is awarded on the principle that they should be detained as a pledge only until the rent or duty for which they were taken be paid or satisfied. As the defendant, whilst the suit is pend-

(s) *Anon.*, 1 Lord Raym. 429.
(t) Bull. N. P. 60.
(u) *Lambert* v. *Hepworth*, 2 Queen's B. Rep. 729; 2 Gale & Dav. 112.
(x) *Hopkins* v. *Shrole*, 1 Bos. & Pul. 382.
(y) *Hodgkinson* v. *Snibson*, 3 Bos. & Pul. 603.
(z) *Banks* v. *Brand*, 3 Maule & Selw. 525.
(a) *Bye* v. *Bower*, 1 Car. & Mar. 262.
(b) *Long* v. *Buckridge*, 1 Stra. 112.
(c) Com. Dig. tit. *Pleader* (3 K 20).
(d) *Heskett* v. *Biddle*, 3 Dowl. 634; 1 Hodges, 119.
(e) *Parry* v. *Duncan*, 7 Bing. 243; 5 Moore & Pay. 19; Mood. & Malk. 533.

ing to determine the legality of the caption, has security to have a *return* made, if he make out his claim; it was found necessary to protect the tenant's property from further distresses for the same cause *whilst* the action of replevin was going on. For this purpose, the writ of recaption was framed; in which, if the defendant be convicted, he shall be fined to the Queen; because, by the second caption, the defendant takes upon himself to determine the justice and legality of the first, while that very point is under the consideration of the Court of Justice in which the replevin depends; for if the distress were lawful, he should have a return of it, and therefore the second is unreasonable; and if the first were unlawful, much more is the second; so that the recaption lies even where the cause of the first caption is just (*f*). If, however, the same cattle, or other cattle of the same proprietor, come on to the land damage feasant, they may be distrained again, because each distress is for a distinct or several injury (*g*). In the writ of recaption there can be no avowry, but the defendant must justify as in trespass.

Nature and Effect of a Writ of Second Deliverance.

At common law, if the plaintiff had been nonsuited, either before or after verdict, the defendant who distrained should have had return, but not irreplevisable; so that the plaintiff after nonsuit might have had as many replevins as he chose. To remedy this evil, the statute of Westminster 2 (13 Edw. I. st. 1), c. 2, restrains the plaintiff from any more replevins after nonsuit; but gives a writ of second deliverance: and if in such writ the plaintiff be nonsuited, or if the plea be discontinued, or the writ abate, or if he prevail not in his suit, a return irreplevisable shall be awarded (*h*). Upon a nonsuit either before or after evidence, this writ will lie, because there is no determination of the matter; but no second deliverance lies after a judgment upon demurrer, or after a verdict, or confession of the avowry. In all these cases, judgment must be entered with a return irreplevisable; for in the case of a demurrer and verdict, the matter is determined by the law, and in that of a confession, it is determined by the confession of the party. The statute of Westminster 2, c. 2, gives the writ of second deliverance out of the same Court whence the first replevin was granted, and a man cannot have it elsewhere. The writ must not vary in substance from the declaration in replevin, or it shall be abated; but although the writ cannot vary from that, in year, day, place or number of beasts; yet if the first writ was of a heifer, the second may be of a cow, as by presumption it may in that distance of time grow to such.

(*f*) Imp. Gilb. Replevin, 224; F. N. B. 71 E.

(*g*) F. N. B. 71 E.

(*h*) Bac. Abr. tit. *Replevin* (E 3). When the distress has been for rent, the writ of second deliverance is, it would seem, taken away by statute, 17 Car. II. c. 7, Wilk. Replev. 138. If the plaintiff in replevin be nonsuited for want of delivering a declaration which happened through any cause that would have entitled him to a writ of second deliverance—as sickness of the person employed, &c.,—the Court will order the defendant to accept of a declaration on payment of costs; else the plaintiff would be remediless.

Where a writ of second deliverance is awarded, it is a supersedeas of the execution of a retorno habendo, and closes the sheriff's hand from making any return thereon; but where the defendant had avowed, and the plaintiff, being nonsuited, brought this writ, it was held, that this was not a supersedeas of the writ of inquiry of damages; for these damages were not for the thing avowed for; but were given by the statute 21 Hen. VIII. c. 19, as a compensation for the expense and trouble the avowant has been at. The proceeding in second deliverance is exactly the same as in replevin; except that in the declaration it is stated that *A. B.* was summoned by her Majesty's writ of second deliverance to answer, &c. (*i*). If the sheriff will not execute the writ of second deliverance, the party has his remedy against him.

re of a rn irrepleisable.

Return irreplevisable is a judicial writ directed to the sheriff, for the final restitution of the cattle unjustly taken by another, and so found by verdict, or after nonsuit on a second deliverance (*k*). If the plea be to the writ, or any other plea be tried by a verdict, or judged upon demurrer, a return irreplevisable shall be awarded and no new replevin shall be granted, nor any second deliverance by statute of Westminster 2, but only upon a nonsuit: but if upon issue joined, the plaintiff do not appear on the trial, being called for that purpose, a return irreplevisable shall not be awarded, but the party may have a writ of second deliverance. If a man has a return irreplevisable, and a beast dies in the pound, he may distrain anew; so, if the beast dies before *judgment*. The owner, however, may offer the arrears; and if the defendant refuse to deliver the distress—it being only in the nature of a pledge—the plaintiff may bring an action of detinue.

SECT. 7.—*Error and False Judgment.*

When Error and False Judgment lie.

As the Sheriff's Court is not a Court of Record, no writ of error lies; but if the defendant complains that false judgment has been given against him in the Court below, he must sue out of Chancery a writ of false judgment, which is directed to the sheriff, ordering him to remove the suit into the Court above. This writ is in the nature of a re. fa. lo (*l*). The sheriff makes his return to the writ, and summons the parties in the same manner as on a re. fa. lo. To the writ of false judgment it is not necessary to return the original minutes of the proceedings, but merely a statement of them; for it is not necessary to the validity of the proceedings in a suit in the ancient County Court, that any memorandum thereof should be made (*m*), although regular proceedings thereof should be kept. If the proceedings be erroneous, —as if the cause of action be not laid to have arisen within the jurisdiction of the inferior Court, or the like,—the Court above will reverse

(*i*) Co. Entr. 589 a.
(*k*) Bac. Abr. tit. *Replevin* (E 6).
(*l*) Watson's Sheriff, 294.
(*m*) *Dyson* v. *Wood*, 3 Barn. & Cres. 449; 5 Dowl. & Ryl. 295.

the judgment (*n*). When a replevin suit is brought in an inferior Court of Record,—which is sometimes the case,—a writ of error lies to the superior Court. No writ of error, however, lies on the judgment in a suit in the new County Courts (*o*).

SECT. 8.—*Proceedings against other Parties.*

(a) *Against the Sureties by Action.*

In what Case the Remedy against Sureties is resorted to.

When goods are taken in distress for rent, and replevied, the distrainer has no lien on the goods, but is left to his remedy on the replevin bond (*p*). The usual remedy, therefore, where the distress is for rent, and a replevin bond has been entered into according to statute 11 Geo. II. c. 19, s. 23, is by taking an assignment of the replevin bond, and bringing an action thereon against the pledges in the defendant's own name (*q*). The mode of proceeding on this statute is now generally preferred to the old remedy by scire facias; and it is not affected by the statute 17 Car. II. c. 7 (*r*); for where, in pursuance of that statute, the avowant had judgment for want of a plea in bar, it was held that he had two methods of proceeding, at his election; namely, either to execute a writ of inquiry, or to sue upon the replevin bond (*s*). To a declaration against one of the sureties on the bond, averring that the plaintiff in replevin did not prosecute his suit with effect, a plea, stating the writ of inquiry, and judgment to recover the arrears of rent, found under 17 Car. II. is no bar to the action on the bond, and is bad on general demurrer; it not showing that an execution had issued on the judgment, or that the sum recovered had been levied and paid to the avowant before action brought (*t*). It has also been held, that if judgment be given against the plaintiff in replevin, for not prosecuting his suit with effect, his sureties on the bond will be answerable to the avowant, notwithstanding he has *afterwards* proceeded on the statute 17 Car. II. c. 7, s. 2, and obtained a judgment under a writ of inquiry, in pursuance of that statute, to recover the arrears of rent and costs (*u*). Even if the defendant in replevin elects to proceed on that statute, he is not confined to his execution under the statute, but may sue the sureties on the replevin bond, or the sheriff in an action on the case, for negligence in losing the bond (*x*). Where the defendant may sue on the bond as assignee of the sheriff, he may proceed in the superior Court, though the replevin be not removed out of the County Court; averring in his declaration, that the plaintiff did not appear at the next County Court,

(*n*) Watson's Sheriff, 295; *Bishop* v. *Kaye*, 3 Barn. & Ald. 605.
(*o*) By sect. 108 of statute 9 & 10 Vict. c. 95. See post, Chap. IX., Sect. 3.
(*p*) 1 Bro. Par. Cas. 427; see ante, 665.
(*q*) 2 Sell. Prac. 266.
(*r*) Ante, 696.
(*s*) Gilb. Replev. 225.
(*t*) *Waterman* v. *Yea*, 2 Wils. 41.
(*u*) *Turnor* v. *Turner*, 2 Brod. & Bing. 107; 4 Moore, 606.
(*x*) *Perreau* v. *Bevan*, 5 Barn. & Cres. 284; 8 Dowl. & Ryl. 72.

and prosecute according to the condition of the bond (y). Where pledges are taken, and they prove to be insufficient, the party has a double remedy, viz. against the sheriff, by action; and against the sureties, if the distress was not for rent, by scire facias; and if for rent, either by scire facias, or upon the replevin bond, assigned according to the statute (z).

What amounts a Forfeiture the Replevin d.

Sureties in a replevin bond are liable in three instances: viz. if the plaintiff in replevin does not prosecute his suit with effect; without delay; and make a return of the goods, if such return shall be adjudged (a). A plaintiff in replevin, who does not use diligence in prosecuting the suit, is guilty of a breach of that part of the condition of the bond which requires him to prosecute without delay, even though it may not appear that the suit is determined (b). The condition may be broken though the delay does not exceed the time for proceeding allowed by the practice of the superior Courts, if the defendant be unduly prejudiced thereby (c). The plaintiff is not, however, responsible for the default of the sheriff, or guilty of delay by reason of the sheriff having neglected to serve a summons. The legal meaning of prosecuting with effect, with respect to these bonds, is to prosecute with success, or rather to a not unsuccessful termination (d), the object of the condition of the bond being to give the party security for costs (e); therefore, if a plaintiff in replevin fails, the bond is broken, and the defendant is not restrained from suing on the bond, though he omits to sue out a writ de retorno habendo, and cause elongata to be returned thereon (f). The bond is forfeited if the plaintiff in replevin do not appear in the County Court next after giving the bond, and prosecute according to the condition, by entering his plaint there (g), and afterwards proceed in the prosecution (h); but if he enter his plaint, and afterwards be restrained by injunction out of Chancery till his death, whereby the plaint abates, the bond will not be forfeited (i). So it is not forfeited by the death of the plaintiff, after removal into the Court above (k). If the judge in the County Court, held under the 9 & 10 Vict. c. 95, strikes out a replevin suit for want of jurisdiction, a disputed title having been sworn to, this is not in effect a judgment of nonsuit, which causes a forfeiture of the replevin bond (l). It has, however, been held, that the defendant in replevin is not entitled to an assignment of the replevin bond, on the

(y) *Dias* v. *Freeman*, 5 Term Rep. 195; *S. P. Brackenbury* v. *Pell*, 12 East, 585.

(z) Gilb. Replev. 220.

(a) *Turnor* v. *Turner*, 2 Brod. & Bing. 107; 4 Moore, 606; per Blossett, Serj., arguendo.

(b) *Harrison* v. *Wardle*, 5 Barn. & Adol. 146; 2 Nev. & Man. 703.

(c) *Gent* v. *Cutts*, 11 Queen's B. Rep. 288.

(d) *Jackson* v. *Hanson*, 8 Mees. & Wels. 477; 1 Dowl., N. S., 69.

(e) Per Lee, C. J., in *Morgan* v. *Griffin*, 7 Mod. 380.

(f) *Perreau* v. *Bevan*, 5 Barn. & Cres. 284; 8 Dowl. & Ryl. 72.

(g) *Dias* v. *Freeman*, 5 Term Rep. 195.

(h) Com. Dig. tit. *Replevin* (D).

(i) *Ormond (Duke)* v. *Bierley*, Carth. 519; 12 Mod. 380; Holt, 127.

(k) *Morris* v. *Matthews*, 2 Queen's B. Rep. 293; 1 Gale & Dav. 677.

(l) *Tubby* v. *Stanhope*, 17 Law J., N. S., C. P., 190; 12 Jur. 357.

plaintiff's neglecting to declare at the next County Court, if he himself have not then appeared to the summons (*m*). Where the condition of a replevin bond was, that the obligor should appear at the next County Court, and *then and there* prosecute his suit with effect, it means that he should begin to prosecute it at the next County Court, and afterwards prosecute it with effect (*n*). Allowing two years to elapse without proceedings, has been held to be a breach of the condition of a replevin bond, to prosecute the replevin without delay (*o*); and the obligee may recover on such breach, although judgment of non pros. was never signed in the County Court: and the condition is not satisfied by a prosecution of the suit in the County Court merely, if the plaint be removed to the superior Court: in such case the suit must be prosecuted there also with success, and a return made if adjudged there (*p*). Accordingly, where a plaintiff in replevin was nonsuited for want of a plea in bar, it was held, that the avowant might sue the sureties on the bond, and need not execute a writ of *inquiry* for his damages (*q*), because he had thereby not prosecuted his suit with effect, and the condition of the bond was broken. It is the same as in a recognizance given to prosecute with effect in a writ of error, where, if the plaintiff be nonsuited, or the judgment affirmed, the recognizance is not forfeited (*r*).

By whom the Assignment may be made.

The replevin bond may be assigned by any officer who has power to grant replevins; and therefore where one of the sheriffs of London granted the replevin, and took the bond in his own name, an assignment of it by him alone is good (*s*).

To whom and when the Assignment may be made.

Both the avowant and person making cognizance may take an assignment of a replevin bond, and sue jointly upon it (*t*); and the avowant may always sue without joining the person making cognizance (*u*): and where there is no avowant named on the record, the person making cognizance may alone sue on the bond (*x*). The bond may be assigned four days exclusive after the time limited therein for the plaintiff to prosecute his suit (*y*).

Course of Proceeding on Replevin Bond.

The action on the replevin bond need not be brought in the same Court in which the re. fa. lo. is returnable (*z*); and may be by action of debt in the name of the assignee of the bond against one of the

(*m*) *Seal* v. *Phillips*, 3 Price, 17.

(*n*) *Jackson* v. *Hanson*, 8 Mees. & Wels. 477; 1 Dowl., N. S., 69; see also *Morris* v. *Matthews*, 1 Gale & Dav. 677; *Rider* v. *Edwards*, 3 Man. & Gr. 202; 3 Scott, N. R. 456.

(*o*) *Axford* v. *Perrett*, 4 Bing. 586; 1 Moore & Pay. 470.

(*p*) *Chapman* v. *Butcher*, Carth. 248; *Lane* v. *Foulk*, Comber. 410; *Gwillim* v. *Holbrook*, 1 Bos. & Pul. 410.

(*q*) *Waterman* v. *Yea*, 2 Wils. 41.

(*r*) *Ormond* (*Duke*) v. *Bierley*, Carth. 519; Holt, 127; 12 Mod. 380, per Holt, C. J.

(*s*) *Thompson* v. *Farden*, 1 Man. & Gr. 535; 1 Scott, N. R. 275; 8 Dowl. 813.

(*t*) *Phillips* v. *Price*, 3 Maule & Selw. 180.

(*u*) *Archer* v. *Dudley*, 1 Bos. & Pul. 381, n.

(*x*) *Page* v. *Eamer*, 1 Bos. & Pul. 378.

(*y*) 2 Sell. Prac. 266.

(*z*) *Wilson* v. *Hartley*, 7 Dowl. 461. The mode of proceeding is the same as on a bail-bond. Notice of the action should be given to the sheriff, if there is a chance of it being necessary afterwards to proceed against the sheriff for taking insufficient sureties; *Baker* v. *Garratt*, 3 Bing. 60; 10 Moore, 333.

sureties in the detinet only (*a*). The Court of Common Pleas will not set aside proceedings on a replevin bond, because the action is commenced before breach, for it may be pleaded (*b*); nor will they on motion set aside an execution in an action on a replevin bond, upon an objection to the proceedings, which might have been taken before judgment (*c*). Where three actions were brought, the Court made a rule for staying proceedings in all, on payment of the rent due and costs; and, if not paid, that one action should be proceeded with, the other two defendants being bound by the Court (*d*). It should in general appear clearly that an application to stay proceedings on a replevin bond is made on behalf of the sureties (*e*).

Extent of the Liability of the Sureties.

The sureties in a replevin bond are only liable for the value of the goods seized and the costs; and if that value exceeds the amount of rent due, they will only be liable for the rent and the costs (*f*). The two are together liable only to the amount of the penalty in the bond, and the costs of the suit on the bond (*g*). Their liability is limited to the amount of rent in arrear at the time of the distress, and costs; and they are not liable for subsequent rent (*h*). Where a sheriff took a replevin bond from one surety only, and was sued by the person making cognizance, for having taken insufficient pledges, who recovered damages and costs in such action; it was held, that the sheriff having sued the surety on the bond for not having returned the goods, and suggested breaches according to the statute of 8 & 9 *Will. III.* c. 11, s. 8, was not entitled to recover the costs incurred in defending the action against him as such sheriff; and that as the surety was deprived of calling on his co-surety for contribution, he was only liable to a moiety of the damages awarded by the jury in the action against the sheriff (*i*).

What amounts to a Discharge of the Sureties.

Where the plaintiff and defendant in replevin referred the cause to an arbitrator, and agreed, without the privity of the replevin bond sureties, that the bond should stand as a security for the performance of the award; it was held, that the sureties were discharged (*k*). But where the parties to a replevin suit referred to arbitration the time of payment of the rent, with certain claims of the tenant on the landlord for damages, with liberty for the tenant to deduct them, when awarded,

(*a*) *Wilson* v. *Hobday*, 4 Maule & Selw. 120. It is not necessary to indorse on the writ the amount of debt and costs, pursuant to the new rules; *Rowland* v. *Dakeyne*, 2 Dowl. 832.

(*b*) *Anon.*, 5 Taunt. 776.

(*c*) *Short* v. *Hubbard*, 2 Bing. 445; 10 Moore, 107.

(*d*) *Bartlett* v. *Bartlett*, 4 Man. & Gr. 269; 4 Scott, N. R. 779.

(*e*) *Warton* v. *Blacknell*, 12 Mees. & Wels. 558; 1 Dow. & Low. 650.

(*f*) *Hunt* v. *Round*, 2 Dowl. 558; *Miers* v. *Lockwood*, 9 Dowl. 975; *Gingell* v. *Turnbull*, 3 Bing. N. C. 881; *Bowser* v. *Lloyd*, 9 Dowl. 1029. The statute 11 Geo. II. c. 19, s. 22, gave the defendant double costs; but see statute 5 & 6 Vict. c. 97.

(*g*) *Hefford* v. *Alger*, 1 Taunt. 218; *Branscombe* v. *Scarborough*, 6 Queen's B. Rep. 13.

(*h*) *Ward* v. *Henley*, 1 Yon. & Jerv. 255.

(*i*) *Austen* v. *Howard*, 1 Moore, 68; 7 Taunt. 28, 327; 2 Marsh. 352.

(*k*) *Archer* v. *Hale*, 4 Bing. 464; 1 Moore & Pay. 285; and see *Ireland (Bank)* v. *Bereford*, 6 Dowl. 238.

for the rent, and agreed to suspend the proceedings in replevin pending the reference; after an award made, it was held, that the sureties in the replevin bond were not thereby discharged (*l*). And it has been held, that it is no plea to an action against the sureties, that the replevin cause was referred to an arbitrator, and that he, without the knowledge of his sureties, enlarged the time for making his award (*m*). An agreement, which was made a rule of Court, between the plaintiff and the principal, to stay all proceedings in the replevin, upon payment by the latter of a certain sum of money, each party to pay his own costs, was held not to be a discharge to the surety, after breach by the principal; but that the surety was liable for such sum as appeared upon a reference to be due (*n*).

(b) *Against the Sureties by Scire Facias.*

Nature of the Remedy against Sureties by Scire Facias.

Another remedy which the defendant in replevin has, if the plaintiff does not make a return of the goods when a return has been awarded, is by scire facias against the pledges. Before, however, a scire facias can be issued, a writ pro retorno habendo must have been sued out, and an elongata or eloignment be returned by the sheriff; after which, if the names of the pledges be not known, an application may be made to the replevin clerk, and if he refuses or delays to tell them, the Court on motion will make a rule upon him for that purpose (*o*). If the plaint has never been removed, the defendant may sign a non pros. in the Court below, and have a precept in the nature of a scire facias (*p*). The two preceding remedies are used where the distress is not for rent, as well as where it is.

(c) *Against the Sheriff.*

Remedy where the Sheriff neglects to take a Replevin Bond.

The sheriff, upon making replevin, is bound, as has been before stated, to take pledges, and they must be sufficient pledges. If he has taken none, or they are insufficient, or he has lost the replevin bond, or has taken a bond not in conformity with the statute 11 Geo. II. c. 19, s. 23, an action on the case will lie against him (*q*); the Court, however, will not proceed in a summary way, by granting an attachment against the sheriff for neglecting to take a replevin bond (*r*). In an action against the sheriff subsequently to the passing of the Small Debts Act, 9 & 10 Vict. c. 95, for taking an insufficient replevin bond, an averment in the declaration that the County Court had no jurisdiction at the time of taking the bond is a sufficient statement, on

(*l*) *Moore* v. *Bowmaker*, 7 Taunt. 97; 7 Price, 223; 2 Marsh. 392.
(*m*) *Aldridge* v. *Harper*, 10 Bing. 118; 3 Moore & Scott, 518.
(*n*) *Hallett* v. *Mountstephen*, 2 Dowl. & Ryl. 343.
(*o*) 2 Sell. Prac. 266.
(*p*) *Waterman* v. *Yea*, 2 Wils. 41.
(*q*) 1 Saund. 195, note 3; *Perreau* v. *Bevan*, 5 Barn. & Cres. 284; 8 Dowl. & Ryl. 72.
(*r*) *Rex* v. *Lewis*, 2 Term Rep. 617; 2 Sell. Prac. 262; *Twells* v. *Colville*, Willes, 375.

motion in arrest of judgment, that the County Court had no jurisdiction at the time of making the plaint to the sheriff (s).

Nature of Remedy where the Sheriff takes insufficient Pledges.

Formerly, when the defendant obtained judgment, and a writ de retorno had been issued as usual, if the sheriff returned an eloignment, a capias in withernam issued to take other goods of the plaintiff; and if the sheriff returned to this nihil, the defendant then sued out a scire facias against the pledges, to show cause why their goods and chattels, to the value of the goods and chattels eloigned, should not be delivered to the defendant (t). If no cause was shown, a writ issued to take their cattle; but if they had none, the sheriff returned nihil also to that writ, and then a scire facias was awarded against the sheriff himself, that he render to the defendant as many cattle (u). These proceedings have now, however, fallen into disuse, and a shorter practice has been adopted; for if the defendant obtain judgment, but is not able to get satisfaction either from the principal or the sureties, an action on the case may be maintained against the sheriff for taking insufficient pledges. So if insufficient pledges de retorno habendo be taken by the officer of the Court below in replevin, the remedy against him is by action; and the Court will not order him to pay the costs recovered by the defendant in replevin (x). The high-sheriff, under-sheriff and replevin clerk are all answerable to the defendant for the sufficiency of the pledges de retorno habendo (y); and unless reasonable discretion in the discharge of their duty has been exercised, they are liable to an action if *either* surety turn out to be insufficient (z).

What amounts to insufficiency of the Sureties.

If at the time of taking the replevin bond, the sureties were *apparently* responsible, the sheriff is not liable to an action for taking insufficient pledges (a): therefore it is sufficient, on the part of the sheriff in such an action, to show that the sureties are apparently persons of responsibility, although they are not actually such; unless it be shown that the sheriff had notice of the fact, or neglected means of information within his power, and did not act under the circumstances, and considering the information he had obtained, with a reasonable degree of caution; and the general reputation, as to the want of credit of the sureties in the neighbourhood of their respective residences, is evidence against the sheriff (b). A replevin clerk is bound to make reasonable and cautious inquiries into the apparent responsibility of persons who, being unknown to him, tender themselves as sureties; and it is not sufficient to take the statements of the persons themselves; but it seems that he is not bound to go out of his own

(s) *Edmonds* v. *Challis*, 7 C. B. Rep. 413; 6 Dow. & Low. 581.

(t) Rast. 569 b; *Dorrington* v. *Edwin*, 3 Mod. 56.

(u) *Trevors* v. *Michelborne*, Hutt. 77; 3 Nels. Abr. 207, pl. 3.

(x) *Tesseyman* v. *Gildart*, 1 New Rep. 292.

(y) *Richards* v. *Acton*, 2 W. Black. 1230.

(z) *Scott* v. *Waithman*, 3 Stark. 168; *Plumer* v. *Brisco*, 11 Queen's B. Rep. 46.

(a) *Hindle* v. *Blades*, 5 Taunt. 225; 1 Marsh. 27.

(b) *Scott* v. *Waithman*, 3 Stark. 168.

office for the purpose of making inquiries (*c*). Where an avowant in replevin obtained a verdict against the sheriff for having taken insufficient pledges on a replevin bond, which had been taken by his replevin clerk, against whom he brought an action for negligence; and the attesting witness to the bond proved that the sureties did not reside within the bailiwick of the sheriff, and that one of them occupied a well-stocked farm at the time the bond was executed; it was held, that such clerk was not answerable, as it was not incumbent on him to make personal inquiries as to the responsibility of the sureties; if they appear responsible it is sufficient: but it seems, that when they reside out of the bailiwick of the sheriff, by whom the bond is taken, it is necessary to search the sheriff's office, where they do reside, to ascertain whether any process has been sued out against them, before the bond is taken (*d*).

Proceedings in an Action for taking insufficient Sureties.

The action for taking insufficient pledges is generally brought in the name of the avowant; but if there be no avowant on the record, the action may be brought by the person making cognizance (*e*). Some evidence must be given by the plaintiff of the insufficiency of the pledges; but very slight evidence is sufficient to throw the proof on the sheriff; for the sureties are known to him, and he is to take care that they are sufficient (*f*). The sureties have always been held competent to prove whether they are sufficient or not (*g*). In an action against the sheriff for taking insufficient sureties to a replevin bond under 11 Geo. II. c. 19, s. 23, the sheriff, by taking and assigning the bond, admits its due execution and validity as a bond, and the execution of the sureties, although averred in the declaration, need not be proved (*h*). The declarations and acts of the replevin clerk at the time of taking the bond are evidence against the sheriff in such action, although there is no other proof of the person being replevin clerk (*i*). A fi. fa. executed in an action for use and occupation, brought by the plaintiff in the suit against the sheriff against the plaintiff in replevin for the rent, is evidence in an action against the sheriff to show that such execution having been unproductive the plaintiff had failed to obtain satisfaction of the rent after taking of the bond, though the plaintiff in replevin was no party to the present action (*k*); and no objection arises from the plaintiff in replevin having omitted to levy his plaint till the next County Court but two after the replevy, though the declaration avers that he has levied his plaint, "to wit, at the then next County Court," and issue is taken thereon (*l*). It is for the jury in

(*c*) *Jeffery* v. *Bastard*, 4 Ad. & El. 823; 6 Nev. & Man. 303; 2 Har. & Wol. 60; and see *Plumer* v. *Brisco*, 17 Law J., N.S., Q. B., 158; 12 Jur. 351.
(*d*) *Sutton* v. *Waite*, 8 Moore, 27.
(*e*) *Page* v. *Eamer*, 1 Bos. & Pul. 378.
(*f*) Bull. N. P. 60.
(*g*) 1 Saund. 195, note (3).
(*h*) *Barnes* v. *Lucas*, Ry. & Mo. 264; *Scott* v. *Waithman*, 3 Stark. N. P. C. 168; *Plumer* v. *Brisco*, 11 Queen's B. Rep. 46.
(*i*) *Plumer* v. *Brisco*, 11 Queen's B. Rep. 46.
(*k*) Ibid.
(*l*) Ibid.

such action to determine whether the sheriff has used due care in inquiring into the sufficiency of the sureties (*m*). A declaration in such an action is good in arrest of judgment, alleging the insufficiency of the sureties, but making no such averment as to the plaintiff, who was also party to the bond, and although it does not allege a want of reasonable care on the part of the defendant, but merely states as breach the insufficiency of the sureties (*n*). If the avowant take an assignment of the replevin bond, and sue the principal and sureties in the bond, and they are found to be insolvent or insufficient, he may afterwards bring his action on the case against the sheriff for taking insufficient pledges; the assignment of the replevin bond from the sheriff being no waiver of the proceedings against him, as it is in the case of a bail-bond (*o*). In replevin of cattle distrained damage feasant, the declaration against the sheriff must show a judgment of retorno habendo (*p*). A count against a sheriff for not restoring the goods is bad (*q*). The action against the sheriff will lie without any scire facias previously sued out against the sureties. In one case, after judgment pro retorno, and an elongata returned, the Court, on motion, granted a rule against the sheriff, under-sheriff and replevin clerk to pay the defendant 57*l.* 15*s.*, the amount of the verdict in replevin for damages and costs, together with the costs of the application (*r*). In an action against the sheriff for taking insufficient sureties, the Court will not stay the proceedings on an affidavit that the cause was referred without the consent of the sureties, that being matter of defence at the trial (*s*).

To what extent the Sheriff is liable.

The amount of damages to be recovered against the sheriff for taking insufficient pledges, was for a long time an unsettled question. It is, however, now decided, although formerly held otherwise (*t*), that, as regards the rent in arrear, and the costs of the replevin suit, damages may be recovered against the sheriff to the extent of the penalty of the bond taken under the statute 11 Geo. II. c. 19, s. 23,—that is, to double the value of the distress taken (*u*): and this on the principle that the plaintiff ought to be put in as good a situation, and at the same time in no better situation, than he would have been if the sheriff had taken good and sufficient sureties; and damages to this extent in the whole, including the costs of unproductive actions against the

(*m*) *Plumer* v. *Brisco*, 11 Queen's B. Rep. 46.

(*n*) Ibid.

(*o*) 1 Saund. 105, note (3); see also *Baker* v. *Garratt*, 3 Bing. 60; 10 Moore, 333.

(*p*) *Hucker* v. *Gordon*, 1 Cromp. & Mees. 58; 3 Tyr. 107.

(*q*) Ibid.

(*r*) *Richards* v. *Acton*, 2 W. Black. 1220.

(*s*) *Dale* v. *Gordon*, 2 Moore & Scott, 532; and see *S. C.* 3 Moore & Scott, 339.

(*t*) See *Prowse* v. *Pattison*, 16 Vin. Abr. 400; Bull. N. P. 39; but see it cited in 2 H. Black. 39; *Concanen* v. *Lethbridge*, 2 H. Black. 36; *Yea* v. *Lethbridge*, 4 Term Rep. 433; *Scott* v. *Waithman*, 3 Stark. N. P. C. 171.

(*u*) *Evans* v. *Brander*, 2 H. Black. 547; *Baker* v. *Garratt*, 3 Bing. 56; 10 Moore, 324; *Jeffery* v. *Bastard*, 4 Ad. & El. 823; 6 Nev. & Man. 303; 2 Har. & Wol. 60; *Paul* v. *Goodluck*, 2 Bing. N. C. 220; 1 Hodges, 370; nom. *Hall* v. *Goodrich*, 2 Scott, 362; *Perreau* v. *Bevan*, 5 Barn. & Crea. 284; 8 Dowl. & Ryl. 72.

sheriff, may be recovered, even without notice to the sheriff (*x*). But the costs of the actions cannot be recovered beyond the penalty of the bond, unless the plaintiff has given the sheriff notice of his intention to sue the sureties; and merely taking an assignment of the bond is not a sufficient notice (*y*). In an action against the sheriff for taking an insufficient replevin bond, the reasonable measure of damages is the expenses of the distress and the amount of the rent, although such rent may exceed the value of the distress (*z*).

(*x*) *Plumer* v. *Brisco*, 11 Queen's B. Rep. 46.

(*y*) *Baker* v. *Garratt*, 3 Bing. 56; 10 Moore, 324; *Plumer* v. *Brisco*, 11 Queen's B. Rep. 46.

(*z*) *Edmonds* v. *Challis*, 7 C. B. Rep. 413; 6 Dow. & Low. 581.

CHAPTER VI.

ACTIONS OF EJECTMENT.

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Book III. Chapter VI. Sect. 1.

SECT. 1.—*Origin and History of the Action.*

General Nature of the Action of Ejectment.

Of the various remedies which the law affords for the breach of a contract, or the reparation of a wrong, none perhaps so intimately concerns the relation of landlord and tenant as the action of ejectment. It may be defined to be a mixed action, by which a lessee for years, when ousted of his term, may recover possession, together with damages and costs; it is real in respect of the lands, but personal in respect of the damages and costs. By this proceeding, almost all possessory titles to land may be tried: whether the party's title be to an estate in fee, fee-tail, for life, or for years, and it is now almost the only remedy in practice for recovering land wrongfully withheld.

History of the Action of Ejectment.

By the ancient common law, the only method of recovering the possession of land was by real action, by writ of *entry or assize*; and this in no case where the estate was less than freehold. A mere leasehold interest, or term of years, was deemed of such little importance, that no remedy was provided by which the tenant could regain his possession, in case he was ousted by his landlord or by a stranger;

st the former he could proceed only upon his breach of contract; st the latter, indeed, he might have his writ of ejectment; but at he could recover damages only, and not the possession. In times the ejectment was a mere personal action of trespass. ever, in process of time—perhaps as early as the reign of IV.(*a*), but certainly about the time of Hen. VII., when long came into use—the remedy by ejectment was extended, and red more efficacious; the object of the action being completely ged, and the term itself recovered. This was effected by the ts of Law resolving to allow the lessee in ejectment to recover ssion of the land itself, by a process called a writ of habere facias ssionem (*b*). By statute 3 & 4 Will. IV. c. 27, all real and l actions, except an action of dower quare impedit and ejectment, bolished (*c*).

Ancient Practice in the Action of Ejectment.

om the period when the practice in ejectment became wholly ct to the control of the Court, and a new method of trial, unm to the common law, was introduced, it became usual for a man had a right of entry into any land to enter thereon, and seal a , and then the person who next came on the freehold animo posdi, was accounted an ejector of the lessee. By this means any might be turned out of his possession, because the lessee in ejectt would recover his term without any notice to the tenant in poson; the Courts of Law, therefore, made it a standing rule that no ntiff should proceed in ejectment to recover his lands against such gned ejector, without delivering to the tenant in possession a detion, and making him a defendant if he chose it. Upon this e to the tenant in possession, and an affidavit thereof made, it was d for him to move the Court, that as the title of the land belonged im, he might defend the suit in the casual ejector's name; and the Court usually granted. The lease was to be actually sealed delivered on the land itself, otherwise it amounted to what the law sidered *maintenance* to convey a title to any one, when the grantor self was not in possession. Such was the original method of proding in ejectment; but one alteration by degrees followed another, fiction was heaped upon fiction, until, during the reign of King arles II., an entirely new mode of proceeding was invented and induced by Lord C. J. Rolle.

Modern Practice in the Action where Judgment by Default.

This new method of proceeding in ejectment, which has now been to reat extent superseded by the Common Law Procedure Act, 1852, & 16 Vict. c. 76, depended entirely upon a string of legal fictions; lease was sealed—no entry or ouster actually made,—the plaintiff d defendant were fictitious persons,—and all the preliminaries were rely ideal, for the sole purpose of trying the title. The following is

(*a*) 3 Black. Com. 201. (*b*) 2 Sell. Prac. 162. (*c*) Ibid.

a general outline of that course of proceeding:—The action was commenced by the party claiming title delivering to the party in possession a declaration, in which the plaintiff and defendant were both fictitious persons; and in which it was stated, that a lease for a term of years had been made by the party claiming the title, to such plaintiff, of the premises in question; that the plaintiff entered by virtue of that demise; and that the defendant afterwards entered thereon, and ousted the plaintiff during the continuance of his term (*d*). At the foot of this declaration was a notice, in the name of this fictitious defendant, who was called the casual ejector, directed to the tenant in possession; in which notice the casual ejector informed him of the action having been brought him by the lessee, and stating that he had no title at all to the premises, advised him to appear in Court at a certain time, and defend his own title; otherwise he, the casual ejector, would suffer judgment to be had against him by default, by which the actual tenant would be turned out of possession. If, on the receipt of this declaration, the tenant in possession omitted to appear within a limited time, he was supposed to have no title at all: and upon an affidavit of the due service of the declaration, the Court would order judgment to be entered against the casual ejector by default; and the real tenant would be turned out of possession by the sheriff.

Modern Practice in the Action where there is an Appearance.

If the tenant, pursuant to the notice, applied to be made defendant (*e*), he was allowed to do so, upon condition that he entered into a rule of Court—usually called the consent rule—by which he undertook to confess, at the trial of the cause, three of the four requisites necessary to maintain the plaintiff's action, viz. (*f*) the lease of the lessor, the entry of the plaintiff, and the ouster by the tenant himself. These requisites, as they were wholly fictitious, could not of course be proved, and a nonsuit would be the consequence; but by this confession of them, the defendant agreed not to avail himself of any advantage arising from the want of such proof, and to place his reliance solely upon the merits of his title: and, lest at the trial he should break his engagement, another condition was also added, that in such case he should pay the costs of the suit, and should allow judgment to be entered against the casual ejector (*g*). Upon this rule being entered into, the declaration was altered, by inserting the name of the tenant instead of the fictitious name of the casual ejector; and the cause went to trial under the name of the fictitious lessee as plaintiff, on the demise of the lessor or person really claiming title against the defendant. If the lessor of the plaintiff made out his title in a satisfactory manner, judgment was given for the nominal plaintiff, and a writ of

(*d*) 2 Sell. Prac. 164.
(*e*) Ibid.
(*f*) See *Oates* d. *Wigfall* v. *Brydon*, 3 Burr. 1895, where the reasons for the practice of confessing lease, entry and ouster, in ejectment, are stated.
(*g*) Adams on Eject. 14, 4th ed.

possession went in his name to the sheriff to deliver possession: but if the defendant failed to appear at the trial, and confess lease, entry, ouster and possession, the nominal plaintiff would then indeed be non-suited, for want of proving these requisites, but judgment would nevertheless in the end be entered for him against the casual ejector; for the condition on which the tenant was admitted defendant was broken, and the plaintiff was put again in the same situation as if there had been no appearance. The same process, therefore, as would have been had provided no consent rule had been made, had to be pursued, as soon as it was broken; but execution was stayed, if any landlord, after the default of his tenant, applied to be made a defendant, and entered into the usual rule. Thus the practice of sealing leases upon the premises (except in the case of vacant possession), and making an actual entry and ouster (unless to avoid a fine), was dispensed with, and a more easy and expeditious method was adopted; while the same substantial justice was done to the tenant in possession, by proper notice being given to him of the service of the declaration; nor was there any hardship in compelling him to confess lease, entry, ouster and possession, as they were mere formalities, and had nothing to do with the merits of the case (*h*). By the Common Law Procedure Act, 15 & 16 Vict. c. 76, the proceedings in ejectment have been much simplified and improved. Instead of the present mode of proceeding, a writ issues, directed to the persons in possession and to the persons entitled to defend the possession, commanding them to appear within sixteen days after service, and defend the possession of the whole or part of the property sued for, and stating that in default of appearance they will be turned out of possession. This writ is to be served in the same manner as the declaration in ejectment was formerly served. If no appearance be entered within the sixteen days, or an appearance be entered as to part only, judgment may be signed for the whole or for the part undefended. If an appearance be entered, the claimant may make up the issue without any pleadings and proceed to trial.

15 & 16 Vict. c. 76.

To what Cases between Landlord and Tenant the Action applies.

The cases which more immediately apply to the subject of this work, are those in which a landlord is compelled to have recourse to this remedy. 1st. Where his tenant holds over without his permission and against his consent, after the term has expired by effluxion of time or otherwise. 2ndly. Where his tenant determines the lease, by non-payment of rent, or non-performance of covenants: and a right of re-entry and forfeiture is conditioned on the breach of them.

SECT. 2.—*Necessity of actual Entry.*

What actual Entry necessary by the Common Law.

By the common law it was necessary for the person claiming title to lands and tenements, in all cases, to make an actual entry upon

(*h*) 2 Sell. Prac. 165.

them, in order to support an action of ejectment. In the case of a lease, therefore, as the landlord could not enter, and take the actual possession until the lease expired, it became usual to insert a proviso, that in case the rent should be behind and unpaid at a certain time, the lessor should have a right to re-enter. In parol demises, however, from year to year, the landlord could not have the benefit of such a proviso; and when the right of re-entry subsisted, great inconvenience frequently happened to lessors or landlords in cases of re-entry for non-payment of rent; by reason of the many formalities that attended re-entries at the common law, and even when the legal re-entry was made, the landlord or lessor was put to the expense and delay of recovering in ejectment before he could obtain the actual possession of the demised premises.

Enactment of Statute 4 Geo. II. c. 28, s. 2, and 15 & 16 Vict. c. 76, s. 210, as to Re-entry.

In order to obviate the defect above pointed out, it was enacted by statute 4 Geo. II. c. 28, s. 2, "that in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof," he may, without any formal demand (*i*) or re-entry, serve a declaration in ejectment for the recovery of the demised premises, which shall stand in the place and stead of a demand and re-entry. This section has been substantially re-enacted by the 15 & 16 Vict. c. 76, s. 210, the service of a writ in ejectment being substituted for the service of the declaration: it enacts, that "In all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made appear to the Court where the said action is depending, by affidavit, or be proved upon the trial, in case the defendant appears, that half-a-year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same

(*i*) As to the necessity of a demand of rent, see ante, 274; 15 & 16 Vict. c. 76, s. 210.

manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be nonsuited therein, then in every such case such defendant shall have and recover his costs; provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed (*k*)." In all cases, therefore, which come under the enactments of the above statutes, there is now no occasion for the plaintiff to make an actual entry, and seal a lease on the premises (*l*). These statutes only apply where the right of re-entry is absolute, and where the lease is thereby avoided, and consequently do not apply in a case where there is a condition in the lease that, on non-payment of half-a-year's rent, the landlord may enter on the premises for the same "*till it be fully satisfied* (*m*)." A landlord cannot recover in ejectment under the above statutes, if a sufficient distress be on the premises (*n*). When, under the old practice, the rent became due on the 25th March, and the demise was laid on the 2nd May, and it appeared that there was no sufficient distress on some *day* in May (the particular day being left uncertain), and the declaration was served on 6th June, and no evidence was given by the defendant to repel the inference of there being no sufficient distress; it was held, that it was sufficiently proved that there was no sufficient distress on the day of the demise (*o*). With respect to searching for distress, every part of

(*k*) See *Doe* d. *Lawrence* v. *Shawcross*, 3 Barn. & Cres. 752; 5 Dowl. & Ryl. 711; *Doe* d. *Gooch* v. *Knowles*, 1 Dowl. & Low. 198.

(*l*) *Goodright* d. *Hare* v. *Cator*, 2 Dougl. 477, 483.

(*m*) *Doe* d. *Darke* v. *Bowditch*, 8 Queen's B. Rep. 973.

(*n*) *Doe* d. *Forster* v. *Wandlass*, 7 Term Rep. 117; see post, Sect. 9, (c).

(*o*) *Doe* d. *Smelt* v. *Fuchau*, 15 East, 286. The date of the writ is by the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 169, substituted for the day of the demise in the old declaration.

the premises must be searched (p); but the goods must be so visible that a broker going to distrain would, using reasonable diligence, find them, so as to be able to distrain them (q). A landlord may recover in ejectment under the above statutes, if he show that he was prevented by the tenant from entering on the premises to distrain, by his locking up the doors without showing that there was actually no sufficient distress (r).

In what Cases an actual Entry is necessary, and how made.

It seems to be now fully settled, that an actual entry is only necessary to avoid a fine with proclamations (s); or perhaps to prevent the operation of the Statutes of Limitations. An entry to avoid a fine must be made animo clamandi, but it need not be accompanied with a declaration that the object is to avoid the fine (t). Where, under the old practice in ejectment, the plaintiff brought his ejectment upon an avoidance of a fine, he was bound to lay his demise subsequently to the entry (u); and so, under the new practice, he would have to state as the time of the accruing of his claim some day subsequently to the entry, for he could not lay his demise, nor can he now state a day before the entry, or recover the mesne profits that accrued before the entry (x). It would seem that any entry, as owner, would be sufficient in point of law to avoid a lease for lives, on a breach of a condition (y). An actual entry upon an estate generally, is an entry for the whole; and if it be for less, it should be so defined at the time (z). When an actual entry is necessary, it is only operative where the action is commenced within one year after it is made (a).

SECT. 3.—*For what the Action lies, and by what Description.*

(a) *Houses, Buildings and Lands.*

For what Ejectment will lie, and by what Description generally.

The action of ejectment is maintainable for all kinds of corporeal hereditaments; or, in other words, it will lie for anything on which entry can be made, or of which the sheriff can give possession. The Courts now allow many things to be recovered in an ejectment, which could not be formerly demanded in a præcipe quod reddat (b). It is the practice for the sheriff to deliver possession of the premises recovered, according to the directions of the claimant, who therein acts at his own peril (c). It was formerly not any objection to a description,

(p) *Rees* d. *Powell* v. *King*, 2 Brod. & Bing. 514; Forrest, 19.

(q) *Doe* d. *Haverson* v. *Franks*, 2 Car. & Kir. 678.

(r) *Doe* d. *Chippendale* v. *Dyson*, Mood. & Malk. 77.

(s) *Doe* d. *Phillips* v. *Rollings*, 4 Com. B. Rep. 188; *Doe* d. *Davenport* v. *Duncannon*, Lofft, 360; *Berrington* v. *Parkhurst*, 13 East, 489. By statute 3 & 4 Will. IV. c. 74, fines and recoveries are abolished, and other methods of assurance are substituted.

(t) *Doe* d. *Jones* v. *Williams*, 2 Nev. & Man. 602.

(u) *Berrington* v. *Parkhurst*, 13 East, 489.

(x) *Doe* d. *Compere* v. *Hicks*, 7 Term Rep. 727.

(y) *Doe* d. *Evans* or *Griffith* v. *Pritchard*, 5 Barn. & Adol. 765; 2 Nev. & Man. 489.

(z) *Doe* d. *Tarrant* v. *Hellier*, 3 Term Rep. 170.

(a) Stat. 4 Anne, c. 16, s. 16.

(b) Run. Eject. 126.

(c) *Cottingham* v. *King*, 1 Burr. 623, 630; *Connor* v. *West*, 5 Burr. 2672.

that the premises were twice demanded in the same demise (*d*): for the plaintiff shall recover according to his title, although he demands more than he has title to; but not è contra (*e*); and the same rule of course prevails under the 15 & 16 Vict. c. 76; in addition to which, the Court or a judge, by sect. 222 and by 17 & 18 Vict. c. 125, s. 96, possesses large and liberal powers of amendment (*f*).

When Ejectment will lie for a Messuage, and by what Description.

Upon the principle before mentioned, an action of ejectment may be maintained for a house; or for an apartment, or part of a house; for a cottage; or for a barn, stable or other outbuilding (*g*). It has been held, however, that ejectment will not lie for a *tenement;* for as many incorporeal hereditaments are included under that name, it is too uncertain; nor will it lie for a "messuage or tenement;" the word "tenement" being of more extensive signification than the word "messuage;" and consequently it is uncertain what is demanded by the ejectment (*h*). Where, in ejectment, the plaintiff declared of "one messuage or tenement," and had a verdict; and a motion was made to arrest the judgment, because an ejectment would not lie for a tenement, and "messuage or tenement" was so uncertain, that the sheriff could not tell of what he should give possession; although the Court seemed inclined to get over this objection if possible, and took time to consider, yet they at last thought themselves bound by the adjudged cases, and arrested the judgment (*i*). Afterwards, however, an ejectment for a messuage *and* tenement was held good, after verdict (*k*); but this was overruled by a case still later, "for that it passed by surprise, and was not law, being contrary to adjudged cases." Notwithstanding this point seems to be now fully settled, yet the defendant will not be permitted to take advantage of such error in description; for the Court will give leave to the plaintiff, after a verdict in ejectment for a messuage *and* tenement, to enter the verdict according to the judge's notes, for the messuage only, (pending a rule nisi to arrest the judgment for uncertainty,) without obliging the lessor of the plaintiff to release the damages (*l*). Again in a later case, where judgment in ejectment for a messuage *and* tenement was entered up generally for the plaintiff, it was held no ground for reversal on error (*m*).

(*d*) Adams on Eject. 22, 4th ed.

(*e*) *Dens* d. *Burges* v. *Purvis*, 1 Burr. 326.

(*f*) See post, Sect. 9, (e).

(*g*) Run. Eject. 122.

(*h*) Run. Eject. 124; *Doe* d. *Bradshaw* v. *Plowman*, 1 East, 441.

(*i*) *Goodright* d. *Welch* v. *Flood*, 3 Wils. 23. As to arresting judgment, see 15 & 16 Vict. c. 76, s. 143.

(*k*) *Doe* d. *Stewart* v. *Denton*, 1 Term Rep. 11. A messuage or tenement, with other words expressing its meaning, is good; as "a messuage or tenement called the Black Swan;" for the addition reduces it to the certainty of a dwelling house; 1 Lord Raym. 191; Cowp. 350; Run. Eject. 125. So an ejectment for a messuage or burgage in H. is good; because both signify the same thing in a borough. So for a messuage or dwelling-house; for both are synonymous terms. So an ejectment for a house is good; although in a præcipe it ought to be demanded by the name of "a messuage;" Cro. Jac. 654.

(*l*) *Doe* d. *Bradshaw* v. *Plowman*, 1 East, 441; *Goodtitle* d. *Wright* v. *Otway*, 8 East, 357.

(*m*) *Doe* d. *Lawrie* v. *Dyeball*, 8 Barn. & Cres. 70; 2 Man. & Ryl. 184; 1 Moore & Pay. 330.

Amendment.

All these defects and errors, as before observed, might now be amended under the 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96; and by section 175 of 15 & 16 Vict. c. 76, "want 'of reasonable certainty' in the description of the property, or part of it, in the writ or notice, shall not nullify them, but shall only be ground for an application to a judge for better particulars of the land claimed or defended, which a judge shall have power to give in all cases."

When for Part of a Messuage, and Description.

Ejectment lies for part of a house: as a chamber in a house; or one room in a house (*n*). Formerly, an ejectment for a kitchen was determined to be bad; for though the word be well understood in common parlance, yet because any chamber in a house might be applied to that use, the sheriff had not certainty enough to direct him in the execution; and the kitchen might be changed between judgment and execution (*o*). Although this reasoning might have held good formerly, yet there is reason to believe that it would now be of no avail, as the sheriff would deliver the possession of the premises recovered according to the directions of the plaintiff. An ejectment for a place called a passage room has been held to be certain enough (*p*).

When for other Buildings, and Description.

An ejectment may be maintained for any building whatsoever: thus it has been held, that an ejectment will lie for corn mills, without saying of what kind, whether wind mills or water mills (*q*). If a person eject another from land, and build thereon, it is sufficient if the owner bring his ejectment for the land, without mentioning the building, except where the building is a messuage, and then perhaps it ought to be particularly named (*r*).

When for Places of Religious Worship, and Description.

An ejectment will lie for a church; but it must be demanded by the name of a messuage (*s*). So an ejectment for "a certain place called the vestry in *D.*" was held well enough (*t*). And at common law, although it was formerly held that ejectment would not lie for a chapel, yet as chapels are now considered to have become lay inheritances, they are recoverable in ejectment, like other lay estates; but they should be demanded by the name of messuages, the same as a church.

When for Manors and Rectories.

Ejectment will lie for a manor; but not for a manor generally, as that would be bad, for not expressing the number of acres belonging to the manor (*u*). So an ejectment will lie for a rectory, consisting of church, glebe lands and tithes, on the principle that it resembles a manor; the church being compared to the mansion-house, the glebe

(*n*) *Sullivan* v. *Seagrave*, 1 Stra. 695; 3 Wils. 49.

(*o*) Run. Eject. 122.

(*p*) *Bindover* v. *Sindercombe*, 2 Ld. Raym. 1470.

(*q*) *Fitzgerald* v. *Marshall*, 1 Mod. 90.

(*r*) *Goodtitle* d. *Chester* v. *Alker*, 1 Burr. 143, 144.

(*s*) Esp. N. P. 428; *Hillingworth* v. *Brewster*, 1 Salk. 256. In this case it was held, that the curate might have a rule to defend, *quoad* a right of entry to perform divine service; but this has since been overruled.

(*t*) 3 Lev. 96.

(*u*) Esp. N. P. 428; Hetl. 80.

lands to the demesnes, and the tithes to the service. Where a party was presented to a rectory, in consideration of his having given a bond to resign in favour of a particular person at the request of the patron, and was instituted and inducted, and such bond was held to be void on the ground that it was simoniacal, and the king then presented *A. B.*, and he was instituted and inducted; it was held, that *A. B.* might maintain ejectment for the rectory against the person who had been simoniacally presented (*x*). So it would seem that ejectment will lie for tithes to get into the receipt of the profits of a benefice, although there is no glebe land (*y*).

What Description of Land is necessary.

Ejectment may of course be maintained for every description of land; the number of acres should be stated with certainty, and not by estimation; and the nature of the land,—whether meadow, pasture, arable, &c. A description of *land* generally, means arable land, for the word "land" has, when by itself, that signification. It seems that an ejectment will not lie for a close; and that giving it a particular name will not make it sufficiently certain for the sheriff to be able to deliver it: nor will it lie for "a piece of land (*z*):" nor for the third part of a close, nor fourth part of a meadow, without setting forth the particular contents, or number of acres (*a*). Although the particular description of the land should be specified, yet it may be claimed under a name applicable to its natural character: thus ejectment will lie for so many acres of furze, or heath; or so many acres of moor, or marsh; or so many acres of wood, or underwood (*b*). So an ejectment "for ten acres of peas" has been held to be certain enough, as signifying the same with ten acres of land covered with peas (*c*): so ejectment will lie for a hop-yard or an orchard. When it is desired to recover water, as ponds or streams, to which the claimant is exclusively entitled, it may be done by the description of so many acres of land covered with water.

When a provincial Description of Land is sufficient.

Land in general may be described by the provincial term of the country in which it lies;—thus an ejectment will lie for alder-carr,—a provincial term well known in Norfolk, signifying land covered with alders; for cattle-gates in Yorkshire; for a beast-gate in Suffolk,—the term there denoting land and common for one beast (*d*). Upon a writ of error from Ireland, terms used in that country have been held to be sufficiently certain: thus an ejectment will lie, for so many acres of *bog* in Ireland, that word having but one signification, and compre-

(*x*) *Doe* d. *Watson* v. *Fletcher*, 8 Barn. & Cres. 25.

(*y*) *Doe* d. *Moore* v. *Ramsden*, Essex Spring Assizes, 1833, MS. See post, 725, Chap. VI., Sect. 3, (c).

(*z*) *Hillingsworth* v. *Brewster*, Salk. 256.

(*a*) Run. Eject. 123. See the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 175, as to obtaining better particulars, and s. 222 and 17 & 18 Vict. c. 125, s. 96, as to amendments.

(*b*) Run. Eject. 129.

(*c*) Adams on Eject. 25, 4th edit.

(*d*) A cattle-gate is a distinct thing from a right of common; it passes by lease and release; cannot be devised but according to the Statute of Frauds; and has been decided to be a tenement within the statute 13 & 14 Car. II. c. 12, for the purpose of gaining a settlement.

hending but one sort of land (*e*); so, for so many acres of *mountain* in Ireland; because there the word "mountain" is rather a description of quality, than the situation of the land (*f*); and is deemed as a distinct species of land, as well as meadow, pasture or bog: so for a "quarter of land," in Ireland; for it may be a term as well known there as mountain is: and that the Courts here will intend. In one case, an ejectment in Ireland was affirmed, upon a writ of error here, after a verdict in Ireland in the Common Pleas, and an affirmance in the King's Bench there, though many of the descriptions were unknown in England (*g*). However, an ejectment in England for a hundred acres of mountain, or a hundred acres of waste, would be bad for uncertainty, because both waste and mountain comprehend in England many sorts of land (*h*).

When for Coal Mines, Fisheries, &c.

An ejectment may be brought for a coal mine (*i*); and it may be brought for a coal mine generally, where such is the particular mode of declaring in the county: but ejectment will not lie for a tin-bound, which is a right to enter and mark out bounds, to work mines underneath (*k*). By the old cases, it appears that ejectment will not lie for a fishery; but Ashhurst, J., in one case said, "there is no doubt but that a fishery is a tenement; trespass will lie for an injury to it, and it may be recovered in an ejectment; and where a fishery is demised, it will be presumed that the soil passed along with it (*l*)." The action lies for a boilery of salt; for that is not, like a piscary, transient and running, but the water is fixed within a certain space, and may be taken to be part of the soil; for by the grant generally, of a boilery of salt, the soil itself passes (*m*). An ejectment, however, for a watercourse, or stream of water, is ill, for possession of it cannot be delivered (*n*); when, however, the ground over which the stream runs is the property of the claimant, the watercourse may be recovered, by laying the action for "so many acres of land covered with water." An ejectment may be maintained for a pool, or pit of water, because those words comprehend both land and water (*o*).

(b) *Profits of Land.*

For what Profits of Land the Action of Ejectment will lie.

The action of ejectment will lie for prima tonsura, that is, the best profit of the land: thus, if a man have a grant of the first grass, which grows on the land every year, he may have an action of eject-

(*e*) Run. Eject. 128.

(*f*) *Kingston* (*Lord*) v. *Babbington* (*in error*), 1 Bro. Parl. Cas. 71.

(*g*) *Cottingham* v. *King*, 1 Burr. 623.

(*h*) Adams Eject. 22, 4th edit.

(*i*) *Comyn* v. *Kineto*, Cro. Jac. 150; Adams Eject. 17, 4th edit.

(*k*) *Doe* d. *Falmouth* (*Earl*) v. *Alderson*, 1 Mees. & Wels. 210; 1 Gale, 441; Tyr. & Gr. 543; see also *Jones* v. *Reynolds*, 7 Car. & Pay. 335; 4 Ad. & El. 805; 6 Nev. & Man. 441; *Doe* d. *Hanley* v. *Wood*, 2 Barn. & Ald. 724; and *Muskett* v. *Hill*, 5 Bing. N. C. 694; 7 Scott, 855; *Daniel* v. *Gracie*, 6 Queen's B. Rep. 145.

(*l*) Run. Eject. 131; *Rex* v. *Aireford*, 1 Term Rep. 361.

(*m*) Run. Eject. 131.

(*n*) Esp. N. P. 428.

(*o*) *Chalenor* v. *Thomas*, Yelv. 143; Co. Litt. 5 b.

ment against him who withholds it; on the principle that he who is entitled to the profits of the land, is also entitled to the land itself; and consequently, whilst he is so entitled, no man can enter thereon, without being a trespasser (*p*). On the same principle, ejectment will lie for the hay-grass and after-math of a meadow, or for a right to the herbage; that being the most signal profit of the soil, and the grantee having at all times a right to enter and take it (*q*). In these cases, the ejectment should not, however, be brought for the land generally, but for the first grass, after-math, or herbage thereof, as the case may be: although where the demise was for so many acres of pasture land, it was held sufficient for the lessor of the plaintiff, in the first instance, to show that he was entitled to the prima tonsura thereof, because the first grass being the most signal profit, the freehold of the land shall be esteemed to be in him who has it, until the contrary is shown (*r*). Ejectment will lie for a sheep-walk; as for the pasture of a hundred sheep,—that is, as much land as will feed them;—but it will not lie for a right to pannage; because pannage is not the immediate produce of the soil itself, but merely the masts which fall from the trees (*s*). The action will lie, by the owner of the soil, for land subject to a passage over it,—as the queen's highway; for the queen having nothing but the passage for herself and her people, the freehold and all profits belong to the owner of the soil; but it can only be recovered subject to the easement (*t*).

(c) *Incorporeal Hereditaments.*

For what Incorporeal Hereditaments the Action of Ejectment will lie.

By the common law, an ejectment will not lie for any thing whereon an entry cannot be made, or of which the sheriff cannot deliver possession under an execution: therefore it will not lie for incorporeal hereditaments,—as for a rent, advowson, common in gross, or per cause de vicinage, which is a mere permission, or other things which pass only by grant (*u*). Tithes, indeed, though an incorporeal inheritance, may be recovered by this action; but the right of maintaining an ejectment does not arise from the common law, but is given by the provisions of the statute 32 Hen. VIII. c. 7, which enacts, that where any person shall have an estate of inheritance in tithes, or other spiritual profits, which shall be in lay hands, he may have his remedy in the temporal Courts. This has been construed to mean that he may maintain ejectment or other action for them; and the action is equally sustainable, whether the tithes are in the hands of the clergy, or in lay hands: ejectment therefore will lie for small tithes, and consequently it will lie for wool, and for an egg; both these things being small

(*p*) *Ward* v. *Petifer*, Cro. Car. 362.
(*q*) *Wheeler* v. *Toulson*, Hard. 330; *Rex* v. *Stoke*, 2 Term Rep. 451.
(*r*) Adams Eject. 19, 4th ed.
(*s*) Run. Eject. 133.
(*t*) *Goodtitle* d. *Chester* v. *Alker*, 1 Burr. 143.
(*u*) Bull. N. P. 99.

tithes (*x*). So ejectment will lie for a common appendant or appurtenant; for the sheriff by giving possession of the land gives possession of the common: it may be prudent, however, to state in the description, that the common claimed is a common appendant or appurtenant; although it has been held, after verdict, that an ejectment for lands, and also for "common of pasture" generally, is sufficient (*y*).

SECT. 4.—*Title of Plaintiff or Claimant.*

(a) *General Requisites.*

Legal Title must be in the claiming Party.

In ejectment, the party claiming must have the legal title, in order to enable him to maintain the action; for the legal title must in all cases prevail, even against the equitable title (*z*). Indeed, this rule is so strict, that an ejectment may be brought by a trustee against his own cestui que trust (*a*); and an unsatisfied term outstanding in trustees, will bar the recovery of the heir at law, even though he claim only subject to the charge (*b*); but a surrenderor, before admittance of a copyhold estate, will be considered as a trustee for the surrenderee; and therefore will not be permitted to set up a formal objection against the plaintiff's recovering the property which he holds for his benefit (*c*). It seems that any person in possession of an estate, as tenant or devisee, may file a bill in equity to discover the title of the party bringing ejectment against him, and to have it set out, and seen whether such title be not in some other (*d*).

The Party recovers upon the strength of his own Title and not on the other's weakness.

In this action the plaintiff can only recover upon the strength of his own title; he cannot found his claim upon the weakness of the defendant's title; for possession gives the defendant a right against every man who cannot show a good title: therefore, though the defendant have no title in himself, if he prove the title out of the plaintiff, it will be sufficient, without also proving that he holds the lands with the consent of the real owner (*e*). The case will not be varied, although the plaintiff can prove that he has previously been himself in possession of the premises: thus, in ejectment by a landlord against a tenant, whose lease is expired, the latter is not barred from showing that his landlord's title is extinct (*f*): but when the defendant would prove a

(*x*) Esp. N. P. 437; *Camel* v. *Clavering*, 2 Lord Raym. 789.

(*y*) *Baker* v. *Roe*, Cas. temp. Hard. 127; *Newman* v. *Holdmyfast*, 1 Stra. 54; Adams Eject. 17, 4th ed.

(*z*) *Doe* d. *Da Costa* v. *Wharton*, 8 Term Rep. 2; *S. P. Goodtitle* d. *Jones* v. *Jones*, 7 Term Rep. 47; *Doe* d. *Hodsden* v. *Staple*, 2 Term Rep. 684; *Roe* d. *Eberall* v. *Lowe*, 1 H. Black. 447; *Doe* d. *Blake* v. *Luxton*, 6 Term Rep. 289.

(*a*) *Roe* d. *Read* v. *Read*, 8 Term Rep. 118, 129; Adams Eject. 28, 4th ed.

(*b*) *Doe* d. *Hodsden* v. *Staple*, 2 Term Rep. 684.

(*c*) *Doe* d. *Warry* v. *Miller*, 1 Term Rep. 393; *Holdfast* d. *Woollams* v. *Clapham*, 1 Term Rep. 600.

(*d*) 1 Ves. 249.

(*e*) Bull. N. P. 110; *Roe* d. *Haldane* v. *Harvey*, 4 Burr. 2484; *Doe* d. *Crisp* v. *Barber*, 2 Term Rep. 749.

(*f*) *England* d. *Syburn* v. *Slade*, 4 Term Rep. 682; *S. P. Doe* d. *Jackson* v. *Ramsbotham*, 3 Maule & Selw. 516.

title out of the plaintiff, it must be a subsisting one; for the mere production of an ancient lease, though for a thousand years, will not be sufficient, unless he likewise prove possession under it within twenty years.

The Party should have the Right of possession at the Time laid in the Writ.

The true question in ejectment seems to be, who has the right of immediate possession,—or, in other words, who has a right of possession of the lands at the time of the title laid in the writ; for although the plaintiff may have the legal title, yet if he have not the right of possession, he will not succeed: thus, where the tenant's title accrues prior to that of the plaintiff, the latter will not succeed, even though he give the tenant notice that he does not mean to disturb his possession, but only wishes to get into the receipt of the rents and profits of the estate (*g*). If, however, the plaintiff be entitled to the possession at the time of the title laid in the writ, it will be sufficient, although such right is lost before trial (*h*). The 8 & 9 Vict. c. 106, s. 5, enacts, that "a right of entry, whether immediate or future, and whether vested or contingent into or upon any tenements or hereditaments in England of any tenure may be disposed of by deed." This section does not relate to a right to repossess or re-enter for condition broken, but only to an original right where there has been a disseisin, or where the party has a right to recover lands and his right of entry, and nothing but that remains (*i*).

Right of Entry assignable under 8 & 9 Vict. c. 106, s. 5.

Discontinuance and Descent.

The right of entry or possession might formerly be destroyed by discontinuance and by descent (*k*); but it is not necessary to enter into a discussion of the old doctrine on these subjects, as by 3 & 4 Will. IV. c. 27, s. 39, no descent, discontinuance or warranty, happening after 31st December, 1833, shall defeat a right of entry or action for the recovery of land.

(b) *Limitation.*

Limitation of Right of Possession or Entry by Statutes of Limitation.

Though a good and lawful title may subsist in the plaintiff, yet he may be barred of his right of entry or possession, and therefore of his power to recover in this action, under the Statutes of Limitation, 21 Jac. I. c. 16, 3 & 4 Will. IV. c. 27, and 7 Will. IV. & 1 Vict. c. 28 (*l*).

(*g*) *Doe* d. *Da Costa* v. *Wharton*, 8 Term Rep. 2.

(*h*) *Doe* d. *Morgan* v. *Bluck*, 3 Camp. 447.

(*i*) *Hunt* v. *Bishop*, 8 Exch. Rep. 675; *Hunt* v. *Remnant*, 9 Exch. Rep. 635.

(*k*) See Adams Eject. 29, 4th ed.

(*l*) By 21 Jac. I. c. 16, it is enacted, that no person shall make an entry upon any lands, &c. but within twenty years after his right and title shall first descend or accrue; and in default thereof, such person so not entering, and his heir, shall be utterly disabled from such entry, with a saving for infants, feme coverts, and insane persons, &c.

By 3 & 4 Will. IV. c. 27, s. 2, it is enacted, that "no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

By section 3 it is enacted, "that in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed

The doctrine of non-adverse possession (*m*) is done away with by the statute 3 & 4 Will. IV. c. 27, ss. 2, 3, and, except in cases provided

Cases under the Statute 3 & 4 Will. IV. c. 27.

to have first accrued at such time as hereinafter is mentioned (that is to say),

"When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.

"And when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest, who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death.

"And when the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed or otherwise assured by any instrument (other than a will), to him or some person through whom he claims, by a person being in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.

"And when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.

"And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken."

Provided always, by section 4, "that when any right to make an entry or distress, or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened."

Provided also, by section 5, "that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent."

By section 6, it is enacted, "that for the purposes of this act, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration."

By section 7, it is enacted, "that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. Provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

By section 8, it is enacted, "that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress, or to bring an action to recover such

(*m*) See post, 733.

for by section 15, the question is, whether twenty years have elapsed *since the right accrued,* whatever be the nature of the defendant's pos-

land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)."

By section 9, it is enacted, "that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

By section 10, it is enacted, "that no person shall be deemed to have been in possession of any land within the meaning of this act, merely by reason of having made an entry thereon."

By section 11, it is enacted, "that no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action."

By section 12, it is enacted, "that when any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them."

By section 13, the possession or receipt of a younger brother, or other relation, shall not be deemed the possession or receipt of the heir.

Provided always, by section 14, "that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

Section 15 reserves a right for five years after the passing of the act (24th July, 1833) to bring actions in certain cases; on which section the cases of *Doe* d. *Burgess* v. *Thompson*, 5 Ad. & El. 532; 1 Nev. & Per. 215; 2 Har. & Wol. 451; *Doe* d. *Thompson* v. *Thompson*, 6 Ad. & El. 721; 2 Nev. & Per. 656; Will. Wol. & Dav. 236; *Doe* d. *Jones* v. *Williams*, 5 Ad. & El. 291; 6 Nev. & Man. 816; 2 Har. & Wol. 213; and *Culley* v. *Doe* d. *Taylerson*, 11 Ad. & El. 1008; 3 Per. & Dav. 539, have been decided.

By section 16, where persons are under the disabilities of infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, when the right of entry accrues, a right of action, &c. is allowed for ten years after the disability ceases or the person dies, which shall first happen.

Provided (section 17), that in such cases the action is brought within forty years after the right of entry accrues, though the disability may have continued the whole of that time.

By sections 20, 21, where the right to an estate in possession is barred, the right of the same person to future estates is also barred; and where the tenant in tail is barred, the remainderman shall not recover.

By section 34, at the determination of the period limited by the act for bringing an action, &c., the right and title of the party to the land, &c. shall be extinguished.

By section 35, it is enacted, "that the receipt of the rent payable by any tenant from year to year or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act."

The statute 7 Will. IV. & 1 Vict. c. 28, recites, that doubts having been entertained as to the effect of the above act as to mortgages, declares and enacts, "that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act, to make an entry or bring an action at law or suit in equity to recover such land, at any time

Sect. 2.
Sect. 3.

session (*n*). The second section does not prevent a tithe-owner from recovering tithes *as chattels* from the occupier, although not set out for twenty years; but applies to cases where there are two parties, each claiming an adverse estate in the tithes (*o*). The object of the third section of the statute is to explain the second section, not to limit its operation to the instances given by the third: therefore the limitation affecting a right to recover a rent-charge granted by will is twenty years from the death of the testator (*p*). A rent is extinguished under the third section by the lapse of twenty years from the day of the last payment; and therefore where a rent was due annually to the lord of a manor at Michaelmas, and was paid in January, 1825, up to the previous Michaelmas, it was held, that it was extinguished in January, 1845 (*q*). Where a term has been assigned more than twenty years to a trustee to attend the inheritance, and there has been no possession, the right of the trustee to recover will be barred by the second and third sections (*r*). The branch of the third section, which relates to estates in reversion expectant on the determination of a particular estate, does not apply to the case where the same person who has the reversion has also the particular estate vested in him: therefore where the same person became entitled at the same time to an estate for lives and also to the reversion, the former of which determined some years after, it was held, that, even supposing there was no merger, the statute commenced to run from the time he first became entitled to the two estates (*s*). Where rent on a lease for a term is allowed by the lessor to be unpaid for some years, and there is not any adverse receipt of it by any other person, the lessor's right to the premises accrues on the expiration of the term, and not on the ceasing of the payment of the rent, the case being within the latter branch of the third section (*t*). Copyhold lands being surrendered to husband and wife and the heirs of the husband, the former, in 1805, absconded, and was never afterwards heard of; in 1807, the usual assignment of his estate was made under a commission of bankrupt against him, and the wife occupied the copyhold premises until her death in 1841; held, that this was a "future estate or interest" in the assignee within the third section (*u*). If a continuous tenancy at will exist for twenty-one years, or if during

within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said act notwithstanding."

(*n*) *Nepean* v. *Doe* d. *Knight* (*in error*), 2 Mees. & Wels. 894; Mur. & Hurl. 291. As to this decision, and the general effect of this statute, see Smith's Leading Cases, vol. 2, p. 396, &c.

(*o*) *Ely* (*Dean and Chapter*) v. *Cash*, 15 Mees. & Wels. 617; see also *Grant* v. *Ellis*, 9 Mees. & Wels. 113.

(*p*) *James* v. *Salter*, 4 Bing. N. C. 544; 4 Scott, 168; 3 Hodges, 70.

(*q*) *Owen* v. *De Beauvoir*, 16 Mees. & Wels. 547; affirmed on error in the Exch. Cham. in *De Beauvoir* v. *Owen*, 5 Exch. Rep. 166.

(*r*) *Doe* d. *Jacobs* v. *Phillips*, 10 Queen's B. Rep. 130.

(*s*) *Doe* d. *Hall* v. *Moulsdale*, 16 Mees. & Wels. 689.

(*t*) *Doe* d. *Davey* v. *Orenham*, 7 Mees. & Wels. 131; Hurl. & Walm. 4.

(*u*) *Doe* d. *Johnson* v. *Liversedge*, 11 Mees. & Wels. 517.

that period the tenancy at will is determined, and the tenant continues to occupy during the remainder of that time as tenant at sufferance, the lessor will be barred by the seventh section; but if, when the original tenancy at will is determined, a new tenancy at will is constituted, he will not be barred until twenty-one years after such new tenancy (*x*). So where a tenant at will before the statute is turned out after the statute, and immediately resumes possession, but no new tenancy at will commences, the statute runs from the time of his resuming possession (*y*). Where a tenancy at will ceased before the passing of the statute, it was held, that the seventh section did not apply so as to make the limitation run from a year after the commencement of that tenancy, but that the limitation ran from the time of the determination of the tenancy (*z*). Where a term is created by way of use, the owner of the fee is as a tenant at will to his own trustee (*a*). In 1801, a person put his daughter and her husband in possession of some property as tenants at will, and they continued on until his death in 1837, when by his will the father devised the property to the daughter for life, remainder over; the daughter continued in possession till her death in 1844; held, that the remainderman was barred by the seventh section (*b*). Where a tenant at will kept possession of land without acknowledgment for upwards of twenty years, and died before the passing of the 3 & 4 Will. IV. c. 27, it was held, that the seventh section did not give his heir at law title to maintain ejectment against a third person (*c*). The proviso as to cestui que trusts, contained in the seventh section, applies only to cases of declared and express trusts, and not to the case of a person holding under an agreement to purchase (*d*). The eighth section applies to tenancies created before and existing at the passing of the act (*e*). Where a tenant holds premises by the service of cleaning the parish church, or of ringing the church bell at stated times, such service is a rent within the eighth section (*f*). The ninth section is retrospective, and therefore a party may be barred by the lapse of twenty years before the passing of the statute (*g*). A feme sole, seised in fee, married, and she and her husband ceased to be in possession or enjoyment of the land, and went to reside at a distance from it; they both died at times which were not

Sect. 7.

Sect. 8.

Sect. 9.

Sect. 17.

(*x*) *Doe* d. *Bennett* v. *Turner*, 7 Mees. & Wels. 226; see also *Turner* v. *Doe* d. *Bennett*, 9 Mees. & Wels. 643; and *Doe* d. *Goody* v. *Carter*, 9 Queen's B. Rep. 863.

(*y*) *Randall* v. *Stevens*, 2 Ell. & Bl. 641.

(*z*) *Doe* d. *Evans* v. *Page*, 5 Queen's B. Rep. 767; 1 Dav. & Mer. 601; *Doe* d. *Birmingham Canal Company* v. *Bold*, 11 Queen's B. Rep. 127.

(*a*) Sugd. Vend. & Pur. 489, 8th edit.; Appendix, No. xxvi.; 3 Price, 1129, 11th edit.; *Doe* d. *Jacobs* v. *Phillips*, 10 Queen's B. Rep. 130.

(*b*) *Doe* d. *Dayman* v. *Moore*, 9 Queen's B. Rep. 555; 10 Jurist, 815.

(*c*) *Doe* d. *Thompson* v. *Thompson*, 6 Ad. & El. 721; 2 Nev. & Per. 656; Will. Wol. & Dav. 236.

(*d*) *Doe* d. *Stanway* v. *Rock*, 1 Car. & Mar. 549; 4 Man. & Gran. 30.

(*e*) *Doe* d. *Jukes* v. *Sumner*, 14 Mees. & Wels. 39.

(*f*) *Doe* d. *Edney* v. *Benham*, and *Doe* d. *Edney* v. *Billett*, 7 Queen's B. Rep. 976; and see *Doe* d. *Robinson* v. *Hinde*, 2 Mood. & Rob. 441.

(*g*) *Doe* d. *Angell* v. *Angell*, 9 Queen's B. Rep. 828.

shown to be within forty years from their ceasing to occupy; the wife's heir at law brought ejectment against the person in possession, within twenty years of the husband's death, and within five years of the passing of statute 3 & 4 Will. IV. c. 27, but more than forty years after the husband and wife ceased to occupy; held, that the heir at law was barred by the adverse possession of above forty years under the seventeenth section of the statute, though the wife was always under the disability of coverture, and the husband had a tenancy by the curtesy during his life (*h*). Property which has been in the possession of a man for more than twenty years, and on his death in possession of his widow for more than twenty years, may on her death be recovered by the eldest son of both as heir of his mother, though he cannot recover as heir of his father (*i*).

Acknowledgments under 3 & 4 Will. IV. c. 27, s. 14.

It is a question for the judge to decide what is a sufficient acknowledgment of title within the statute 3 & 4 Will. IV. c. 27, s. 14 (*k*); and where a party who was in possession adversely, said he thought, if matters were contested, he could establish his legal right, but had made up his mind to accede to a proposal to accept a lease at a moderate rent, but the bargain subsequently went off, it was held not a sufficient acknowledgment (*l*). An answer to a claim for rent, complaining that the occupier of the land had been involved in law expenses in defending the claimant's title, and asking that a recompense should be made to him, was held a sufficient acknowledgment (*m*). A declaration by a person who had been in possession of the land, made within twenty years, that he was then paying rent to the lessor of the plaintiff, and an acknowledgment afterwards by the defendant that he was tenant to that person, is sufficient under the eighth section, notwithstanding the fourteenth section (*n*).

Cases under the Statute 21 Jac. I. c. 16.

It has been held, that ecclesiastical persons are not within the statute 21 Jac. I. c. 16 (*o*), and that the king is not bound by it (*p*); but, with these exceptions, the statute applies to all persons capable of a right to enter. If the plaintiff was not able to prove himself or his ancestors to have been in possession within twenty years before the action brought, or that he was prevented prosecuting by some of the disabilities allowed by the statute, he was nonsuited. This possession of the plaintiff within twenty years was obliged to be an actual and not an implied or presumptive possession merely: therefore, in eject-

(*h*) *Doe* d. *Corbyn* v. *Bramston*, 3 Ad. & El. 63; 4 Nev. & Man. 664; 1 Har. & Wol. 162.

(*i*) *Doe* d. *Bennett* v. *Long*, 9 Car. & Pay. 773.

(*k*) See the section, ante, 729, note.

(*l*) *Doe* d. *Curzon* v. *Edmonds*, 6 Mees. & Wels. 295.

(*m*) *Fursdon* v. *Clogg*, 10 Mees. & Wels. 572.

(*n*) *Doe* d. *Spencer* (*Earl*) v. *Beckett*, 4 Queen's B. Rep. 601.

(*o*) An adverse possession for twenty years was not a bar to a rector or vicar, except as against the same incumbent who submitted to such possession; *Rancorn* v. *Doe* d. *Cooper* (*in error*), 5 Barn. & Cres. 696. But see 3 & 4 Will. IV. c. 27, s. 29, &c.

(*p*) By the statute 9 Geo. III. c. 16, the king must claim within sixty years, or he will be barred.

ment for mines, the possession of the manor was not sufficient to avoid the statute, where there had been no entry within twenty years upon the mines, the mines being a distinct possession, and perhaps a different inheritance (*q*). So also a verdict in trover for lead dug out of the mines, was not sufficient evidence of a possession; for trover may be brought for property without possession. So the possession of a manor was not the possession of a cottage built thereon; for if it were, the lord would have a better title to that than to any other part of the estate (*r*). A receipt for rent by a stranger was not sufficient evidence of possession so as to take it out of the party in whom the right of possession was; for it is not any disseisin without the admission of such party; nor even if such stranger had made a lease to the tenant by indenture, reserving rent, unless he made an actual entry; nor was it sufficient evidence of possession, even if the tenant declared that he was in possession for the stranger; although it might have been proper to be left to a jury, especially if the stranger had any colour of title (*s*). Where, under the old practice, a declaration in ejectment was delivered within twenty years, and a trial had, whereby lease, entry and ouster were confessed; and the plaintiff, who was nonsuited in that action, brought another ejectment after the twenty years expired; it was held, that the former confession of lease, entry and ouster was not sufficient to save the running of the statute against the plaintiff (*t*). It was also held, that the right first accrued under this statute on the determination of any holding which was not inconsistent with the title of the person claiming the property, and that therefore the statute did not begin to run where there was a holding with the consent of, or under a contract with that person,—that is, where the possession was not adverse to him; and hence, in order to make a bar under that statute, it was necessary to show an adverse possession for twenty years. A very numerous class of cases has been decided as to what was and what was not to be considered an adverse possession; but this doctrine having been, as already stated, done away with by the statute 3 & 4 Will. IV. c. 27, ss. 2, 3 (*u*), it is unnecessary in a work like the present to advert to them particularly.

Adverse Possession.

(c) *Particular Titles.*

Tenants for Years, for Life, in Tail, or in Fee, may maintain Ejectment.

The general principles of title, as respects the action of ejectment, having been explained, it remains to be shown what persons, by reason of their particular titles, may maintain the action; always recollecting that the right of entry, or possession, must accompany the legal title. A tenant for years, for life, in tail, or in fee, may maintain ejectment;

(*q*) *Rich* d. *Cullen* v. *Johnson*, 2 Stra. 1142.
(*r*) Bull. N. P. 102.
(*s*) Bull. N. P. 104; and see *Doe* d. *Grubb* v. *Grubb*, 10 Barn. & Cres. 816; 5 Man. & Ryl. 666.
(*t*) Bull. N. P. 102.
(*u*) Ante, 728.

and although it was formerly said, that a tenant for years could not, before actual entry, maintain ejectment, yet it seems that such doctrine is now exploded, and no actual entry is necessary (*x*).

Mortgagees.

Mortgagees may maintain ejectment, in order to obtain possession of the mortgaged premises. A distinction, however, should be observed between cases where the premises have been let for years, and afterwards mortgaged; and cases where the lease has been made subsequently to the mortgage, without the privity of the mortgagee; in the former instance, the tenant's possession will be protected, and he cannot be turned out by the mortgagee, and it is doubtful whether the mortgagee would recover, even if he had given notice to the tenant that he did not intend to disturb his possession, but only required the rent to be paid to him, and not to the mortgagor (*y*): in the latter instance, however, of a lease made subsequently to a mortgage, a mortgagee may recover against the tenant, without giving such notice; because the mortgagor has no power to let leases not subject to every circumstance of the mortgage; and therefore such tenant is a trespasser, disseisor and wrong-doer, and may be turned out by the mortgagee without notice to quit (*z*). It seems that the same principle extends also to cases where the party in possession is tenant from year to year to the mortgagor (*a*). In ejectment by mortgagee against mortgagor, it is not necessary to demand possession before action brought (*b*). The mere fact of the mortgagee having received interest down to a time later than the day of the demise, is not a recognition that the mortgagor, as his tenant, was in lawful possession until that time, and consequently is no defence (*c*). So distraining after the day laid in the writ for the interest due before that day, under a power to do so as for rent, is no recognition of the mortgagor as tenant (*d*). In ejectment by mortgagee against mortgagor, the latter cannot set up in answer a lease granted to him by a person who has recovered against him in ejectment subsequently to the mortgage (*e*). So where the

(*x*) *Goodright* d. *Hare* v. *Cator*, 2 Dougl. 477, 486.

(*y*) *Moss* v. *Gallimore*, 1 Dougl. 282; *White* d. *Whately* v. *Hawkins*, 1 Dougl. 23, n.; and see *Doe* d. *Da Costa* v. *Wharton*, 8 Term Rep. 2.

(*z*) *Keech* d. *Warne* v. *Hall*, 1 Dougl. 21. An intimation has, however, been expressed, that a mortgagee may so bind himself by recognizing the right of the mortgagor's tenant as to be precluded from treating him as a trespasser; *Evans* v. *Elliott*, 9 Ad. & El. 342; 1 Per. & Dav. 256; 1 Will. Wol. & Hod. 744. But merely going to the premises to see improvements made by the tenant is not such a recognition; *Doe* d. *Parry* v. *Hughes*, 11 Jurist, 698. See ante, Book I., Chap. V., Sect. 5, p. 195; Chap. VI., Sect. 2, p. 210; and Chap. VII., Sect. 6, (a), p. 286.

(*a*) *Thunder* d. *Weaver* v. *Belcher*, 3 East, 449; *Anon.*, Lofft, 364. A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of statute 11 Geo. II. c. 19, s. 12, for secreting ejectments; *Buckley* v. *Buckley*, 1 Term Rep. 647.

(*b*) *Doe* d. *Roby* v. *Maisey*, 8 Barn. & Cres. 767; 3 Man. & Ryl. 107.

(*c*) *Doe* d. *Rogers* v. *Cadwallader*, 2 Barn. & Adol. 473; but see *Doe* d. *Whitaker* v. *Hales*, 7 Bing. 322; 5 Moore & Pay. 132.

(*d*) *Doe* d. *Wilkinson* v. *Goodier*, 10 Queen's B. Rep. 957. See ante, Book I., Chap. V., Sect. 5, p. 195.

(*e*) *Doe* d. *Ogle* or *Old* v. *Vickers*, 4 Ad. & El. 782; 6 Nev. & Man. 437.

defendant is not the mortgagor, but in reality defends for him, he cannot set up a prior mortgage executed by the mortgagor (*f*). A second mortgagee, who has the legal estate, and has all the title deeds, but has not had any notice of the prior mortgage, may recover in ejectment against the first mortgagee (*g*). If the mortgagee assign the mortgage, and the assignee assign to another, the last assignee may maintain this action for the mortgaged premises (*h*).

Devisees and Legatees.

The devisee of a freehold interest may immediately, and without any possession, maintain ejectment for the lands devised; for after the testator's decease the law casts the freehold on the devisee. Even should the heir enter, and die seised, and a descent were cast, it was formerly said, that the devisee might enter, and maintain ejectment, unless he were barred by a fine levied by the heir, and five years non-claim (*i*). So the devisee of a term of years may maintain ejectment to recover the term devised, but he must first show the assent of the executors to the bequest (*k*). When, however, such assent is obtained, the legatee has the legal estate vested in him absolutely, and he may maintain ejectment against the executors, as well as against a stranger (*l*).

Personal Representatives.

Under the statute 4 Edw. III. c. 7, executors may maintain ejectment for land let to their testator for a term of years, and it will be immaterial whether the ouster takes place before or after the death of the testator (*m*). So, also, the administrator of a yearly tenant, for so long as the lessor and lessee pleased, may maintain this action; and such administrator will have the same right, even if the administration be granted pendente lite. Personal representatives may also recover in ejectment, under the statute 7 Will. IV. & 1 Vict. c. 26, s. 6, estates held pur autre vie, where there is no special occupant. This statute extends to copyhold, which the previous statute, 29 Car. II. c. 3, s. 12, did not (*n*). Two out of three co-executors may recover, laying the title in two of them (*o*).

Under 15 & 16 Vict. c. 76, s. 193.

The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, contains some valuable provisions as to the rights of executors in the case of the death of claimants before execution and before trial. The 193rd section enacts, "that in case of a verdict for two or more claimants, if

(*f*) *Doe* d. *Hurst* v. *Clifton*, 4 Ad. & El. 813; 6 Nev. & Man. 857.

(*g*) *Goodtitle* d. *Norris* v. *Morgan*, 1 Term Rep. 755; Powell's Mortgages, p. 434, &c., 6th ed.

(*h*) *Smartle* v. *Williams*, 1 Salk. 245; 3 Lev. 353.

(*i*) Co. Litt. 240 b. Where the devisee of an estate refused to take it, saying she was entitled as heir at law, and would not accept any benefit by the will of the devisor; it was held, that this was not such a disclaimer as prevented her from afterwards bringing ejectment, and relying on her title as devisee. But it seems unsettled whether a devise of an estate can be waived by parol; *Doe* d. *Smyth* v. *Smyth*, 6 Barn. & Cres. 112; 9 Dowl. & Ryl. 136.

(*k*) *Young* v. *Holmes*, 1 Stra. 70.

(*l*) *Doe* d. *Say and Sele* v. *Guy*, 3 East, 120.

(*m*) Esp. N. P. 439; Co. Litt. 129; *Doe* d. *Shore* v. *Porter*, 3 Term Rep. 13; *Slade's case*, 4 Co. Rep. 92, 95.

(*n*) *Zouch* d. *Forse* v. *Forse*, 7 East, 186; 3 Smith, 191.

(*o*) *Doe* d. *Stace* v. *Wheeler*, 15 Mees. & Wels. 623.

one of such claimants die before execution executed, the other claimant may, whether the legal right to the property shall survive or not, make a suggestion of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and proceed to judgment and execution for recovery of possession of the entirety of the property and the costs; but nothing herein contained shall affect the right of the legal representative of the deceased claimant, or the liability of the surviving claimant to such legal representative; and the entry and possession of such surviving claimant, under such execution, shall be considered as the entry and possession on behalf of the legal representative in respect of the share of the property to which he shall be entitled as such representative, and the Court may direct possession to be delivered accordingly."

The 194th section enacts, that "in case of the death of a sole claimant, or, before trial, of one of several claimants, whose right does not survive to another or others of the claimants, the legal representative of such claimant may, by leave of the Court or a judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed; and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of the deceased claimant, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion, as hereinbefore provided with reference to a judgment for or against such claimant; and in case such suggestion in the case of a sole claimant be made after trial and before execution executed by delivery of possession thereupon, and such suggestion be denied by the defendant within eight days after notice thereof, or such further time as the Court or a judge may allow, then such suggestion shall be tried; and if, upon the trial thereof, a verdict shall pass for the person making such suggestion, he shall be entitled to such judgment as aforesaid for the recovery of possession, and for the costs of and occasioned by such suggestion; and in case of a verdict for the defendant, such defendant shall be entitled to such judgment as aforesaid for costs."

Assignees of Bankrupts.

Assignees of bankrupts may maintain ejectment, either for the leasehold or freehold lands of a bankrupt; for by the statute 12 & 13 Vict. c. 106, ss. 141, 142, all the bankrupt's real and personal property, except copyholds or customary tenements, which he may be possessed of at the time of the bankruptcy, or which he may acquire before obtaining his certificate, is vested in the assignees, by virtue of their appointment (*p*).

(*p*) Compare the sections 141 and 142 with the corresponding sections 63 and 64 in the repealed act, 6 Geo. IV. c. 16, and the 25th and the 26th sections of the partly-repealed stat. 1 & 2 Will. IV. c. 56. The 142nd section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, enacts as follows:—"The bankruptcy or insolvency of the plaintiff in *any* action which the assignees might maintain for the benefit of

Assignees of Insolvents.

The assignees of an insolvent may also maintain ejectment; being empowered by the Insolvent Act, 1 & 2 Vict. c. 110, s. 51, to sue in their own name, for any estate, effects, or right of the insolvent, for the benefit of the creditors. It was held, that they might maintain ejectment to recover copyhold premises, although the assignment to them had not been inrolled on the court rolls of the manor, pursuant to the old Insolvent Act, 7 Geo. IV. c. 57, s. 20 (*q*). The assignees, under the Insolvent Act, 5 & 6 Vict. c. 116, have the same powers of suing that assignees under a fiat in bankruptcy have. The provisional assignee might maintain ejectment for the estate of an insolvent, assigned to him under the provisions of the statutes 1 Geo. IV. c. 119, and 3 Geo. IV. c. 123, without the previous approbation of one of the commissioners or order of the Insolvent Court (*r*): and the Court of Common Pleas refused to stay the proceedings in the action, on an objection that it was not proved at the trial of the cause that the assignee had, pursuant to statute 1 Geo. IV. c. 119, s. 11, such authority (*s*). A conveyance to a creditor of an insolvent's estate by the clerk of the peace, in whom it was vested upon the order for the insolvent's discharge by the statute 41 Geo. III. c. 70, s. 15, until the subsequent conveyance to the creditor, did not vest the estate in such creditor by relation to the date of the order of the conveyance, but only from the actual execution of such conveyance by the clerk of the peace; therefore such creditor could not recover in ejectment before the execution, though after the estate was out of the insolvent debtor, and the order to convey the same to the lessor (*t*). A discharged insolvent, lessee of premises, cannot sue in ejectment against his underlessee, though no permanent assignee has been appointed, and the provisional assignee has never done any act whereby he showed that he accepted the lease (*u*).

Trustees of Real Estates.

It has been before observed, that the party who has the legal estate may always maintain ejectment: and where trusts are not executed by the Statute of Uses, the legal estate vests in the trustees; and of course, in such cases, they may maintain ejectment (*x*). A bonâ

the creditors shall not be *pleaded* in bar to such action, unless the assignees shall decline to continue, and give security for the costs thereof, upon a judge's order to be obtained for that purpose, within such reasonable time as the judge may order, but the proceedings may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action, and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, *plead* the bankruptcy." It would seem that this section includes the action of ejectment, and that in such case that the words "pleaded" and "plead" ought to be read as signifying "shall be made available" and "avail himself of."

(*q*) *Doe* d. *Brenan* v. *Glenfield*, 1 Scott, 699; 1 Hodges, 78.

(*r*) *Doe* d. *Clarke* v. *Spencer*, 3 Bing. 203; 11 Moore, 232; 2 Car. & Pay. 79.

(*s*) *Doe* d. *Spencer* v. *Clark*, 3 Bing. 370.

(*t*) *Doe* d. *Whatley* v. *Telling*, 2 East, 257.

(*u*) *Doe* d. *Palmer* v. *Andrews*, 4 Bing. 348; 2 Car. & Pay. 593.

(*x*) As doubts may arise, whether, from the wording of the instrument by which the trust is created, the trustees take the legal estate, it is considered to be advisable to state shortly some of the leading cases, in which the point, whether trustees take or not the legal estate, has been determined. A devise to a person in trust to *pay over* the rents and profits to another, vests the legal estate in the trustee; *Silvester* d. *Law* v.

fide lease made by the cestui que trust cannot now be set up against the legal title of his trustee, without the aid of a Court of Equity (y);

Wilson, 2 Term Rep. 444; and see the cases there cited, and *Farmer* v. *Francis*, 2 Bing. 151; 9 Moore, 310. A devise, however, in trust to *permit* some other person to *receive* the rents and profits vests the legal estate in the cestui que trust, and not in the trustee; Adams, Eject. 60, 4th ed.; and see *Doe* d. *Leicester* v. *Biggs*, 2 Taunt. 109, 113. It is said, that some other acts, as well as paying over the rents and profits, should be required to be done by the trustees, so as to vest the legal estate in them; and indeed that is now generally the case; Adams, Eject. 61, 4th ed.; *Kenrick* v. *Beauclerk* (*Lord*), 3 Bos. & Pul. 175; *Doe* d. *Hallen* v. *Ironmonger*, 3 East, 533. A devise of a copyhold in trust to permit *A. B.* to enjoy the same, or to pay to, or to permit and suffer her to receive rents during her life; and, subject to such estate, to such persons, &c. as *A. B.* should by her will appoint; vests the legal estate in the appointee by will of *A. B.*, although the trustees never surrendered to the use of the will of *A. B.*, nor had *A. B.* been admitted tenant; *Doe* d. *Woodcock* v. *Barthrop*, 5 Taunt. 382; 1 Marsh. 90.

In cases where, by the nature of the trust, it is necessary for the carrying into effect the testator's intention, that the trustees should take the legal estate, it will vest in them, though the devise be that they suffer and *permit*, &c.; and therefore a devise of land to trustees, upon trust to permit a feme covert to receive and take the rents and profits during her life, for her sole and separate use, vests the legal estate in the trustees; *Horton* v. *Horton*, 7 Term Rep. 652. And where lands were conveyed to trustees, in trust that they should with the consent of *B.* sell the inheritance in fee, and apply the purchase-money to certain trusts, mentioned in the deed, with a proviso that the rents, &c. until such sale, should *be received by such person and for such uses* as they would have been if the deed had not been made; it was held, notwithstanding the proviso, that the estate was executed in the trustees immediately, even before *B.* had given his consent to the sale; and that it was not a mere power of sale annexed to the legal estate of the owner; *Keene* d. *Byron* (*Lord*) v. *Deardon*, 8 East, 248.

Where the devise was to *A.* in trust to suffer and permit the testator's widow to have, hold, use, occupy, possess and enjoy the full, free and uninterrupted possession and use of all interests of monies in the funds, and rents and profits arising from the testator's houses, for her natural life, if she should remain unmarried; and that her receipts for all rents, &c., with the approbation of any one of his trustees, should be good and valid, she providing for, and educating properly, the testator's children, and also paying certain annuities; and that his children should be solely under their mother's direction, until marriage or properly provided for: it was held, that the use was executed in the devisees in trust, on the principle that the testator having rendered the approbation of the trustees necessary to the wife's receipt, it was quite clear that he did not intend to give her the legal estate; *Gregory* v. *Henderson*, 4 Taunt. 772. Where, however, the devise was thus, "as to my real and personal estate, subject to my debts and funeral expenses, I give and devise the same as follows, viz. my real estate and also my personal estate unto *A. B.* upon trust, to the intent that he dispose of my personal estate in discharge of my debts, funeral expenses, and such legacies as I may direct; and as to my real estates, subject to my debts, and such charges as I may make, I give and devise the same to *R. P.* for life:" it was held, that the legal estate was vested in *R. P.* for life, and not in the trustee, it not being sufficiently apparent in the will that the trustee was to pay the debts; *Kenrick* v. *Beauclerk* (*Lord*), 3 Bos. & Pul. 175.

Where lands were devised to a feme covert for life, and trustees were appointed to receive the rents, and pay them over to the wife, and attend to repairs, with a proviso to distrain, lease, &c.; and the trustees dying, the testator revoked the devise by codicil, and devised the lands to other trustees, to the same intents, and in the same manner in all respects as if the new trustees had originally been named trustees in the will; it was held, that the new trustees took the legal estate in the land; *Tenny* d. *Gibbs* v. *Moody*, 3 Bing. 3; 10 Moore, 252.

Where there was a devise of lands and personalty, in trust out of the rents to apply 250*l.* a year to the maintenance of the devisor's daughter, till she should be twenty-one or marry, and out of the residue as much as should be thought necessary for the maintenance of the devisor's son till he should be twenty-one, or his sister married, and upon his attaining twenty-one, or his sister marrying, to raise 5,000*l.* and to pay the interest of it to the daughter after her attaining twenty-one or marrying; and, subject thereto, that the trustees should stand seised of the residue, in trust for the son till he attained twenty-one, and then to the use of the son, his heirs, &c. for ever; but in case the son should die under twenty-one, and the daughter survive, or in case the son should live to twenty-one, and afterwards die without lawful issue, to the use of the trustees till the daughter attained twenty-one or married, and then to the use of the daughter for life, with divers remain-

(y) *Baker* v. *Mellish*, 10 Ves. jun. 544; Adams, Eject. 68, 4th ed.

although it had been held, that the lease of an equitable tenant in tail would prevent the trustee from recovering in ejectment against the lessee (z). It seems that an agreement for a lease, made before the creation of a trust, will in no case, after a proper notice to quit, bar the recovery of the trustees in ejectment (a).

Persons for whose Benefit the Trust is held.

In order to do away with obstacles which may arise in actions of ejectment, brought by the cestui que trust, the jury will, under certain circumstances, be permitted to presume that the term has been surrendered by the trustees to the cestui que trust, so as to give him the legal title to maintain the action (b); thus a term may be presumed to be surrendered, where the purposes for which the trust estate was created have been satisfied (c); so in the case of a plain trust, where the trustees are directed to convey to a devisee, on his attaining twenty-one, the jury may be directed to presume a conveyance at any time afterwards, though considerably less than twenty years (d). A similar presumption arises, where the beneficial occupation of the estate induces a supposition, that a conveyance of the legal estate has been made to the party beneficially interested (e). But such a presumption will not be made, if the surrender be a breach of the trust against the owner of the inheritance, who is interested in upholding it (f): nor where the title of the party, for whom such presumption is required, is doubtful in a Court of Equity (g). If, however, no such presumption be made, and it appears in a special verdict in ejectment, that such a term is still outstanding in a trustee who is not joined in bringing the ejectment, the cestui que use cannot recover (h).

Lords of Manors.

The lord of a manor for the time being may maintain ejectment for lands forfeited by reason of some act done by the tenant; but the heir of the lord, in whose time the forfeiture was committed, cannot take advantage of this right, unless the act of forfeiture destroy the estate (i). The case, however, will be otherwise, where the manor belongs to a bishopric, and the forfeiture is committed during the

ders over; it was held, that the trustees took the legal estate till the 5,000*l.* was raised; *Glover* v. *Monckton*, 3 Bing. 13.

With respect to cases where a term of years only is created, the legal estate always vests in the trustees, whatever the trust may be; for the Statute of Uses only applies to such persons as are *seised* to the use of others, and does not extend to cases where a termor is only *possessed*. Adams, Eject. 65, 4th edit. Copyhold premises also are not included within the Statute of Uses; and therefore a surrender of a copyhold to *A.* to the use of *B.* will not transfer the legal estate to *B.*, although in equity he would be entitled to the rents, &c. and to call upon *A.* to surrender the estate; Adams, Eject. 68, 4th ed.

(z) *Roe* d. *Ebrall* v. *Lowe*, 1 H. Black. 447.

(a) Adams, Eject. 29, 4th ed.

(b) *Goodtitle* d. *Jones* v. *Jones* (*in error*), 7 Term Rep. 47.

(c) *Doe* d. *Hodsden* v. *Staple*, 2 Term Rep. 684.

(d) *England* d. *Syburn* v. *Slade*, 4 Term Rep. 682.

(e) Adams, Eject. 66, 4th ed.

(f) *Doe* d. *Graham* v. *Scott*, 11 East, 478.

(g) *Keene* d. *Byron* (*Lord*) v. *Deardon*, 8 East, 248.

(h) *Goodtitle* d. *Jones* v. *Jones* (*in error*), 7 Term Rep. 47; *S. P. Doe* d. *Bowerman* v. *Sybourn*, 7 Term Rep. 2; 2 Esp. 299.

(i) Adams, Eject. 44, 4th ed.; *Doe* d. *Tarrant* v. *Hellier*, 3 Term Rep. 162.

vacancy of the see (*k*). Where an inclosure has been made from the waste for twelve or thirteen years, and seen by the steward of the same lord from time to time without any objection made, the jury may presume it to have been made by the license of the lord; and ejectment cannot be maintained by him against the tenant, without a previous notice to throw it up (*l*). It has been held, that the Statute of Limitations, 21 Jac. I. c. 16, will run against a lord, in case of a forfeiture by a copyholder (*m*).

Copyholders.

A copyholder, if ejected by his lord, may maintain ejectment against him; for though he is called a tenant at will, yet it is according to the custom of the manor, and he cannot be put out while he performs his services. It seems he may maintain the action against all persons but the lord, even if he be not empowered either by the custom of the manor, or the licence of the lord, to make a lease (*n*). Where a copyholder has done fealty, and attorned tenant to the lord, he cannot impeach the lord's title, in ejectment by him for a forfeiture, by setting up the right of a third person, who does not join in resisting the title of the lord (*o*). Where the admission of a copyholder is made in pursuance of a surrender, and not of a voluntary grant from the lord, the lord's title at the time of the surrender is immaterial in an action of ejectment by the copyholder against a third person (*p*). If the heir apparent of a copyholder in fee surrender in the lifetime of his ancestor, and survive him, the heir of such surrenderor is not estopped by that surrender from claiming against the surrenderee; for, in order to pass an estate by surrender, the estate must pass into the hands of the lord, through which it must be taken; and if a surrender be not good, there will be no estoppel (*q*). So a party claiming by descent has as complete a title without admittance as with it, so as to maintain the ejectment against all the world except the lord (*r*); but if the lord

(*k*) Bull. N. P. 107.

(*l*) *Doe* d. *Foley* v. *Wilson*, 11 East, 56; *Doe* d. *Dunraven* (*Earl*) v. *Williams*, 7 Car. & Pay. 332.

(*m*) *Doe* d. *Tarrant* v. *Hellier*, 3 Term Rep. 162, 172; *Whitton* v. *Peacock*, 3 Mylne & Keen, 325.

(*n*) *Goodwin* v. *Longhurst*, Cro. Eliz. 535; *Doe* d. *Tressidder* v. *Tressidder*, 1 Gale & Dav. 70; *Doe* d. *Robinson* v. *Bousfield*, 6 Queen's B. Rep. 492; 1 Car. & Kir. 558.

(*o*) *Doe* d. *Nepean* (*Bart.*) v. *Budden*, 5 Barn. & Ald. 626; 1 Dowl. & Ryl. 243.

(*p*) *Doe* d. *Burgess* v. *Thompson*, 5 Ad. & El. 532; 1 Nev. & Per. 215; 2 Har. & Wol. 451.

(*q*) *Goodtitle* d. *Faulkner* v. *Morse*, 3 Term Rep. 365.

(*r*) *Rex* v. *Rennett*, 2 Term Rep. 197; *Doe* d. *Tarrant* v. *Hellier*, 3 Term Rep. 169; *Doe* d. *Taylor* v. *Crisp*, 8 Ad. & El. 779; 1 Per. & Dav. 37; 1 Will. Wol. & Hod. 593. In the case of a surrender, no complete title vests in the surrenderee till after admittance; for until the admittance, the title remains in the surrenderor, and if he dies it vests in his heir; Bull. N. P. 108; *Doe* d. *Jefferys* v. *Hicks*, 2 Wils. 13, 15; *Graham* v. *Sime*, 1 East, 632. If, however, the surrender be made, the admittance shall relate to that time as against all persons but the lord; and the surrenderee may recover on a title laid within the time of surrender and admittance, provided the admittance be made before trial; the surrender and admittance being considered as one act, and taken to operate from the substantial part by relation; this is especially the case when it is a sale for a valuable consideration; *Holdfast* d. *Woollams* v. *Clapham*, 1 Term Rep. 600; *Doe* d. *Bennington* v. *Hall*, 16 East, 208; *Vaughan* d. *Atkins* v. *Atkins*, 5 Burr. 2787. A surrender, however, of chambers in New Inn to the treasurer and ancients of the society, made with their assent, to the intent that they may grant

seize the land upon the death of the ancestor, and the heir bring ejectment against him, it will be necessary to show that he has tendered himself to be admitted at the lord's court, or that the lord has dispensed with such tender (*s*). An assignment of copyhold premises by a common law conveyance of lease and release, without surrender to the lord of the manor, is not sufficient to support ejectment by the releasee even against the widow of the releasor (*t*).

Grantees of Lords of Manors.

A grantee of the lord of a manor by copy of court roll may maintain ejectment without admittance: thus, where the lord of a manor granted to *A.* by copy of court roll the reversion of certain premises then in his tenure, to have and to hold to *B.* for his life, immediately after the death of *A.*; it was held, that *B.* might, on the death of *A.*, maintain an ejectment; although he had never been admitted, he having acquired a perfect legal title by the grant, without admittance (*u*).

Husband against Wife.

The nominal plaintiff under the old system might have recovered against a married woman, who had entered into the common consent rule, on a demise by the defendant's husband (*x*).

Action not abated by Marriage.

The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 141, enacts as follows:—"The marriage of a woman, plaintiff or defendant, shall not cause the action to abate, but the action may notwithstanding be proceeded with to judgment; and such judgment may be executed against the wife alone, or by suggestion or writ of revivor, pursuant to this act, judgment may be obtained against the husband and wife, and execution issue thereon; and in case of a judgment for the wife, execution may be issued thereupon by the authority of the husband, without any writ of revivor or suggestion; and if in any such action the wife shall sue or defend by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence, unless such authority be countermanded by the husband, and the attorney changed according to the practice of the Court."

Widows entitled to Freebench.

A widow entitled to her freebench may maintain the action of ejectment before admittance; for it comes out of the estate of the husband, and is a customary right (*y*).

the said chambers to a purchaser, passes the estate to such a purchaser, before admission; for admission in this case is not necessary, as in the case of copyholds, to complete the grantee's estate, but it is only for the purpose of signifying the assent of the society, that the grantee should become a member of the inn; *Doe* d. *Warry* v. *Miller*, 1 Term Rep. 393. Where the devisee of a copyhold estate, which had been surrendered to the use of a will, died before admittance, it was held, that her devisee, though afterwards admitted, could not recover in ejectment, as the admittance had no relation to the last legal surrender, and the legal title remained in the heir of the surrenderor; *Doe* d. *Vernon* v. *Vernon*, 7 East, 8; 3 Smith, 6; *S. P. Doe* d. *Burrough* v. *Reade*, 8 East, 353.

(*s*) *Doe* d. *Burrell* v. *Bellamy*, 2 Maule & Selw. 87.

(*t*) *Doe* d. *North* v. *Webber*, 3 Bing. N. C. 922; 5 Scott, 189; 3 Hodges, 203.

(*u*) *Roe* d. *Cosh* v. *Loveless*, 2 Barn. & Ald. 453.

(*x*) *Doe* d. *Merigan* v. *Daly*, 8 Queen's B. Rep. 934.

(*y*) Hutt. 18; Hob. 181; 2 Danv. Abr. 184; Ambl. 299.

Lessees of Copyholders.

A lease by a copyholder for three years, under a licence to let for twenty-one years, is good; and the lessee may bring ejectment on it at common law (z). Indeed the lessee for years of a copyholder may sustain ejectment, though there be no custom in the manor to lease, and no licence has been obtained from the lord, the lease being good between the parties, and void only as against the lord (a).

Guardians in Socage, &c.

A guardian in socage (b), or testamentary guardian, appointed pursuant to the statute 12 Car. II. c. 24, s. 8 (c), may bring ejectment; but a guardian for nurture cannot, the office of guardian giving him no power over the lands.

Infants.

An infant may maintain this action; but he must name a good plaintiff who may be answerable for the costs (d).

Lunatics and their Committees.

The committee of a lunatic may bring an ejectment; but it was formerly held that it must be in the name of the lunatic, as the committee was but as bailiff, and could not make leases of the land (e).

Aliens and their Issue.

As an alien cannot take lands by descent, he cannot maintain ejectment; but with regard to the issue of aliens, and to children born out of the realm, it is settled by statute 25 Edw. III. st. 2, that children whose fathers and mothers, at the time of their birth, are liege subjects of England, shall inherit lands within the kingdom, though such children were born out of the kingdom; and by statutes 7 Ann. c. 5, 4 Geo. II. c. 21, and 13 Geo. III. c. 21, all children born out of the allegiance of the crown of Great Britain, whose fathers (or grandfathers by the father's side) are natural-born subjects, shall be deemed natural-born subjects so as to inherit lands (f). Where husband and wife were lessors of the plaintiff, and title was proved in the wife, the Court refused, before the passing of 7 & 8 Vict. c. 66, to nonsuit on account of the husband being an alien (g).

Corporations.

Corporations, either aggregate or sole, may bring ejectment (h): even a bishop may maintain the action against the copyholders of a manor belonging to the bishopric, for a forfeiture committed while the see was vacant (i). In a case, previous to the statute 59 Geo. III. c. 12, s. 17 (k), by which parish officers were empowered to hold

(z) *Goodwin* v. *Longhurst*, Cro. Eliz. 535.

(a) *Doe* d. *Tressidder* v. *Tressidder*, 1 Queen's B. Rep. 416; 1 Gale & Dav. 70; and see Run. Eject. 226; and ante, 30—45.

(b) Adams, Eject. 48, 4th ed.

(c) *Roe* d. *Parry* v. *Hodgson*, 2 Wils. 129, 135.

(d) *Noke* v. *Windham*, 1 Stra. 694; see *Maddon* d. *Baker* v. *White*, 2 Term Rep. 159. As to a special admission of prochein amy or guardian, see Reg. Gen. Hil. Term, 1853, pl. 5.

(e) *Drury* v. *Fitch*, Hutt. 16; *Cocks* v. *Darson*, Hob. 215; *Knipe* v. *Palmer*, 2 Wils. 130. But see 11 Geo. IV. & 1 Will. IV. c. 65, whereby powers are given to committees of lunatics to grant leases, ante, 30.

(f) See ante, Book I., Chap. II., Sect. 6, p. 45.

(g) *Doe* d. *Miller* v. *Rogers*, 1 Car. & Kir. 390.

(h) Adams, Eject. 57, 169, 4th ed. It has been held, that the London Dock Company may maintain, under a clause in their act of incorporation, ejectment on a lease granted by the directors before the incorporation; *Doe* d. *The London Dock Company* v. *Knebell*, 2 Mood. & Rob. 66.

(i) Bull. N. P. 107; Esp. N. P. 440.

(k) This enactment does not apply to copyholds; *Doe* d. *Bailey* v. *Foster*, 3 Com. B. Rep. 215.

parish property in the character of a corporation (*l*), it was held, that the existing overseers could not maintain ejectment for land in the possession of a pauper, having no derivative title as a corporation from their predecessors, by whom the pauper was put in possession, and the pauper having done no act to recognize his holding under the demising set of overseers (*m*). Where lands have been held jointly by the churchwardens and overseers of a parish, and by the corporation of the borough in which it lies, the latter holding as trustees for general parochial purposes, the churchwardens and overseers may bring ejectment for such lands as vested in them, by stat. 59 Geo. III. c. 12, s. 17 (*n*). Evidence of payment of rent to parish officers as such is evidence to show that the property for which it is paid is parish property, within the operation of the statute 59 Geo. III. c. 12, s. 17, so as to enable the parish officers for the time being to maintain ejectment (*o*).

Where a demise by a corporation omitted to state that it was by deed under the common seal, the error was cured by verdict (*p*).

Rectors and Vicars.

A rector or vicar may maintain ejectment for tithes (*q*): the action, however, can only be maintained against persons claiming title thereto, and not for refusing to set them out: nor will it lie where there is a composition (*r*): nor can the parson maintain ejectment for glebe land after sequestration (*s*).

Reversioners and Assignees of the Reversion.

A plaintiff may recover in an ejectment a reversionary interest, subject to a lease, and a right of present possession in another (*t*). An assignee of the reversion may bring ejectment upon a right of re-entry for condition broken; it being enacted by statute 32 Hen. VIII. c. 34, that the grantees or assignees of a reversion shall have the same rights and advantages with respect to the forfeitures of estates, as the heirs of individuals and the successors of corporations had until that time solely enjoyed (*u*). The statutes extend to copyhold lands, but not to gifts in tail (*x*).

Lessors.

It seems to be now settled that after twenty years' possession of encroachments made by a lessee upon land adjoining the demised premises, the lessor has such a primâ facie title as to enable him to

(*l*) Ante, 10. See *Doe* d. *Pitminster (Churchwardens)* v. *Roe*, 1 Will. Wol. & Hod. 347.

(*m*) *Doe* d. *Grundy* v. *Clarke*, 14 East, 488.

(*n*) *Doe* d. *Edney* v. *Billett*, 7 Queen's B. Rep. 976.

(*o*) *Doe* d. *Higgs* v. *Terry*, 4 Ad. & El. 274; 5 Nev. & Man. 556; 1 Har. & Wol. 547; see also *Allason* v. *Stark*, 9 Ad. & El. 255; 1 Per. & Dav. 183; *Gouldsworth* v. *Knights*, 11 Mees. & Wels. 337; *Rumball* v. *Munt*, 8 Queen's B. Rep. 382; *St. Nicholas, Deptford (Churchwardens, &c.)* v. *Sketchley*, 8 Queen's B. Rep. 394; and *Doe* d. *Bowley* v. *Barnes*, 8 Queen's B. Rep. 1037.

(*p*) *Patrick* v. *Balls*, Carth. 390; *Bird* v. *Higginson*, 6 Ad. & El. 824; and see 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96, as to amendments.

(*q*) *Camel* v. *Clavering*, 2 Lord Raym. 789. See ante, 725.

(*r*) Dyer, 116 b.

(*s*) *Doe* d. *Morgan* v. *Bluck*, 3 Camp. 447.

(*t*) 1 Term Rep. 761, n.

(*u*) Adams, Eject. 53, 4th ed.; *Wright* v. *Burroughs*, 3 Com. B. Rep. 685; 4 Dow. & Low. 438. See further, ante, 210.

(*x*) Co. Litt. 215 a; *Glover* v. *Cope*, Carth. 205.

maintain ejectment for the encroachments (*y*). Where in a lease there was a proviso, that the lessee would on three months' notice give up any part of the land, and that the lessor might take possession, and the lessor gave a notice and took possession before the three months expired, it was held, that the lessee could not maintain an ejectment brought long after the three months expired (*z*).

Grantees of Rent-Charges.

If a rent-charge be granted to any one, with a proviso, that if the rent be in arrear, it shall be lawful for the grantee, his heirs and assigns, to enter and hold the lands, out of which the rent-charge is granted, until the arrears be satisfied; this will give to the grantee such an interest, that he may make a lease of the land, on which he may maintain ejectment (*a*). The right of entry, however, in such cases, must always be construed strictly (*b*).

Persons having Possession for Twenty Years.

One who has had possession for twenty years, unaccompanied by acknowledgment of title in another person, may maintain ejectment; such possession giving him a complete possessory title to the lands, provided it is not affected by the exceptive provisions of the Statute of Limitations. He may maintain ejectment against any one who ousts him after the expiration of the twenty years (*c*). The possession, however, must be peaceable and uninterrupted, for repeated trespasses from time to time will not gain a possession (*d*). Where the lessor of the plaintiff had a possession for more than twenty years, and the defendant relied on a subsequent possession of ten years; it was held, that the lessor of the plaintiff must prevail, and that he was entitled to recover unless the defendant showed a better title (*e*). A person who married the widow of one who was seised in fee, and who himself was in possession of the property for above twenty years, but who procured the son of the former husband to execute a mortgage which he effected of the property, was held to be tenant at will to the son, and to be estopped from alleging he had acquired an estate under the statute 3 & 4 Will. IV. c. 27 (*f*). This doctrine will apply where a party, after having had possession for twenty years, deserted the premises, and the right owner peaceably entered thereon; for in such

(*y*) *Doe* d. *Lloyd* v. *Jones*, 15 Mees. & Wels. 580; *Doe* d. *Lewis* v. *Rees*, 6 Car. & Pay. 610; *Doe* d. *Harrison* v. *Murrell*, 8 Car. & Pay. 134; *Doe* d. *Dunraven* (*Earl*) v. *Williams*, 7 Car. & Pay. 332; *Doe* d. *Watt* v. *Morris*, 2 Bing. N. R. 189; 2 Scott, 276; 1 Hodges, 215; *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208; *Doe* d. *Challnor* v. *Davies*, 1 Esp. 461; *Doe* d. *Colclough* v. *Mulliner*, 1 Esp. 460; *Andrews* v. *Hailes*, 2 Ell. & Bl. 349. The presumption does not hold as regards third persons; *Doe* d. *Baddeley* v. *Massey*, 17 Queen's B. Rep. 373; ante, 515, 543.

(*z*) *Doe* d. *Gardner* v. *Kennard*, 12 Queen's B. Rep. 244.

(*a*) *Jemott* v. *Cowly*, 1 Saund. 112; 1 Lev. 170; see also *Doe* d. *Chawner* v. *Bowler*, 6 Ad. & El. 675; 1 Nev. & Per. 650; Will. Wol. & Dav. 333; *Doe* d. *Butler* v. *Lord Kensington*, 8 Queen's B. Rep. 429.

(*b*) *Hassell* d. *Hodson* v. *Gouthwaite*, Willes, 500.

(*c*) Adams, Eject. 71, 4th ed.; *Stocker* v. *Bernay*, 1 Lord Raym. 741; Esp. N. P. 431.

(*d*) *Hughes* v. *Morden College*, 1 Ves. jun. 189.

(*e*) *Doe* d. *Harding* v. *Cooke*, 7 Bing. 346; 5 Moore & Pay. 181.

(*f*) *Doe* d. *Groves* v. *Groves*, 10 Queen's B. Rep. 486.

case the former may bring ejectment against the rightful owner (*g*). Where, however, any of the disabilities mentioned in the 16th and 17th sections of the Statute of Limitations, 3 & 4 Will. IV. c. 27, occur, or the lands belong to the crown or the church (*h*), a twenty years' possession will not avail. With respect to crown lands, a grant will be presumed from the crown, after an uninterrupted possession for twenty years, unless the crown is incapable of making such grant; but no possession for less than sixty years, where there is no grant, will be sufficient to support ejectment (*i*). In ejectment it appeared that the lessor of the plaintiff's husband had been in possession as tenant at will for eighteen years ending in 1834, when he died, leaving a son (not a party to the action), and that she then became possessed, and remained in possession for thirteen years; it was held, that the plaintiff could not rely on the husband's possession, except as primâ facie evidence of a seisin in fee, on which supposition it was also evidence of title in his heir, which defeated the title of the lessor of the plaintiff; and that she could not insist on her own possession for thirteen years, as it was not derived from the husband's possession; although the possession by herself and her husband for more than twenty years consecutively would have entitled her to a verdict if she had been defendant in an ejectment brought by the real owner. It would seem that the effect of the 34th section of statute 3 & 4 Will. IV. c. 27, which says, that at the determination of the period limited by the act for any person to make an entry, his title shall be "extinguished," is to give title by possession for twenty years, but that such twenty years' possession must be either by the same persons, or several persons claiming one from another (*j*).

Persons having Peaceable Possession.

Having peaceable possession of premises for a certain time will, in some particular cases, give a sufficient title to maintain ejectment: thus, if it be proved that the plaintiff let the premises to a tenant, who held peaceable possession for about a year; this will be sufficient evidence of title, as against a party who came in the night, and forcibly turned such tenant out of possession (*k*). So where the plaintiff was proved to have received rent for a house for five quarters, down to March, 1841, and in that month a person was found in possession, who claimed the house as his own freehold, it was held sufficient evidence to call on the defendant to show his title (*l*).

Joint Tenants, &c.

Formerly a joint tenant, coparcener or tenant in common might maintain ejectment against his companion, on an actual ouster; but an ouster was necessary, as an entry by one was good for all, he being supposed to enter according to his estate (*m*). By the statute 3 & 4

(*g*) *Doe* d. *Burrough* v. *Reade*, 8 East, 353.

(*h*) See statute 3 & 4 Will. IV. c. 27, s. 29, &c.

(*i*) See statute 9 Geo. III. c. 16, and *Goodtitle* d. *Parker* v. *Baldwin*, 11 East, 488.

(*j*) *Doe* d. *Carter* v. *Barnard*, 13 Q. B. 945.

(*k*) *Doe* d. *Hughes* v. *Dyball*, 3 Car. & Pay. 610; Mood. & Malk. 346.

(*l*) *Doe* d. *Humphrey* v. *Martin*, 1 Car. & Mar. 32.

(*m*) Co. Litt. 195 b; *Smales* v. *Dale*, Hob. 120; Esp. N. P. 434; *Ford* v. *Gray*, 1 Salk.

Will. IV. c. 27, s. 12 (*n*), however, it is now enacted, that the possession of one coparcener, joint tenant or tenant in common shall not be deemed the possession of another; and it has been held, that this section has relation back, so as to make the possession of such persons separate from the time they first came into possession (*o*). The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 188, enacts, that in case of any ejectment "being brought by some or one of several persons entitled as joint tenants, tenants in common or coparceners, any joint tenant, tenant in common or coparcener in possession may at the time of appearance, or within four days after, give notice in the same form as in the notice of a limited defence, that he or she defends as such, and admits the right of the claimant to an undivided share of the property (stating what share), but denies any actual ouster of him from the property, and may, within the same time, file an affidavit stating with reasonable certainty that he or she is such joint tenant, tenant in common or coparcener, and the share of such property to which he or she is entitled, and that he or she has not ousted the claimant; and such notice shall be entered in the issue in the same manner as the notice limiting the defence, and upon the trial of such an issue the additional question of whether an actual ouster has taken place shall be tried." Section 189 enacts, that "upon the trial of such issue as last aforesaid, if it shall be found that the defendant is joint tenant, tenant in common or coparcener with the claimant, then the question whether an actual ouster has taken place shall be tried, and unless such actual ouster shall be proved the defendant shall be entitled to judgment and costs; but if it shall be found either that the defendant is not such joint tenant, tenant in common or coparcener, or that an actual ouster has taken place, then the claimant shall be entitled to such judgment for the recovery of possession and costs." It was at one time held, that one tenant in common could not set up an outstanding term against an ejectment for a moiety by another tenant in common (*p*); but this doctrine has been overruled by a series of decisions. Indeed it has been held, that an unsatisfied term, raised for the purpose of securing an annuity, may, during the life of the annuitant, be set up in an ejectment by the heir at law, though he only claimed subject to such charge (*q*). Ejectment is maintainable by one of two tenants in common, who have agreed to divide their property, if the defendant, who holds under both as occupier, pay rent under a distress

Under 15 & 16 Vict. c. 76, s. 188.

Sect. 189.

285; 6 Mod. 44; *Fairclaim* d. *Empson* v. *Shackleton*, 5 Burr. 2604. Trespass qu. cl. fre. lies by one of several tenants in common against his co-tenant where there has been an actual expulsion; *Murray* v. *Hall*, 7 C. B. Rep. 441; *Wilkinson* v. *Haygarth*, 16 Law J., N. S., Q. B., 103.

(*n*) Ante, 729.

(*o*) *Culley* v. *Doe* d. *Taylerson*, 11 Ad. & El. 1008; 3 Per. & Dav. 539; *Doe* d. *Holt* v. *Horrocks*, 1 Car. & Kir. 566.

(*p*) *Doe* d. *Bristow* v. *Pegge*, 1 Term Rep. 759, n.; 4 Dougl. 309.

(*q*) *Doe* d. *Hodsden* v. *Staple*, 2 Term Rep. 684; *Goodtitle* d. *Jones* v. *Jones*, 7 Term Rep. 43; *Doe* d. *Da Costa* v. *Wharton*, 8 Term Rep. 2.

to such co-tenant alone, after such agreement; and it is no defence to such action, that the deeds of partition between the co-tenants have not been executed (*r*). It was doubted in one case whether one of two coparceners, on whom the reversion had descended, could alone maintain ejectment for breach of a covenant in a lease (*s*). Where a person demised mines to a company of which he afterwards became a partner, but was not in possession of the mines as one of the company; it was held, that he was entitled to recover them in ejectment against another partner in the company (*t*).

Tenants by Elegit and Fi. Fa.

A tenant by elegit may maintain this action, in order to be put into possession under the elegit of the lands returned by the inquisition before the sheriff (*u*); and it was held to be no defence where the elegit has been executed upon a judgment on a warrant of attorney, that the warrant of attorney and judgment had been given to secure a loan on usurious interest (*x*). It is doubtful, however, whether an ejectment is necessary, in order to obtain actual possession of the lands under the elegit; Gibbs, C. J., in the case of *Rogers* v. *Pitcher* (*y*), seemed to intimate that it is not. When the plaintiff claims under an elegit, subsequent to a lease granted to the tenant in possession, he cannot recover in ejectment, even though he give the tenant notice that he does not mean to disturb his possession, but only wishes to get into the receipt of the rents and profits of the estate, on the ground that the lessee's title, being prior in point of time, the estate is in him (*z*). A tenant by elegit of lands, which before the execution had been mortgaged for a term of years, has no right to maintain ejectment (*a*). If at the time of the judgment the elegit debtor is entitled to the whole property sought to be recovered by the elegit creditor, other parties with whom the former is in possession when the ejectment is brought must prove their title, or the elegit creditor is entitled to judgment against all (*b*). If the sheriff sell a term under a writ of fi. fa., but execute no assignment, the debtor may recover in ejectment even against the execution creditor (*c*). If the fi. fa. is, after the sale, set aside for irregularity, and the produce of the sale directed to be returned to the termor, the termor cannot maintain ejectment to recover his term against the vendee under the sheriff (*d*).

(*r*) *Doe* d. *Pitcher* or *Pritchitt* v. *Mitchell*, 1 Brod. & Bing. 11; 3 Moore, 229.

(*s*) *Doe* d. *De Reutzen* v. *Lewis*, 5 Ad. & El. 277; 6 Nev. & Man. 764; 2 Har. & Wol. 162.

(*t*) *Francis* v. *Doe* d. *Harvey*, 4 Mees. & Wels. 331; 1 Horn. & Hurl. 363.

(*u*) *Taylor* v. *Cole*, 3 Term Rep. 292; *Denn* d. *Taylor* v. *Abingdon* (*Earl*), 2 Dougl. 473; Bull. N. P. 104.

(*x*) *Hughes* v. *Lumley*, 24 Law J., Q. B., 57.

(*y*) 6 Taunt. 202; 1 Marsh. 541.

(*z*) *Doe* d. *Da Costa* v. *Wharton*, 8 Term Rep. 2.

(*a*) *Poole* (*Mayor, &c.*) v. *Whitt*, 15 Mees. & Wels. 571.

(*b*) *Doe* d. *Evans* v. *Owen*, 2 Cromp. & Jer. 71; 2 Tyr. 149.

(*c*) *Doe* d. *Hughes* v. *Jones*, 9 Mees. & Wels. 372; 1 Dowl. N. S. 352.

(*d*) *Doe* d. *Emmett* v. *Thorn*, 1 Maule & Selw. 425; see also *Doe* d. *Batten* v. *Murless*, 6 Maule & Selw. 110. See also on this subject, ante, Book I., Chap. VI., Sect. 6, p. 222.

Conusees of Statute Merchant or Staple.

The conusee of a statute merchant or staple may bring this action (*e*).

Persons claiming under an Award.

An award under a submission to arbitration will give a good title on which to maintain this action: thus, where the plaintiff and the defendant in ejectment had before referred their right to the land to an arbitrator, who had awarded in favour of the plaintiff, it was held, that the award concluded the defendant from disputing the plaintiff's title to the land in an action of ejectment (*f*).

Award under 17 & 18 Vict. c. 125, s. 16.

Prior to the passing of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, where an award directing the delivery up of land was disobeyed, the remedy was either by action or attachment; but this remedy proving in many cases expensive and dilatory, that statute enacts, sect. 16, that when any award made under its provisions directs that land capable of being made the subject of ejectment shall be delivered up, or that any party is entitled thereto, the Court may order the parties to the reference being in possession, and others claiming under them subsequently to the submission, to deliver up possession; and the rule of Court or order to deliver up possession shall have the effect of a judgment in ejectment, and execution may issue, and possession shall be delivered by the sheriff as in a judgment in ejectment.

SECT. 5.—*Writ and Notice.*

(a) *Title, Parties and Venue.*

How Proceedings in Ejectment are commenced.

Formerly, proceedings in ejectment were commenced by the delivery of the declaration and the notice, signed by the casual ejector, to the tenant in possession. This had the effect of the ordinary process in other actions, and by it the party in possession was informed of the claim set up by the lessor of the plaintiff, and was required to appear and defend his title. But now, by the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 168, it is enacted, that "Instead of the present proceeding by ejectment, a writ shall be issued, directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed, which property shall be described in the writ with reasonable certainty." Section 169 enacts, that "the writ shall state the names of all the persons in whom the title is alleged to be, and command the persons to whom it is directed to appear within sixteen days after service thereof in the Court from which it is issued, to defend the possession of the property sued for, or such part thereof as they may think fit; and it shall contain a notice, that in default of appearance they will be turned out of possession; and the writ shall bear teste of

15 & 16 Vict. c. 76, s. 168.

Sect. 169.

(*e*) Co. Litt. 42 a; *Hammond* v. *Wood*, 2 Salk. 563.

(*f*) *Doe* d. *Morris* v. *Rosser*, 3 East, 15; *S. P. Doe* d. *Grenville* v. *Roper*, Hereford Assizes, 1802, MS.

the day on which it is issued, and shall be in force for three months, and shall be in the form contained in Schedule (A.), to this act annexed, No. 13 (*g*), or to the like effect; and the name and abode of the attorney issuing the same, or if no attorney, the name and residence of the party shall be indorsed thereon in like manner as hereinbefore enacted with reference to the indorsements on a writ of summons in a personal action; and the same proceedings may be had to ascertain whether the writ was issued by the authority of the attorney whose name was indorsed thereon, and who and what the claimants are, and their abode, and as to staying the proceedings, upon writs issued without authority, as in the case of writs in personal actions." In some cases proceedings may be taken under the 213th section of the same statute, which is similar in substance to 1 Geo. IV. c. 87, s. 1, and enacts, that "Where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing any lands, tenements or hereditaments for any term or number of years certain, or from year to year, shall have expired or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the writ in ejectment, to address a notice to such tenant or person requiring him to find such bail, if ordered by the Court or a judge, and for such purposes as are hereinafter next specified; and upon the appearance of the party on an affidavit of service of the writ and notice, it shall be lawful for the landlord producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the Court or apply by summons to a judge at chambers for a rule or summons for such tenant or person to show cause, within a time to be fixed by the Court or judge on a consideration of the situation of the premises, why such

Tenant to find Bail, sect. 213.

(*g*) Form of writ:—

"Victoria, &c. to *X. Y. Z.* and all persons entitled to defend the possession of —— [*describe the property with reasonable certainty*], in the parish of ——, in the county of ——, to the possession whereof *A.*, *B.* and *C.*, or some or one of them, claim to be [*or* to have been on and since the —— day of ——, A.D. ——] entitled and to eject all other persons therefrom: These are to will and command you, or such of you as deny the alleged title, within sixteen days after service hereof, to appear in our Court of —— to defend the said property, or such part thereof as you may be advised; in default whereof judgment may be signed, and you turned out of possession.

"Witness, &c."

tenant or persons should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum conditioned to pay the costs and damages which shall be recovered by the claimants in the action; and it shall be lawful for the Court or judge upon cause shown, or upon affidavit of the service of the rule or summons in case no cause shall be shown, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to find such bail, with such conditions and in such manner as shall be specified in the said rule or summons, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court or judge to enlarge the time for obeying the same, then the lessor or landlord filing an affidavit that such rule or order has been made and served and not complied with, shall be at liberty to sign judgment for recovery of possession and costs of suit in the form contained in the Schedule (A.) to this act annexed, marked No. 21, or to the like effect (*h*)." And the lease or agreement which the landlord is bound to produce under the 1 Geo. IV. c. 87, s. 1, and also under the above section, ought to be annexed to the affidavits in support of the motion (*i*). Section 215 of the Common Law Procedure Act enacts, that "In all cases in which such security shall have been given as aforesaid, if upon the trial a verdict shall pass for the claimant, unless it shall appear to the judge before whom the same shall have been had that the finding of the jury was contrary to the evidence, or that the damages given were excessive, such judge shall not, except by consent, make any order to stay judgment or execution, except on condition that within four days from the day of the trial the defendant shall actually find security, by the recognizance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw or manure produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the

Staying Execution under s. 215.

(*h*) "In the Queen's Bench.

"The —— day of ——, A.D. 18 .
[*date of writ.*]

"Yorkshire, } On the day and year above
to wit. } written, a writ of our lady the Queen issued forth of this Court, with a notice thereunder written, the tenor of which writ and notice follows in these words; that is to say,

[*Here copy the writ and notice, which latter may be as follows:*]

"'Take notice, that you will be required, if ordered by the Court or a judge, to give bail by yourself and two sufficient sureties, conditioned to pay the costs and damages which shall be recovered in this action.'

"And *C. D.* has appeared by —— his attorney [*or* in person] to the said writ, and has been ordered to give bail, pursuant to the statute, and has failed so to do: Therefore it is considered that the said [*here insert name of landlord*] do recover possession of the land in the said writ mentioned, with the appurtenances, together with £—— for costs of suit."

(*i*) *Doe* d. *Foucan* v. *Roe*, 2 Low. M. & P. 322.

case may be: provided always, that the recognizance last above mentioned shall immediately stand discharged and be of no effect, in case proceedings in error shall be brought upon such judgment, and the plaintiff in error shall become bound in the manner hereinbefore provided." And by section 216 it is enacted, that "All recognizances and securities entered into as last aforesaid may and shall be taken respectively in such manner and by and before such persons as are provided and authorized in respect of recognizances of bail upon actions and suits depending in the Court in which any such action of ejectment shall have been commenced; and the officer of the same Court with whom recognizances of bail are filed shall file such recognizances and securities, for which respectively the sum of two shillings and sixpence, and no more, shall be paid; but no action or other proceeding shall be commenced upon any such recognizance or security after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord."

Sect. 216.

By section 217 it is enacted, that "In all actions of ejectment hereafter to be brought in any of her Majesty's Courts at Westminster by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments in any county, except London or Middlesex, where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord, in or after Hilary or Trinity Terms respectively, it shall be lawful for the claimant in any such action, at any time within ten days after such tenancy shall expire, or right of entry accrue as aforesaid, to serve a writ in ejectment in the form contained in the Schedule (A.) to this act annexed, marked No. 13 (*j*), except that it shall command the persons to whom it is directed to appear within ten days after service thereof in the Court in which such action may be brought; and the like proceedings shall be thereupon had as hereinbefore provided, save that it shall be sufficient to give at least six clear days' notice of trial to the defendant before the commission day of the assizes at which such ejectment is intended to be tried; and any defendant in such action may, at any time before the trial thereof, apply to a judge by summons to stay or set aside the proceedings, or to postpone the trial until the next assizes; and it shall be lawful for the judge, in his discretion, to make such order in the said cause as to him shall seem expedient." This section is similar to 11 Geo. IV. & 1 Will. IV. c. 70, s. 36. Section 218 is as follows:—"Nothing herein contained shall be construed to prejudice or affect any other right of action or remedy which landlords may possess in any of the cases hereinbefore provided for otherwise than hereinbefore expressly en-

Right of Ent[illegible] after Hilary [illegible] Trinity Term, sect. 217.

Sect. 218.

(*j*) Ante, 749, note (*g*).

Venue in ejectment is local.

15 & 16 Vict. c. 76, s. 182.

Uncertainty allowed in describing the county of the premises.

acted." Where the rent or value of the premises is less than 50*l*, proceedings may be taken under the County Court Act, 9 & 10 Vict. c. 95, s. 122.

Ejectment being a local action, the venue must be laid in the county in which the premises are situate; for the proceedings being in rem, the effect of the judgment cannot be had, nor can the sheriff give possession if the venue be not laid in the proper county (*k*). But now, by the 15 & 16 Vict. c. 76, s. 182, "The Court or a judge may, on the application of either party, order that the trial shall take place in any county or place other than that in which the venue is laid; and such order being suggested on the record, the trial may be had accordingly."

More particularity is required in the description of the premises than was necessary in the old declaration in ejectment. The parish and county ought of course to be stated; and it would be advisable to mention the name or abuttals of the property. If an insufficient description be given, the course is to apply for better particulars, which under section 175 would probably be granted, even before appearance. The cases decided under the old mode of proceeding will not be found inapplicable. It was not necessary, though usual, to state in the declaration that the premises were situated in a parish or hamlet; it was sufficient to mention the name of the place in which they were situate, without also describing it by the name of its ecclesiastical or civil division. It had also been held, that the statement of the county alone in which the lands lay was sufficient (*l*). When the premises were situated in different parishes, it has been usual to enumerate the whole as lying in one parish, and to repeat the description as lying in the other parish: but it was probably sufficient to describe the whole as lying in the parishes of *A.* and *B.* (*m*); for it was not necessary in ejectment to aver the premises to be in a parish; if they were described as being in the parish of *A.* and *B.*, the Court would construe it to mean part in the parish of *A.* and part in *B.*; *B.* being the name of a parish (*n*). With respect to the certainty required in describing the locality of the premises sought to be recovered, so much certainty was not required in describing the locality, as in the description of the premises; for instance, where in ejectment the premises were described as being in the parish of Westbury, and it was proved that there were two parishes of Westbury, viz. Westbury on Trym, and Westbury on Severn; it was held, that this was not a fatal variance (*o*): so where the premises were described as being in Farnham, and they were

(*k*) *Anon.*, 6 Mod. 222; *Mostyn* v. *Fabrigas*, Cowp. 161, 176.

(*l*) *Doe* d. *Edwards* v. *Gunning*, 7 Ad. & El. 240; 2 Nev. & Per. 260; Will. Wol. & Dav. 460.

(*m*) 2 Chit. Plead. 671, n., 7th ed.

(*n*) *Goodtitle* d. *Brembridge* v. *Walker*, 4 Taunt. 671; but see contra, *Doe* d. *Merriott* v. *Edwards*, 1 Mood. & Rob. 319.

(*o*) *Doe* d. *James* v. *Harris*, 5 Maule & Selw. 326.

proved to be in Farnham Royal; it was held, that this was not a fatal variance, unless it could be shown that there were two Farnhams (*p*): so where the premises were laid to be in the parish of St. Luke, in the county of Middlesex, and there are two parishes of St. Luke in that county, the one St. Luke, Chelsea, and the other St. Luke, Old Street, or more commonly called St. Luke, Middlesex; it was held not to be a fatal variance (*q*); but where premises where described as being in the united parishes of St. George the Martyr and St. George's, Bloomsbury, and were proved to be situated in St. George's, Bloomsbury, only: the variance was held to be fatal, although the parishes were united by act of parliament, for the purpose of a joint provision for the poor (*r*). It would seem that the omission of all local description was error, though the county and vill in which the demise was made were stated in the declaration, and the county was stated in the margin (*s*). In one case it was held, that the vill in which the demised lands lie, might, after verdict, be collected from the vill in which the ejectment is laid to have been committed (*t*). These matters, however, are now of less importance than heretofore, seeing that, in addition to the power of obtaining better particulars, by the 222nd section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, and the 17 & 18 Vict. c. 125, s. 96, judges of the superior Courts are bound to make all such amendments as may be necessary for determining the real questions between litigants (*u*).

(b) *Persons bringing the Action.*

Title of Parties.

We have seen that in the writ in ejectment are to be stated the names of all the persons in whom the title is alleged to be, and that by the 222nd section of the Common Law Procedure Act, 15 & 16 Vict. c. 77, and the 17 & 18 Vict. c. 125, s. 96, large powers of amendment are conferred upon the judges of the superior Courts, which they are bound to exercise for the purpose of determining the real questions in controversy between suitors. We have now to consider by what parties ejectment may be maintained. It may be maintained for freehold lands, by a person attainted of felony, when there has been no office found on behalf of the king (*v*). A corporation aggregate is not bound to mention in the writ the Christian names of those who compose it; but if the corporation be sole, the name of baptism had better be inserted (*x*).

Title of Trustees.

Where a term is limited to trustees, for securing the payment of an annuity, or portions, or the like, although the trustees seldom act, it

(*p*) *Doe* d. *Tollet* v. *Salter*, 13 East, 9.
(*q*) *Doe* d. *Boys* v. *Carter*, 1 You. & Jer. 492.
(*r*) *Goodtitle* d. *Pinsent* v. *Lamminman*, 2 Camp. 274; 6 Esp. 128.
(*s*) *Doe* d. *Rogers* v. *Bath*, 2 Nev. & Man. 440.
(*t*) *Goodright* d. *Smallwood* v. *Strother*, 2 W. Black. 706.
(*u*) See p. 852 a.
(*v*) *Doe* d. *Griffith* or *Evans* v. *Pritchard*, 5 Barn. & Adol. 765; 2 Nev. & Man. 489.
(*x*) Run. Eject. 150; and see ante, Sect. 4, p. 742.

will be advisable to insert in the writ their names, and also that of the cestui que trust (*y*). Application, however, should in strictness be first made to such trustees, for their consent to use their names; and where the names of any parties are inserted in the writ without their consent, the Court, on motion, will probably order their names to be struck out of the declaration, unless the justice of the case should be thereby defeated (*z*): and the party served with the writ may, before appearance, move the Court for that purpose (*a*). The Court will not interfere on behalf of either party, where there is a dispute as to the inheritance (*b*). In one case, under the old system, the Court refused, at the instance of the defendant, to interfere against a plaintiff, who had laid a demise by the assignees of a bankrupt without their permission; they having given up the property to the bankrupt, and the plaintiff claiming under him (*c*). In another case the Court struck out the name of a lessor of the plaintiff, under whom the defendant claimed, the action being defended to protect his interest against that of the lessors of the plaintiff (*d*). Where the plaintiff obtained a verdict in ejectment, on a count on a supposed demise by a party, without his authority, and without his concurring in the action, the Court set aside the verdict (*e*).

Title of Joint Tenants and Tenants in Common.

Questions of great nicety have arisen as to the right of joint tenants in common and coparceners to join or sever in actions of ejectment. These questions have, however, been rendered unimportant by the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 169, in pursuance of which the writ will state indiscriminately the names of all the persons in whom the title is alleged to be. It may, however, be observed, that it is not compulsory upon joint tenants or coparceners to join in the writ of ejectment, as each may sue; it having been decided, that ejectment will lie at the suit of each for the recovery of the whole premises, although the joint tenancy is severed by the separate letting (*f*). So one joint tenant may maintain ejectment for his own share of a copyhold, descending by custom to all the children equally of the tenant last seised; but it will be considered as a severance of the tenancy (*g*). Where, by an under-lease power was reserved, on non-payment of rent, "to the lessors and the original lessor" to enter; it was held, that the demise was properly laid to be by the lessors alone, and that it need not be a joint demise by the lessors and the original lessor (*h*).

Overseers.

When a pauper has been let into possession of parish property by

(*y*) *Morris* v. *Barry*, 1 Wils. 1; Run. Eject. 211.
(*z*) Adams, Eject. 168, 4th ed.
(*a*) *Doe* d. *Shepherd* v. *Roe*, 2 Chit. 171.
(*b*) *Doe* d. *Prosser* v. *King*, 2 Dowl. 580.
(*c*) *Doe* d. *Vine* v. *Figgins*, 3 Taunt. 440.
(*d*) *Doe* d. *Hurst* v. *Clifton*, 4 Ad. & El. 809; *S. C.* nom. *Doe* d. *Orchard* v. *Stubbs*, 6 Nev. & Man. 857.
(*e*) *Doe* d. *Hammek* v. *Fillis*, 2 Chit. 178.
(*f*) *Doe* d. *Lutham* v. *Fenn*, 3 Camp. 90.
(*g*) *Roe* d. *Raper* v. *Lonsdale*, 12 East, 9; *S. P. Doe* d. *Marsack* v. *Read*, 12 East, 57; and see *Doe* d. *Whayman* v. *Chaplin*, 3 Taunt. 120.
(*h*) *Doe* d. *Bedford* v. *White*, 4 Bing. 276; 12 Moore, 526; and see *Doe* d. *Barney* v. *Adams*, 2 Cr. & Jerv. 232; 2 Tyr. 289.

the parish officers, the title ought to be laid in the parish officers for the time being, when the ejectment is brought (*i*).

When the Court will assist the Title of the Claimant.

Where, under the old practice several demises were apparently inconsistent, the Court, to assist the title of the plaintiff, would perhaps have permitted him to enter a non pros. as to all the demises but that which he could legally sustain: and after verdict, if by any means it could be presumed that the plaintiff had title, as stated in the declaration, the Court would support it. Where a declaration in ejectment, by churchwardens and overseers, contained two sets of counts, one describing them by their *office* without their *names*, and the other by their *names* without their *office*; it was held, that the objection, if any, was cured after verdict (*k*). In a similar case, the Court ordered one set of counts to be struck out (*l*). So where the demise was laid to be by the mayor, burgesses, &c., of the borough town of *M.*, and on the trial it turned out from the charter, that the name of the corporation was "the mayor, &c., of *M.*; it was held, that this was no variance, it appearing from the charter, which was in evidence, that *M.* was a borough town (*m*). These points, however, are now of small practical importance, since the passing of the Common Law Procedure Act, 15 & 16 Vict. c. 76, and the provisions contained in sections 222, 143, and 144, and in the 17 & 18 Vict. c. 125, s. 96, relating to amendment and arresting the judgment.

(c) *Writ. Date.*

The Writ should be dated subsequently to the Accrual of Title.

As the claimant must recover by the strength of his own title, he must show a good and subsisting one at the time of the ejectment brought; and must, therefore, state in the writ some day on or subsequent to which his title accrued (*n*). It will be the better way to lay the day as far back as the claimant's title will admit (*o*).

Heirs.

In ejectment on the demise of an heir by descent, the demise was laid on the day the ancestor died, and held well enough after verdict; for as to the fraction of a day, a fiction of law may heal, but will not hurt (*p*). So it was held that a posthumous son, taking under the

(*i*) *Doe* d. *Pitminster* (*Churchwardens*) v. *Roe*, 1 Will. Wol. & Hod. 347. See the statute 59 Geo. III. c. 12, s. 17, which empowers churchwardens and overseers to take lands and hereditaments in the nature of a body corporate, and declares that, in all actions brought in respect thereof, it shall be sufficient to name the churchwardens and overseers for the time being, describing them as the churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish. Ante, 743.

(*k*) *Doe* d. *Orleton* v. *Harpur*, 2 Dowl. & Ryl. 708.

(*l*) *Doe* d. *Llandesilio* v. *Roe*, 4 Dowl. 222; Tyr. & Gr. 1084.

(*m*) *Doe* d. *Maldon* (*Corporation*) v. *Miller*, 1 Barn. & Ald. 699.

(*n*) Esp. N. P. 444; Run. Eject. 214; *Goodtitle* d. *Galloway* v. *Herbert*, 4 Term Rep. 680.

(*o*) Bull. N. P. 87. See ante, 656. If, however, a lessor, after entry for breach of the terms of a lease, brings an action for damages, the day of the demise in the ejectment will be taken as the day of his reentry, so that he will not be able to recover damages for rent accruing after that day; *Oldershaw* v. *Holt*, 12 Ad. & El. 590; 4 Per. & Dav. 307; Arn. & Hod. 1.

(*p*) *Roe* d. *Wrangham* v. *Hersey*, 3 Wils. 274; *Doe* d. *Graves* v. *Wells*, 10 Ad. & El. 427; 2 Per. & Dav. 396.

statute 10 & 11 Will. III. c. 16, might lay the demise from the day of his father's death; for the defendant may be estopped to say the plaintiff was not born at the time of the demise laid (*q*).

Executors.

An executor may state his title to have accrued before probate granted (*r*).

Administrators.

Where a sequestration of glebe land was published after the expiration of a notice to quit, a demise by the rector, laid on a day subsequent to the expiration of the notice, and preceding the publication, was held good, though the bishop had previously indorsed the writ—"Let sequestration issue (*s*)."

In ejectment on a forfeiture of a lease, the title may be stated to have accrued on the day on which the forfeiture was incurred (*t*). So it may be laid on the same day that a disclaimer was made (*u*). Where the lease contained the usual clause of re-entry, and a covenant generally to repair, with a further covenant, within three months after notice, to repair the defects pointed out in the notice, the title may be laid on a day before the expiration of the three months (*x*). It was no ground of nonsuit, in ejectment under the statute 4 Geo. II. c. 28, s. 2 (*y*), for a forfeiture by non-payment of rent, that the service of the declaration was on a day subsequent to that of the demise to *John Doe*, if it appeared that there was rent in arrear, and no distress on the premises at the time the declaration was served (*z*).

After a Fine levied.

Where a fine was levied with proclamations, and an actual entry was necessary to avoid it, it was held that the demise must be laid after such entry (*a*): but where the plaintiff's lessor entered, and afterwards levied a fine, and then an ejectment was brought, and the demise laid before the fine, it was held well enough (*b*).

Surrenderees of Copyholds and Assignees.

In case of copyhold premises, the surrenderee may lay the demise on a day between the times of surrender and admittance, provided he be admitted before trial; and this rule extends to all persons but the lord (*c*). The same principle, however, did not apply where assignees of a bankrupt sought to recover freehold lands; as the bargain and sale, under an old Bankrupt Act, did not relate back to the act of bankruptcy, so as to vest the title in the assignees from that time; and therefore a demise laid after the act of bankruptcy, but before the bargain and sale, was bad (*d*): now, however, it would be sufficient if after the appointment of the assignees (*e*). In like manner, the con-

(*q*) Bull. N. P. 105.
(*r*) *Roe* d. *Bendall* v. *Summerset*, 2 W. Black. 694; ante, 235, 735.
(*s*) *Doe* d. *Morgan* v. *Bluck*, 3 Camp. 447.
(*t*) *Doe* d. *Graves* v. *Wells*, 10 Ad. & El. 427; 2 Per. & Dav. 396.
(*u*) *Doe* d. *Bennett* v. *Long*, 9 Car. & Pay. 773.
(*x*) *Roe* d. *Goatley* v. *Paine*, 2 Camp. 520; and see *Horsefall* v. *Testar*, 7 Taunt. 385; 1 Moore, 89.
(*y*) Ante, 718.
(*z*) *Doe* d. *Lawrence* v. *Shawcross*, 3 Barn. & Cres. 752; 5 Dowl. & Ryl. 711.
(*a*) *Doe* d. *Compere* v. *Hicks*, 7 Term Rep. 433.
(*b*) *Musgrave* d. *Hilton* v. *Shelley*, 1 Wils. 740.
(*c*) Ante, 740.
(*d*) *Doe* d. *Esdaile* v. *Mitchell*, 2 Maule & Selw. 446.
(*e*) See ante, 224.

veyance of an insolvent's property by the clerk of the peace, under an old Insolvent Act, did not relate back; and therefore a demise laid before the execution of the conveyance was too soon (*f*).

In Cases of Tenants at Will.

With respect to tenants at will, the plaintiff's title shall be stated to have accrued subsequently to the time when possession is demanded: therefore where possession had been demanded on the 5th of October of a tenant at will, and on ejectment being brought, the demise was laid on the 1st of October; it was adjudged that the plaintiff could not recover, the tenancy not having been determined until after the day of the demise laid in the declaration (*g*).

In cases where there are different Periods of Entry.

Where a tenant held the principal part of the premises from the 2nd of February, and the remainder from the 1st of May, and a six months' notice to quit was given before the 2nd of February, it was considered uncertain whether he could recover in ejectment for the part held from the 1st of May, on a demise laid before that day (*h*).

(d) *Subject-Matter.*

Description of the Premises.

The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 168, enacts, that the "property shall be described in the writ with convenient certainty." The decisions on this point previously to the passing of the above act may be useful. It was necessary that the declaration should state both the quantity and the nature of the land to be recovered (*i*); therefore, where the ejectment was for five closes of arable and meadow, called ——, containing twenty acres in D., upon not guilty pleaded, and verdict for the plaintiff, judgment was arrested, because it was not shown how much there was of one and how much of the other (*j*). The plaintiff was not, however, bound to declare for the exact quantity which he sought to recover, but might claim any intermediate quantity he thought proper; as, for instance, one thousand messuages, one thousand acres of pasture land, or one thousand acres of arable land, &c.: and he would recover according to the quantity to which he proved a *title*. Care, however, was taken to state a greater number than the quantity claimed; for though part might be recovered on a demand for the whole, yet the reverse did not hold; and if the plaintiff proved more than he had declared for, he was not entitled to recover it (*k*). Upon the same principle, if the plaintiff proved a title to but a moiety of that for which he declared, he only recovered such half; thus, where he declared for a house, and the proof went to show that only part of it was built on the plaintiff's land by encroachment, he recovered so

(*f*) *Doe* d. *Whatley* v. *Telling*, 2 East, 257. See ante, 229.

(*g*) *Goodtitle* d. *Galloway* v. *Herbert*, 4 Term Rep. 680. See ante, 192.

(*h*) *Doe* d. *Davenport* v. *Rhodes*, 11 Mees. & Wels. 600; 1 Dow. & Low. 292. See ante, Book I., Chap. VII., Sect. 6, (c), p. 297.

(*i*) See ante, Sect. 3, p. 720, &c.

(*j*) *Knight* v. *Syms*, 1 Salk. 254.

(*k*) *Denn* d. *Burgis* v. *Purvis*, 1 Burr. 330; *Guy* v. *Rand*, Cro. Eliz. 12.

much only as was built on his land (*l*). But where the plaintiff's, being tenants in common, sought to recover possession of premises, and it appeared that there were other tenants in common, but no evidence was given of their number; it was held, that the plaintiffs were not entitled to recover, it not being shown to what portion of the premises they were entitled; the onus probandi in such a case being apparently on them (*m*).

SECT. 6.—*Service of Writ in Ejectment.*

(a) *How made.*

Writ should be personally served.

As the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 170, enacts, that the writ in ejectment "shall be served in the same manner as an ejectment has heretofore been served, or in such manner as the Court or a judge shall order," the decisions relating to the service of a declaration in ejectment will be applicable. It has been held, that the declaration in ejectment—being considered as the process to bring the tenant into Court—ought in general to be personally served upon him, and the purport of it explained (*n*) at the same time. If the tenant refused to receive the declaration, it might be left near him, with an explanation of the nature of the service (*o*); or with a son living with the tenant (*p*); or at his house, he having directed it should be left there (*q*). So where another person prevented it from being given to the tenant, it might be left near him (*r*). A service on a person who denied that he was tenant, but whom a neighbour said that from the description he had no doubt was the tenant, has been held good (*s*). So if the tenant by fraud prevented a regular service, judgment might still be obtained (*t*). Even a tender of the declaration, and reading the notice aloud, where the tenant refused to receive it, or ran away, and shut the door, or threatened with a gun to shoot the person serving it if he came near, have been held good service upon application to the Court (*u*). So where the person making the service was assaulted and forced outside the gates of the prison in which the tenant was confined, the declaration not being left, it was held sufficient for a rule nisi for judgment (*x*). A service, however, on the *person* in possession would not suffice, if it did not appear that he was also the *tenant* in

(*l*) *Goodwin* v. *Blackman*, 1 Lev. 334.

(*m*) *Doe* d. *Hellyer* v. *King*, 6 Exch. Rep. 791.

(*n*) See post, 774.

(*o*) *Doe* d. *Vesque* v. *Roe*, 2 Dowl. 449; *Doe* d. *Lord Somers* v. *Roe*, 5 Dowl. 552; Will. Wol. & Dav. 220; *Wright* d. *Bayley* v. *Wrong*, 2 Chit. 185; *Doe* d. *Lowndes* v. *Roe*, 7 Mees. & Wels. 439; *Doe* d. *Forbes* v. *Roe*, 2 Dowl. 452.

(*p*) *Doe* d. *Grimes* v. *Roe*, 4 Dowl. 591; 1 Har. & Wol. 671.

(*q*) *Doe* d. *Marlborough* (*Duke*) v. *Roe*, Wol. P. C. 66.

(*r*) *Anon.*, 2 Chit. 185.

(*s*) *Doe* d. *Hunter* v. *Roe*, 5 Dowl. 553; Will. Wol. & Dav. 195.

(*t*) *Doe* d. *Frith* v. *Roe*, 3 Dowl. 569; *Doe* d. *Colson* v. *Roe*, 6 Dowl. 765.

(*u*) 2 Sell. Prac. 173; and see *Doe* d. *Wills* v. *Roe*, 3 Dowl. 582; and *Doe* d. *Rees* v. *Roe*, 7 Scott, 846.

(*x*) *Doe* d. *Mann* v. *Roe*, 11 Mees. & Wels. 77.

possession (*y*); and the rule applied to cases where more than one person was tenant (*z*).

Where Service may be made.

When service was made personally on the tenant himself, it might be made at any place (*a*), even out of the country (*b*). Where it was made upon the wife of the tenant, it might be made either on the premises, or at the husband's house elsewhere; or perhaps at any other place, if it were shown that the husband and wife were living together at the time (*c*); but a service upon any other person must always have been made upon the premises. Where a declaration and notice was partly read over to the tenant off the premises, and the tenant having refused to take it, it was left with a servant on the premises, it was held a good service (*d*). Where a tenant in possession was very ill and afterwards died, and a declaration was served on a person at the house where he was staying at the time of his death, which was not the premises sought to be recovered; it was held not to be good service (*e*). Where service was made at a house at which it was sworn it was believed the tenant was, but was denied for the purpose of avoiding service, a rule nisi was granted (*f*).

Service where there are several Tenants in Possession.

If there were several tenants in possession, the plaintiff, in order to be regular, ought to have served a declaration upon each of them separately (*g*); and a service on one of a declaration and notice, addressed to another, was not good (*h*). A service on one of two tenants in possession, with another service on the same tenant for the other, and an explanation given, was not sufficient (*i*); so a service on the wife of one of several tenants was held not to be good service upon all (*k*). It was, however, considered that service upon one of two tenants in possession might be good service on both (*l*). In the case of joint tenants, a service on one of two joint tenants would have been good as to both (*m*); but not if the notice to appear were addressed to only one by name (*n*); nor if it did not appear that they both lived in the same house (*o*); nor if the servant were served and not the tenant (*p*). Service on one of two joint tenants, who were also copartners in trade,

(*y*) 1 Tidd's Prac. 1215.
(*z*) *Doe* d. *Bromley* v. *Roe*, 1 Chit. 141.
(*a*) *Savage* v. *Dent*, 2 Stra. 1064.
(*b*) *Doe* d. *Daniel* v. *Woodroffe*, 7 Dowl. 404.
(*c*) See post, 762.
(*d*) *Doe* d. *Hope* v. *Roe*, 8 Com. B. Rep. 770.
(*e*) *Doe* d. *Hartford* v. *Roe*, 1 Har. & Wol. 352.
(*f*) *Doe* d. *Turncroft* v. *Roe*, 1 Har. & Wol. 371.
(*g*) Bull. N. P. 98; *Doe* d. *Sloe* v. *Roe*, 8 Dowl. 66.
(*h*) *Doe* d. *Smith* v. *Roe*, 5 Dowl. 254; 2 Har. & Wol. 332.
(*i*) *Doe* d. *Elwood* v. *Roe*, 3 Moore, 578.
(*k*) *Doe* d. *Godlin*, East. T. 40 Geo. III. K. B. MS.
(*l*) *Doe* d. *Bailey* v. *Roe*, 1 Bos. & Pul. 369; *Doe* d. *Hutchinson* v. *Roe*, 2 Dowl. 418; *Doe* d. *Gaskell* v. *Roe*, 3 Tyr. 84.
(*m*) *Doe* d. *Williamson* v. *Roe*, 10 Moore, 493; *Doe* d. *Jordan* or d. *Tucker* v. *Roe*, 4 Dowl. 577; 1 Har. & Wol. 671; *Doe* d. *Clothier* v. *Roe*, 6 Dowl. 291; *Doe* d. —— v. *Roe*, 1 Dow. & Low. 373; *Doe* d. *Bennet* v. *Roe*, 7 C. B. R. 127. And in such case the Court will not set aside the declaration to prevent the necessity of bringing a cross action, *Doe* d. *Worthay* v. *Roe*, 10 Jur. 984.
(*n*) *Doe* d. *Braby* v. *Roe*, 10 C. B. 664.
(*o*) *Anon.*, Lofft, 301; but see *Doe* d. *Hewson* v. *Roe*, 2 Har. & Wol. 384; 5 Dowl. 404.
(*p*) *Anon.*, 1 Chit. 121.

has been held sufficient (*q*). Service on one of two executors who were in possession has been held sufficient (*r*). In one case the Court granted a rule nisi for judgment where the service was on one of three tenants in possession, and the affidavits did not state them to be joint tenants (*s*). Where three sisters lived together, and there was service on one of them, by delivery to the other two the day before term commenced, a rule nisi was granted (*t*). Where only four out of five parish officers who were in possession were served, the rule for judgment can only be drawn up as to the premises in the possession of the four (*u*). A service on two out of three assignees of the tenant, who was a bankrupt and could not be found, was sufficient to grant a rule nisi (*x*). An under tenant of part could not be considered as a joint tenant, so as to make a service on him good for the whole (*y*). A service on one of two tenants, who stated that the other was only his servant, was held good (*z*). Where a perfect service had been made on some of several tenants, but was insufficient as to others, judgment might have been obtained against the former, although it would have been refused against the latter (*a*).

Service where there are several Under-Tenants.

Where ejectment was brought for premises which had been demised on lease to one person, who had underlet to others, it was necessary that all the under-tenants should be served with a copy of the declaration (*b*): for although a service upon the original tenant might perhaps be sufficient, yet as a doubt existed upon the point, it was considered most prudent to serve the under-tenants. If, however, service were made upon the original tenant, and he appeared and pleaded, he could not afterwards release himself from the action, upon the ground that his under-tenants and not himself were in possession (*c*). Service on a landlord of premises let by him in single rooms to weekly lodgers, no part of which he himself occupied, was not good (*d*); but where premises usually let to weekly lodgers had been for some time unoccupied, service on the landlord was sufficient (*e*). Where lodgers could not be served, a service on the keeper of the house, at the house, was held sufficient for a rule nisi for judgment (*f*).

(*q*) *Doe* d. *Hall* v. *Roe*, Will. Wol. & Dav. 392; *Doe* d. *Tomkins* v. *Roe*, Will. Wol. & Dav. 49; *Doe* d. *Overton* v. *Roe*, 9 Dowl. 1039; but see *Doe* d. *Field* v. *Roe*, 2 Chit. 174; *Anon.*, 2 Chit. 176.

(*r*) *Doe* d. *Strickland* v. *Roe*, 4 Dow. & Low. 431.

(*s*) *Right* d. —— v. *Wrong*, 2 Chit. 175.

(*t*) *Doe* d. *Grimes* v. *Roe*, 4 Dowl. 86; 1 Har. & Wol. 369.

(*u*) *Doe* d. *Weeks* v. *Roe*, 5 Dowl. 405; 2 Har. & Wol. 335.

(*x*) *Doe* d. *Fisher* v. *Roe*, Will. Wol. & Dav. 219.

(*y*) *Doe* d. *Childers* v. *Roe*, 2 Har. & Wol. 121.

(*z*) *Doe* d. *Sheppard* v. *Roe*, Will. Wol. & Dav. 75.

(*a*) *Doe* d. *Murphy* v. *Moore*, 2 Chit. 176: *Doe* d. *Henson* v. *Roe*, 1 Dow. & Low. 657.

(*b*) *Doe* d. *Darlington* (*Lord*) v. *Cock*, 4 Barn. & Cres. 259.

(*c*) *Roe* v. *Wiggs*, 2 New Rep. 330: Adams, Eject. 190, 4th ed.

(*d*) *Doe* d. *Hubbard* v. *Roe*, 2 Har. & Wol. 333.

(*e*) *Doe* d. *Hayne* v. *Roe*, Will. Wol. & Dav. 72.

(*f*) *Doe* d. *Threader* v. *Roe*, 1 Dowl. N. S. 261.

If one part of the premises were vacant, and the other in the occupation of a tenant, it was sufficient to serve the declaration on the tenant who occupied the one part, and affix a copy on the door of that part which was vacant (*g*). But inquiries had to be made as to there being any tenants of the part vacant (*h*).

Service where Part only is occupied.

Where the tenant had become bankrupt, a service on the messenger, on the premises, and on the official assignee, was held sufficient (*i*): and a service on two out of three assignees has been held sufficient to grant a rule nisi for judgment (*k*).

Service where the Tenant is a Bankrupt.

Where a lessee was dead, service on the person in possession and on the widow, who was sole administratrix, and was believed to hold the interest of the lessee, was held sufficient (*l*). Where a servant of the deceased tenant remained in possession, there being no legal representative, the plaintiff ought to endeavour to get possession; and if the servant resisted, he might be treated as tenant (*m*).

Service where the Tenant is dead.

Where the tenant in possession absconded, or from accidental absence, or some other circumstance, could not be personally served, and the declaration had been served on some person residing at his house; such service on a wife, child, servant or agent of the tenant, has sometimes been held to be good (*n*): but in such a case, even though it appeared clearly that the tenant had been keeping out of the way for nine months, an attempt to serve him ought not to have been deferred until the day before the term (*o*). In a case decided in Ireland, the Court could only deem the service of the ejectment upon the known law agent and receiver of a person resident abroad, out of the jurisdiction, good service upon the party, upon the terms of making him give a month to make defence (*p*). The Court would not interfere to set aside a judgment against the casual ejector, where there had been a service on a son, and it was sworn that the tenant was keeping out of the way to avoid service, on an affidavit denying that fact, if it were not also stated that the tenant did not get the declaration before the first day of the term (*q*). If there was no person at the house, it was held proper to affix the declaration upon the door, or in some other way leave it upon the demised premises (*r*). A service under the statute 4 Geo. II. c. 28, s. 2 (*s*), by affixing the declaration on the

Service where the Tenant has absconded or is absent.

(*g*) *Doe* d. *Evans* v. *Roe*, 4 Moore, 469; *Doe* d. *Hindle* v. *Roe*, 3 Mees. & Wels. 279; 6 Dowl. 393; *Doe* d. *Timothy* v. *Roe*, 8 Scott, 126; *S. C.* nom. *Doe* d. *Emery* v. *Roe*, 1 Arn. 517. But see post, 769.

(*h*) *Doe* d. *Burroughs* v. *Roe*, 7 Dowl. 326; 1 Will. Wol. & Hod. 544.

(*i*) *Doe* d. *Baring* v. *Roe*, 5 Scott, 715; 6 Dowl. 456; 1 Arn. 2; *Doe* d. *Chadwick* v. *Roe*, 9 Dowl. 492; Wol. P. C. 122; *Doe* d. *Johnson* v. *Roe*, 1 Dowl. N. S. 493.

(*k*) *Doe* d. *Fisher* v. *Roe*, Will. Wol. & Dav. 219; see also *Doe* d. *Rowley* v. *Roe*, 11 Jurist, 309.

(*l*) *Doe* d. *Pamphilon* v. *Roe*, 1 Dowl. N. S. 186; *Doe* d. *Paul* v. *Hurst*, 1 Chit. 162.

(*m*) *Doe* d. *Atkins* v. *Roe*, 2 Chit. 179.

(*n*) *Doe* d. *Robinson* v. *Roe*, 3 Dowl. 11; *Doe* d. *Childers* v. *Roe*, 2 Har. & Wol. 121; *Doe* d. *Morpeth* v. *Roe*, 3 Dowl. 577; *Doe* d. *Luff* v. *Roe*, ibid. 575. See also post, 763, 764, 765, 766.

(*o*) *Doe* d. *Brickdale* v. *Roe*, 2 Har. & Wol. 333.

(*p*) *Anon.*, 12 Ir. Rep. 524.

(*q*) *Doe* d. *Protheroe* v. *Roe*, 4 Dowl. 385.

(*r*) *Sprightly* d. *Collins* v. *Dunch*, 2 Burr. 1116; *S. P. Anon.*, Lofft, 266, 273.

(*s*) See ante, 718.

door of the premises, would not be allowed, if there was any probability that the tenant could be personally served (*t*). Service upon the wife of the tenant in possession, who had left this kingdom, and was settled abroad, was sufficient (*u*): but in another case, where the affidavit of service stated that it had been left with the wife of the tenant in possession, the husband having absconded, it was held to be insufficient to found a motion for judgment against the casual ejector (*x*). Where service was effected by nailing on the door, and the tenant's wife afterwards called on the person who made it, and requested to know what she was to do with the paper, and he explained it to her, and recommended her to go to the plaintiff's attorney, to which she replied she would see her husband immediately, and recommend him to do so, it was held not to be sufficient (*y*). Where a tenant kept out of the way to avoid service, after having prevented the landlord from recovering under the statute 11 Geo. II. c. 19, s. 16, saying he disputed the landlord's title, and there had been service on the premises, on a female with whom the tenant cohabited, a rule nisi for judgment was granted (*z*). Where the premises were inaccessible, and the tenant kept out of the way, a service by leaving a copy at the counting-house of the tenant adjoining the premises was held sufficient (*a*). If a tenant in possession had left this country and resided abroad for the purpose of avoiding his creditors, judgment could not be obtained against the casual ejector, on an affidavit that the declaration was duly served on the premises, and a copy thereof affixed to the outer door; nor could the service of the declaration on the solicitor of such tenant be deemed good, unless he resided abroad for the express purpose of avoiding such service (*b*). Service on an agent, and by fixing a copy of the declaration on the premises, the tenant being supposed to be in America, has been held sufficient for a rule nisi for judgment (*c*). Where a tenant had absconded, and left the keys of the premises with an attorney to whom he had referred his landlord, it was held, that service on the attorney, and by affixing a copy of the declaration on the premises, was sufficient for a rule absolute for judgment (*d*).

Service upon the Wife.

Service on the wife of the tenant in possession has often been held good (*e*). The service might be made either on the premises, or at the husband's house elsewhere (*f*); or even at some other place if it were

(*t*) *Doe* d. *Pugh* v. *Roe*, 1 Scott, 464; 1 Hodges, 6.

(*u*) *Doe* v. *Roe*, 1 Dowl. & Ryl. 514.

(*x*) *Doe* d. *Harrison* v. *Roe*, 10 Price, 30. See next page.

(*y*) *Doe* d. *Briggs* v. *Roe*, 2 Cromp. & Jerv. 202; 2 Tyr. 211; 1 Dowl. 312.

(*z*) *Doe* d. *Croley* v. *Roe*, 2 Dowl. N. S. 344.

(*a*) *Doe* d. *Barrow* v. *Roe*, 1 Man. & Gran. 238; 1 Scott, N. R. 25.

(*b*) *Roe* d. *Fenwick* v. *Doe*, 3 Moore, 576.

(*c*) *Doe* d. *Tabay* v. *Roe*, 1 Dow. & Lew. 118.

(*d*) *Doe* d. *Dowston* v. *Roe*, 4 Man. & Gran. 765; 5 Scott, N. R. 174.

(*e*) *Goodright* d. *Waddington* v. *Thrustout*, 2 W. Black. 800.

(*f*) *Doe* d. *Moreland* v. *Baylis*, 6 Term Rep. 765; *S. P. Oates* d. *Chatterton* v. *Gater*, Term Rep. 765, n.; and see *Doe* d. *Baddam* v. *Roe*, 2 Bos. & Pul. 55; *Doe* d. *Bennell*

was to show that they were living together as man and wife, and therefore that it was probable that by such service the husband would have notice of the proceedings (*h*). In ejectment for stables, service on the tenant's wife at his dwelling-house was good (*i*). Service on the wife at a shed where the husband carried on his business, although not part of the premises, has been considered sufficient (*k*). So service on a wife near the premises has been held sufficient to grant a rule nisi for judgment (*l*). Service on a woman, representing herself to be the wife, was held sufficient, even where the affidavit did not state the deponent's belief that she was actually such (*m*). Service was held sufficient where the declaration was left in the shop, where the wife of the tenant in possession was, who refused to hear the notice read, and went out and shut the door after her (*n*). So where the wife refused to take the declaration, and the person serving it left it on a table, after having explained the nature of the proceeding; it was held, upon the wife throwing it after him, a sufficient service, by affixing it on the most conspicuous part of the premises (*o*). Where a copy of the declaration, after being read over and explained to the wife, was marked and left with a daughter, and was the next day seen on the premises, it was held a sufficient service (*p*).

Service on Relatives.

Service upon a relative of the tenant in possession, on the premises, was sufficient if it appeared that he received it before the day prior to which it was necessary that it should be served: thus it has been held, that service on the niece of the tenant in possession on the premises was good, if it appeared that the tenant had received it (*q*). It must, however, have appeared clearly that the declaration came to the hands of the tenant in possession: therefore service on a mother, or a brother or a son of the tenant in possession was held bad, for want of an acknowledgment by the tenant that he had received it (*r*). In one case a rule was granted to show cause why the service on a son of the tenant in possession (who said that his father was unable to attend to any business), and a subsequent admission by a person, who was be-

v. *Wrong*, 2 Dowl. & Ryl. 84; *Goodtitle* d. —— v. *Badtitle*, 1 Chit. 499; *Doe* d. *Wingfield* v. *Roe*, 1 Dowl. 693; *Doe* d. *Southampton* (*Lord*) v. *Roe*, 1 Hodges, 24; *Doe* d. *Mitchell* v. *Roe*, 1 Har. & Wol. 646.

(*g*) *Jenny* d. *Preston* v. *Cutts*, 1 New Rep. 308; *Doe* d. *Boulliott* v. *Roe*, 7 Dowl. 463; *Doe* d. *Williams* v. *Roe*, 2 Dowl. 89; *Doe* d. *Mingay* v. *Roe*, 6 Dowl. 182; 3 Hodges, 239; *Anon.*, 1 Chit. 500, n.; *Doe* d. *Briggs* v. *Roe*, 2 Cromp. & Jerv. 202; 2 Tyr. 211; 1 Dowl. 312.

(*h*) But see *Doe* v. *Roe*, 1 Dowl. & Ryl. 514; and *Doe* d. *Harrison* v. *Roe*, 10 Price, 30; ante, 762.

(*i*) *Doe* d. *Graef* v. *Roe*, 5 Scott, 797; 6 Dowl. 456; 1 Arn. 131.

(*k*) *Doe* v. *Roe*, 1 Dowl. 67.

(*l*) *Doe* d. *Bath* (*Marquis*) v. *Roe*, 7 Dowl. 692.

(*m*) *Doe* d. *Simmons* v. *Roe*, 1 Chit. 228; *Doe* d. *Walker* v. *Roe*, 4 Moore & Pay. 11; *Doe* d. *Bremner* v. *Roe*, 8 Dowl. 135; *Doe* d. *Grange* v. *Roe*, 1 Dowl. N. S. 274.

(*n*) *Doe* d. *Neale* v. *Roe*, 2 Wils. 263.

(*o*) *Doe* d. *Courthorpe* v. *Roe*, 2 Dowl. 440; *S. P. Doe* d. *Nash* v. *Roe*, 8 Dowl. 305.

(*p*) *Doe* d. *Eaton* v. *Roe*, Will. Wol. & Dav. 392.

(*q*) *Anon.*, Lofft, 301.

(*r*) *Right* d. *Freeman* v. *Roe*, 2 Chit. 180; *Doe* d. *Smith* v. *Roe*, 1 Dowl. 614; *Doe* d. *Mitchell* v. *Roe*, 1 Har. & Wol. 646; *Doe* d. *Emerson* v. *Roe*, 6 Dowl. 786; *Doe* d. *Pattison* v. *Roe*, 10 Jurist, 34.

lieved to be the wife of the tenant in possession, that her husband had received it, should not be deemed good service (*s*): and where the tenant was ill, service on the daughter, who told the party serving that she had read and explained the declaration to her father, was held sufficient (*t*). So service on a daughter, who stated she had delivered the declaration to the tenant, who was bedridden, was held sufficient for a rule nisi (*u*). A service on a son on the premises, where the tenant afterwards came home the same day, has been held sufficient (*x*). Service on a son on the premises, where the tenant was met with immediately afterwards, and told what had been done, when he replied, "Then I have no time to lose," has been held sufficient for a rule nisi for judgment (*y*). Service on a sister, who said she received it on behalf of the tenant, was not sufficient, unless agency were shown (*z*). Where the person endeavouring to serve the declaration went to the house, but finding the door closed, knocked, but gained no admission, and upon looking through the window saw the niece of the tenant in possession, and, explaining through the door the nature and object of the service, pasted the declaration on the door; it was held sufficient for a rule nisi (*a*). In another case, service upon a son, who accepted it, and said he knew what it was for, and would deliver it over to his father, was held bad, although it appeared that both the father and son were attornies (*b*). Service on the daughter on the premises has been held insufficient, even for a rule nisi, although there may be reason to believe that the wife is aware of the proceedings, and keeps out of the way to avoid being served (*c*). But in another case, service on a daughter-in-law, who was part of the family on the premises, and who stated she delivered the declaration to her father-in-law, and that he said he would instruct his attorney, was held sufficient for a rule nisi for judgment (*d*). Service on a niece, with an affidavit from her that she delivered the declaration to the tenant, is sufficient (*e*). A service on a daughter, who stated the tenant was in a madhouse, but who was supposed to be keeping out of the way to avoid service, has been held sufficient to grant a rule nisi (*f*). In another case, where the tenant undoubtedly was in a madhouse, a notice on the daughter was held insufficient (*g*). A service on a

(*s*) *Anon.*, 2 Chit. 182; *Doe* d. *Wetherell* v. *Roe*, 2 Dowl. 441; *Doe* d. *Chaffey* v. *Roe*, 9 Dowl. 100; Wol. P. C. 65; but see post, 767, notes (*f*), (*g*).

(*t*) *Doe* d. *Cockburn* v. *Roe*, 1 Dowl. 692; *Doe* v. *Roe*, 2 Dowl. 414; *Doe* d. *Overy* v. *Roe*, 1 Dow. & Low. 803; 6 Man. & Gran. 754; 7 Scott, N. R. 519.

(*u*) *Doe* d. *Frost* v. *Roe*, 8 Dowl. 301; and see *Doe* d. *Farncombe* v. *Roe*, 10 Jurist, 525.

(*x*) *Doe* d. *Timmins* v. *Roe*, 6 Dowl. 765; 1 Will. Wol. & Hod. 347.

(*y*) *Doe* d. *Brickfield* v. *Roe*, 1 Dowl. N. S. 270.

(*z*) *Doe* d. *Tibbs* v. *Roe*, 3 Dowl. 330.

(*a*) *Doe* d. *Mortlake* v. *Roe*, 2 Dowl. 444.

(*b*) *Anon.*, T. T. 4 Geo. III. MS.

(*c*) *Doe* d. *George* v. *Roe*, 3 Dowl. 9.

(*d*) *Doe* d. *Sykes* v. *Roe*, 7 Scott, 121; see also *Doe* d. *Threader* v. *Roe*, 1 Dowl. N. S. 261.

(*e*) *Doe* d. *Eaton* v. *Roe*, 7 Scott, 124; *Doe* d. *Hine* v. *Roe*, 4 Man. & Gran. 766; 5 Scott, N. R. 174.

(*f*) *Doe* d. *Jones* v. *Roe*, Will. Wol. & Dav. 607.

(*g*) *Doe* d. *Brown* v. *Roe*, 6 Dowl. 270; 1 Will. Wol. & Hod. 86; see post, 771.

daughter in the tenant's presence was sufficient (*h*). Where the tenant was clearly keeping out of the way to avoid service, the Court would grant a rule nisi on a regular service on his son on the premises (*i*). So a rule nisi was granted where the service was on a nephew, who said the tenant refused to be seen (*k*).

Service on Agents.

Service by delivery of a declaration to an agent of a tenant in possession, who resided abroad, was sufficient (*l*), at all events for a rule nisi (*m*); but if the tenant was in this country it was not good (*n*). Circumstances, however, must be shown, from which agency can be inferred (*o*). Service on the wife of a son was held sufficient for a rule nisi where the tenant was abroad, and the son managed his business in his absence (*p*). Service on a person appointed by the Court of Chancery to manage an estate for an infant was insufficient (*q*). The Court would grant a rule nisi to make the service of the declaration on the clerk of a public body good service (*r*): so where the service was on the book-keeper of a public company (*s*). Service has been held to be good by the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 135, on the secretary of a railway company (*t*). Service on the secretary of the East India Company has been held sufficient (*u*). Service on the clerk of a company not incorporated, on five or six proprietors, and on the person in possession, has been held sufficient (*x*). Service on the matron and secretary of a charitable institution, with an acknowledgment by the solicitor, has been held sufficient (*y*). So a rule nisi was granted against the casual ejector, where the service was made on an attorney, who represented himself to be the agent for the tenants in possession, and consented to appear for them (*z*): but in another case, service on a person described as mortgagee in possession, by delivering it to his attorney, who undertook to appear for him, was not considered sufficient, without an acknowledgment by the mortgagee (*a*). An acceptance of a declaration by an attorney of the court in which the action is brought, was sufficient to ground a rule for judgment, but not if it were by an attorney of another court (*b*).

(*h*) *Doe* d. *Stedman* v. *Roe*, 1 Will. Wol. & Hod. 86.

(*i*) *Doe* d. *Luff* v. *Roe*, 3 Dowl. 575.

(*k*) *Doe* d. *Moody* v. *Roe*, 8 Dowl. 306.

(*l*) *Doe* v. *Roe*, 4 Barn. & Ald. 653.

(*m*) *Doe* d. *Treat* v. *Roe*, 4 Dowl. 278; 1 Har. & Wol. 526.

(*n*) *Doe* d. *Tomkins* v. *Roe*, Will. Wol. & Dav. 49.

(*o*) *Doe* d. *Nottage* v. *Roe*, 4 Man. & Gran. 28; 1 Dowl. N. S. 750; 4 Scott, N. R. 706.

(*p*) *Doe* d. *Potter* v. *Roe*, 2 Scott, 378; 1 Hodges, 316; and see *Fenn* d. *Knight* v. *Dean*, Barnes, 192.

(*q*) *Goodtitle* d. *Roberts* v. *Badtitle*, 1 Brod. & Bing. 385.

(*r*) *Anon.*, 2 Chit. 181; *Doe* d. *Ross* v. *Roe*, 5 Dowl. 147; 2 Har. & Wol. 124; *Doe* d. *Fisher* v. *Roe*, 10 Mees. & Wels. 21; 2 Dowl. N. S. 225; see also *Doe* d. *Martyns* v. *Roe*, 6 Scott, 610.

(*s*) *Doe* v. *Roe*, 1 Dowl. 23.

(*t*) *Doe* d. *Bayes* v. *Roe*, 16 Mees. & Wels. 98; *Doe* d. *Burgess* v. *Roe*, 4 Dow. & Low. 311.

(*u*) *Doe* d. *Coopers' Company* v. *Roe*, 8 Dowl. 134.

(*x*) *Doe* d. —— v. *Roe*, 1 Dow. & Low. 873; *Doe* d. *Bennet* v. *Roe*, 7 Dow. & Low. 127.

(*y*) *Doe* d. *Fishmongers' Company* v. *Roe*, 2 Dowl. N. S. 689.

(*z*) *Anon.*, 2 Chit. 181; *Doe* d. *Laundy* v. *Roe*, 12 C. B. 451.

(*a*) *Doe* d. *Collins* v. *Roe*, 1 Dowl. 613; see also *Doe* d. *Sturch* v. *Roe*, 1 Har. & Wol. 672.

(*b*) *Doe* d. *Walker* v. *Roe*, 2 Cromp. & Jerv. 381; 2 Tyr. 459; 1 Dowl. 569.

Service on the bailiff of the tenant was held sufficient, where it appeared to have come duly to the hands of the tenant's attorney, who promised to appear (c). So service on a person representing himself to be in possession for another, then temporarily absent, and who afterwards acknowledged the service, was sufficient (d). Where a tenant was keeping out of the way to avoid service, a service on an agent has been held sufficient (e). So service on a broker who had the key of the premises for the purpose of letting them, and by fixing a copy on the house, the tenant having absconded, has been held sufficient (f).

Service upon Servants and others.

Service upon a servant upon the premises was sufficient, if it appeared by the acknowledgment of the tenant (g), or his attorney (h), that the declaration came to his hands upon the first day of term (i): but without that, service by leaving the declaration with a servant of the tenant in possession was bad (k); even though the affidavit of service stated the deponent's belief that the tenant kept out of the way to avoid being served (l): or even where the premises were afterwards found deserted (m). Service on the clerk of an attorney for his master has been however held sufficient (n). Where the tenant was residing out of the country, a service on his servant was held sufficient to grant a rule nisi for judgment (o). So a service on a servant, who stated that the tenant was too ill to be seen, was held sufficient to grant a rule nisi (p). A labourer, who did not pay rent, has been held to be an occupier, and service on him has been held good (q). Service on a person found on the premises, not shown to be one of the tenant's family, was not good (r). Where, after several ineffectual attempts made to serve a tenant in possession, on occasion of the last of which his servant admitted that he was in the house, but refused to permit the person applying to see him, and the declaration was then delivered to the servant, the Court made an order that such service should be sufficient (s). So a service on a servant who said that the same thing had been tried before but without success, and fixing a copy on the premises, was held sufficient to grant a rule nisi, which was afterwards made absolute after a service on the same

(c) *Tenny* d. *Mills* v. *Cutts*, 1 Scott, 52.
(d) *Doe* d. *Walker* v. *Roe*, 1 Price, 399.
(e) *Doe* d. *Morpeth* v. *Roe*, 3 Dowl. 577.
(f) *Doe* d. *Scott* v. *Roe*, 8 Scott, 468; 6 Bing. N. C. 207; 8 Dowl. 254.
(g) *Roe* d. *Hambrook* v. *Doe*, 14 East, 441.
(h) *Doe* d. *Teverell* v. *Snee*, 2 D. & R. 5.
(i) 2 Arch. Prac. 8 ed. 924.
(k) *Doe* d. *Halsey* v. *Roe*, 1 Chit. 100; *Doe* d. *Read* v. *Roe*, 5 Dowl. 85; 1 Mees. & Wels. 633; Tyr. & Gr. 846; *Doe* d. *Dinorben* (*Lord*) v. *Roe*, 2 Mees. & Wels. 374; Mur. & Hurl. 140; *Doe* d. *Harleigh* v. *Roe*, 11 Jurist, 18.
(l) *Doe* d. *Jones* v. *Roe*, 1 Chit. 213; *Doe* d. *Pugh* v. *Roe*, 1 Hodges, 6; 1 Scott, 464.
(m) *Doe* d. *Dobler* v. *Roe*, 2 Dowl. N. S. 333.
(n) *Doe* d. *Bower* v. *Roe*, 2 Dowl. N. S. 923; *S. C. Doe* d. *Gower* v. *Roe*, 6 Scott, N. R. 41; 5 Man. & Gran. 375. But see contra *Anon.*, 11 Jurist, 1105; *Doe* d. *Fowler* v. *Roe*, 4 Dow. & Low. 639.
(o) *Doe* d. *Mather* v. *Roe*, 5 Dowl. 552; Will. Wol. & Dav. 220.
(p) *Doe* d. *Messer* v. *Roe*, 5 Dowl. 716; Will. Wol. & Dav. 393.
(q) *Gulliver* v. *Swift*, 2 Ld. Ken. 511.
(r) *Doe* d. *Story* v. *Roe*, 4 Man. & Gran. 843; 5 Scott, N. R. 838.
(s) *Doe* d. *Harvey* v. *Roe*, 2 Price, 112.

servant (*t*). Service on a clerk, after the tenant had walked away, saying he would have nothing to do with it, has been held sufficient (*u*). A service upon a servant on the premises of the tenant, who was absent, was held not sufficient, though the servant had subsequently acknowledged that he had given the declaration to his master (*x*). But in another case, where the affidavit stated that the tenant could not be found, such a service was considered good (*y*). Where the person attempting to serve the declaration called at the premises, and delivered the declaration, with a proper explanation, to the servant of the tenant in possession, who promised to give it to the tenant; and he afterwards, on the same day, saw the declaration in the hands of the attorney of the tenant in possession, a rule nisi was granted (*z*). Service by leaving the declaration with the turnkey of the prison in which the tenant was confined, and an acknowledgment by the tenant that he had received it, was held sufficient (*a*). Where the declaration was given to a person, who took it up stairs, and was heard to read it over and explain it, and the person making the service was told that it was to the tenant, who was bedridden, judgment was granted (*b*).

Service where Tenant is personated.

Where a tenant in possession was personated at the time of service by another, who accepted the service in his name, it was held to be a good service on the tenant (*c*).

Acknowledgment of Receipt of Declaration and Notice.

If service were made on the servant or other person, some acknowledgment by the tenant that the declaration came to hand before the first day of the term, was in general necessary to be sworn to, in order to render it sufficient. It was necessary that the acknowledgment should show that the declaration was received before the first day of term (*d*). A consent that the service should be sufficient without an acknowledgment that the declaration was received before the first day of the term, has been held sufficient (*e*). An acknowledgment of the receipt on a Sunday was insufficient (*f*). An acknowledgment made after the term had commenced was sufficient (*g*). An acknowledgment by letter, dated before the term, but not received until after the

(*t*) *Doe* d. *Wright* v. *Roe*, 5 Scott, 712; 6 Dowl. 445; 1 Arn. 2.

(*u*) *Doe* d. *Roberts* v. *Roe*, 6 Scott, N. R. 833; 6 Man. & Gran. 227.

(*x*) *Doe* d. *Thomas* v. *Roe*, 1 Moore & Scott, 435.

(*y*) *Doe* d. *James* v. *Roe*, 1 Moore & Scott, 597.

(*z*) *Doe* v. *Roe*, 2 Dowl. 184.

(*a*) *Doe* d. *Harris* v. *Roe*, 2 Dowl. 607.

(*b*) *Doe* d. *Tucker* v. *Roe*, 1 Har. & Wol. 671.

(*c*) *Fenn* d. *Tyrrell* v. *Denn*, 2 Burr. 1181.

(*d*) *Doe* d. *Martin* or *Marshall* v. *Roe*, 2 Ad. & El. 588; 4 Nev. & Man. 553; 1 Har. & Wol. 46; *Doe* d. *Harris* v. *Roe*, 1 Har. & Wol. 372; *Roe* d. *Hambrook* v. *Doe*, 14 East, 441; *Anon.*, 1 Chit. 118 (*a*); *Doe* d. *Finch* v. *Roe*, 5 Dowl. 225; 2 Har. & Wol. 334; but see *Smith* d. *Stourton* v. *Hurst*, 1 H. Black. 644.

(*e*) *Doe* d. *Middleton* v. *Roe*, 1 Dow. & Low. 149.

(*f*) *Goodtitle* d. *Mortimer* v. *Notitle*, 2 Dowl. & Ryl. 232; *S. C.* nom. *Doe* v. *Roe*, 5 Barn. & Cres. 764; *Doe* v. *Roe*, 8 Dowl. & Ryl. 592; *Doe* d. *Hine* v. *Roe*, 4 Man. & Gran. 766; 5 Scott, N. R. 174. See post, 771.

(*g*) *Doe* d. *Smith* v. *Roe*, 4 Dowl. 265; *Doe* d. *Durrant* v. *Roe*, 8 Scott, 459; but see *Doe* d. *Emsley* v. *Roe*, 1 Man. & Gran. 840; *Doe* d. *Figgins* v. *Roe*, 2 Scott, N. R. 448; 2 Man. & Gr. 294; *Doe* d. *Brittlebank* v. *Roe*, 4 Moore & Scott, 562.

term commenced, was sufficient for a rule nisi (*h*). It was necessary that the acknowledgment should be made by the tenant himself; for it was held, that the mere acknowledgment of the wife of the tenant in possession, that she had received a declaration in ejectment, would not bind the husband (*i*). It was, however, afterwards held, that such an acknowledgment was sufficient for a rule nisi for judgment (*k*). So the acknowledgment of the wife, that the tenant had received the declaration, was sufficient for a rule nisi (*l*). But such an acknowledgment ought to be made on the premises (*m*). The wife's declarations with respect to her husband being out of the way, could be used (*n*). Service on the servant of the tenant in possession, with a subsequent acknowledgment from the attorney of the latter, that the declaration had been received, has been held sufficient (*o*). Where the service was on the daughter of the tenant in possession (who was confined by indisposition), and she afterwards acknowledged that she had read over and explained the declaration to the tenant before the proper day of service; it was held sufficient for a rule nisi for judgment (*p*). Where there had been service on a daughter, and the tenant afterwards called on the attorney for the lessor of the plaintiff, and said that "something must be done," it was held a sufficient acknowledgment (*q*). So where, after a similar notice, the tenant wrote to the attorney and proposed terms of arrangement (*r*). But a mere conversation with the tenant on the subject of the action was not a sufficient acknowledgment (*s*). Where, however, the tenant refused to acknowledge the service, but referred to his attorney, it was held sufficient for a rule nisi for judgment (*t*). An acknowledgment by sending a plea and consent rule on the first day of the term was sufficient (*u*). An acknowledgment by the attorney of the tenant taking out a summons for particulars of the demise under which possession was sought to be recovered, was sufficient for a rule nisi (*x*). The rule was merely a rule nisi, where the acknowledgment had been made by the attorney of the tenant (*y*). An acknowledgment by one tenant that he had received the declaration from another, whom he called his under-tenant, would not be good

(*h*) *Doe* d. *Buttram* v. *Roe*, Will. Wol. & Dav. 69; and see *Doe* d. *Notting* v. *Roe*, id.; *Doe* d. *Gibbard* v. *Roe*, 9 Dowl. 844; 3 Scott, N. R. 363; 3 Man. & Gran. 87.

(*i*) *Goodtitle* d. *Read* v. *Badtitle*, 1 Bos. & Pul. 384; 1 Chit. 121; *S. P. Doe* d. *Tucker* v. *Roe*, 2 Dowl. 775; 4 Moore & Scott, 165.

(*k*) *Doe* d. *Morgan* v. *Roe*, 1 Dowl. N. S. 543; *Doe* d. *Greycoat Hospital* v. *Roe*, 7 Man. & Gran. 537; 8 Scott, N. R. 274.

(*l*) *Doe* v. *Chaffey* v. *Roe*, Wol. P. C. 65; 9 Dowl. 100.

(*m*) *Doe* d. *Royle* v. *Roe*, 4 Com. B. Rep. 256.

(*n*) *Doe* d. *Wilson* v. *Smith*, 3 Dowl. 379.

(*o*) *Doe* d. *Teverell* v. *Snee*, 2 Dowl. & Ryl. 5; *Doe* d. *Notting* v. *Roe*, Will. Wol. & Dav. 69; *Doe* d. *Buttram* v. *Roe*, id.; *Doe* d. *Mittins* v. *Roe*, 1 Will. Wol. & Hod. 207; *Doe* d. *Gibbard* v. *Roe*, 3 Scott, N. R. 363; 9 Dowl. 844; 3 Man. & Gran. 87; *Doe* d. *Reynolds* v. *Roe*, 1 Com. B. Rep. 711.

(*p*) *Doe* v. *Roe*, 2 Dowl. & Ryl. 12; and see *Doe* d. *Farncombe* v. *Roe*, 10 Jurist, 525.

(*q*) *Doe* v. *Agar* v. *Roe*, 6 Dowl. 624.

(*r*) *Doe* d. *March* v. *Roe*, 2 Hodges, 199.

(*s*) *Doe* d. *Ginger* v. *Roe*, 9 Dowl. 336.

(*t*) *Doe* d. *Elderton* v. *Roe*, 1 Dowl. N. S. 585.

(*u*) *Doe* d. *Terrell* v. *Roe*, Wol. P. C. 122.

(*x*) *Doe* d. *Evans* v. *Roe*, 2 Dowl. N. S. 334.

(*y*) *Anon.*, 2 Chit. 187.

against the latter (z). A rule nisi, that the service on a son should be deemed good service, was in one case made absolute, on the ground that the tenant did not deny, in his affidavit on showing cause, that he had received the declaration from his son (a).

When it must be treated as a Vacant Possession.

When there is no tenant upon the premises, a distinction must be taken between cases where the tenant has actually abandoned the possession, and where, although he has discontinued to occupy the premises, he has still retained the virtual possession of them. In the former case, the landlord must proceed in the ejectment, as upon a vacant possession (b), in the mode pointed out by the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 170, namely, by posting a copy of the writ of ejectment "upon the door of the dwelling-house or other conspicuous part of the property;" in the latter case, he must proceed in the ordinary way after having effected the best service of the writ in his power. It may be here observed, that the nice distinctions that have heretofore prevailed with respect to vacant possession will be less important in practice, inasmuch as the Court or a judge has the power of directing the mode of serving the writ in ejectment. Several cases, in which nice distinctions are drawn, have been decided upon the facts which amount to an abandonment. Where the tenant of a house locked it up, and quitted it, it was held that the landlord should treat it as a vacant possession (c). Again, where the lessee of a public-house took another, and removed his goods and family, but left beer in the cellar; it was held, that a proceeding as on a vacant possession was incorrect, because the lessee still continued in possession; and a case was mentioned, where leaving hay in a barn was held to be keeping possession; it, however, appeared in the latter case, that the attorney for the plaintiff knew whither the lessee had removed, and might have served him personally, which could not be done upon the premises. In the case of land, to which there was no house or barn, being vacated, it has been held, that if it were known where the tenant lived, he must be served (d): but probably a posting of the writ upon a tree on some conspicuous part of the land would be deemed a sufficient compliance with the 15 & 16 Vict. c. 76, s. 170. Where part of the property consisted of three unfinished houses, which were untenanted, and there was no property in them, the Court refused to allow service by sticking the declaration on the outer doors, but obliged the lessor of the plaintiff to proceed as upon a vacant possession (e). Where one of two tenants in possession had apparently entirely left the premises, it was held, that affixing the declaration on

(z) *Doe* d. *Harris* v. *Roe*, 1 Dowl. N. S. 704.

(a) *Doe* d. *Watts* v. *Roe*, 1 Har. & Wol. 199.

(b) *Doe* d. *Norman* v. *Roe*, 2 Dowl. 399, 428.

(c) *Doe* d. *Darlington* (*Lord*) v. *Cock*, 4 Barn. & Cres. 259.

(d) *Savage* v. *Dent*, 2 Strs. 1064.

(e) *Doe* d. *Schovell* or *Showell* v. *Roe*, 3 Dowl. 691; 2 Cromp. M. & Ros. 42; 5 Tyr. 734.

the door of the house, and a regular service on the other tenant, was sufficient for a rule nisi (*f*). Where three out of seven houses let by one lease were untenanted, and the lessee was dead intestate and insolvent, and service had been made on the attorney of a person who formerly received the rents, and also by sticking the declaration on the premises, the tenants of the other four having been properly served, the Court granted a rule nisi (*g*): and now, in ejectment for vacant possession, it is sufficient to direct the writ to the assignees and personal representatives of *S. B.*, deceased, the last occupier (*h*). Where the premises consisted of a mansion, and four small houses in a yard, surrounded by a wall, through which was a door to them, forming the only means of access; in one of which small houses resided a man who was permitted to live there merely to take care of them and of the mansion-house, the rest of the messuages being vacant; the Court refused a motion to make service on him good, and recommended the plaintiff to affix a declaration on the empty houses, and then to move that it be deemed good service. Where the tenant could not be found, and it could not be ascertained that the premises were legally vacant, service, by sticking the declaration on the premises, was held sufficient for a rule nisi for judgment (*i*).

Service when no Person in actual Possession.

Where no personal service could be made, either because there was no person on the premises, and the tenant could not be found, or because they were of such a description as not to afford a residence; a copy of the declaration and notice had to be affixed on the door or other conspicuous part of the property (*k*). So service by nailing the declaration on the barn-door of the premises, in which barn the tenant had occasionally slept, there being no dwelling-house, and the tenant not being to be found at his last place of abode, was allowed to be good service (*l*). But in ejectment for a stable, service of the declaration by nailing it to the door thereof, no person being therein, and then going to the tenant's house, and informing him of what had been done, was held insufficient to grant a rule that the service be deemed good (*m*). So where a house was found shut up three days before the term, and the declaration was fixed on the door, and it appeared that the tenant was in the habit of shutting up the house and staying away for several days together (*n*). Where an ejectment was brought for land taken into a public road, a motion for judgment was refused on a service on the commissioners of the road and their clerk (*o*).

(*f*) *Doe* d. *Osbaldeston* v. *Roe*, 1 Dowl. 456; *Doe* d. *Hindle* v. *Roe*, 6 Dowl. 393; 3 Mees. & Wels. 279; but see *Doe* d. *Norman* v. *Roe*, 2 Dowl. 399, 428.

(*g*) *Doe* d. *Pope* v. *Roe*, 7 Man. & Gran. 602; 8 Scott, N. R. 321; *Doe* d. *Chippendale* v. *Roe*, 7 C. B. Rep. 125.

(*h*) *Harrington* v. *Bytham*, 2 Com. Law Rep., Exch., 1033.

(*i*) *Doe* d. *Law* v. *Roe*, Will. Wol. & Dav. 187; *Doe* d. *Smith* v. *Roe*, Will. Wol. & Dav. 69; but see contra, *Doe* d. *Bracebridge* v. *Roe*, 7 Scott, 689.

(*k*) 15 & 16 Vict. c. 76, s. 170; *Doe* d. *Hill* v. *Roe*, 2 Chit. 178.

(*l*) *Fenn* d. *Buckle* v. *Roe*, 1 New Rep. 293.

(*m*) *Doe* d. *Lovell* v. *Roe*, 1 Chit. 505.

(*n*) *Doe* d. *Roupel* v. *Roe*, 1 Har. & Wal. 367.

(*o*) *Doe* d. *White* v. *Roe*, 7 Scott, 146; 3 Dowl. 71.

sextoness was held sufficient (*p*): so a service on a person who kept the keys, and on the wife of the late minister, who had absconded, was held sufficient (*q*): a service on the minister and on a trustee, and affixing the declaration on the door, has been held sufficient (*r*); so a service on a person who occupied a school-room attached to a chapel, and on the person who paid rates for the chapel, there being no fixed minister, is sufficient (*s*): but in another case a rule nisi only was granted where the service was on the trustee of the chapel (*t*).

Service for Chapels.

A service on the churchwardens and overseers of a parish, who rented a house for harbouring some of the parish poor, and did not otherwise occupy the house than by placing the poor in it, was deemed sufficient (*u*).

Service on Overseers.

In case the tenant is a lunatic, service should be made on his committee, and not on a servant (*x*). If there is no committee, service on the lunatic is good (*y*). Service on a daughter, the tenant being in a madhouse, is insufficient (*z*). In another case, judgment was entered up against a casual ejector where the service of the declaration was made on a person who had the care of the tenant in possession (a lunatic), and the management of his affairs, though not appointed by a regular committee (*a*). On an affidavit that one of the tenants was a lunatic, and that one *C.* lived with her, transacted her business, and had the sole conduct thereof, and of her person, but would not permit the deponent to have access to her, in order to serve her with the declaration, whereupon he delivered it to the said *C.*; a rule was made for the lunatic and *C.* both to show cause why such service should not be good; the service of the rule to be on *C.* alone (*b*).

Service on Lunatics.

(b) *When to be made.*

The writ in ejectment may be served at any time, with this exception, however, that the service must not be made on a Sunday: and under the old mode of procedure, where the declaration was left at the house of the tenant in possession on Saturday, and received by him on the next day, Sunday, before the essoin day; it was held, that this was service of *process* on a Sunday, within the statute 29 Car. II. c. 7, s. 6, and void (*c*). So an acknowledgment of the receipt on a Sunday of the declaration was held bad (*d*).

When the Service must be made.

(*p*) *Doe* d. *Kirk* or *Kirschner* or *Scott* v. *Roe*, 7 Dowl. 97; 6 Scott, 732; 1 Arn. 372.
(*q*) *Doe* d. *Dickens* v. *Roe*, 6 Scott, 754; 1 Arn. 387; 7 Dowl. 121; 6 Scott, 754.
(*r*) *Doe* d. *Smith* (*Bart.*) v. *Roe*, 8 Dowl. 509.
(*s*) *Doe* d. *Earl Somers* v. *Roe*, 8 Dowl. 292.
(*t*) *Doe* d. *Gray* v. *Roe*, 7 Dowl. 700.
(*u*) Barnes, 181.
(*x*) *Anon.*, Lofft, 461.
(*y*) *Doe* d. *Gibbard* v. *Roe*, 3 Man. & Gran. 87; 9 Dowl. 844; 3 Scott, N. R. 363.
(*z*) *Doe* d. *Brown* v. *Roe*, 6 Dowl. 270; 1 Will. Wol. & Hod. 86.
(*a*) *Doe* d. *Aylesbury* (*Lord*) v. *Roe*, 2 Chit. 183.
(*b*) 2 Sell. Prac. 174.
(*c*) *Doe* d. *Warren* v. *Roe*, 8 Dowl. & Ryl. 342; *Doe* v. *Roe*, ibid. 592.
(*d*) *Goodtitle* d. *Mortimer* v. *Notitle*, 2 Dowl. & Ryl. 232; *S. C.* nom. *Doe* v. *Roe*, 5 Barn. & Cres. 764; *Doe* d. *Hine* v. *Roe*, 4 Man. & Gran. 766; 5 Scott, N. R. 174.

When Service must be made in Cases of Landlord's Right of Entry accruing in or after Hilary or Trinity Terms.

The 117th section of the 15 & 16 Vict. c. 76, which is similar to 11 Geo. IV. and 1 Will. IV. c. 70, s. 36, enacts, that "in all actions of ejectment hereafter to be brought in any of her Majesty's Courts at Westminster by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments in any county, except London or Middlesex, where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord, in or after Hilary or Trinity Terms respectively, it shall be lawful for the claimant in any such action, at any time within ten days after such tenancy shall expire, or right of entry accrue as aforesaid, to serve a writ in ejectment in the form contained in the schedule (A.) to this Act annexed, marked No. 13 (*d*), except that it shall command the persons to whom it is directed to appear within ten days after service thereof in the Court in which such action may be brought; and the like proceedings shall be thereupon had as hereinbefore provided, save that it shall be sufficient to give at least six clear days' notice of trial to the defendant before the commission day of the assizes at which such ejectment is intended to be tried; and any defendant in such action may, at any time before the trial thereof, apply to a judge by summons to stay or set aside the proceedings, or to postpone the trial until the next assizes; and it shall be lawful for the judge, in his discretion, to make such order in the said cause as to him shall seem expedient."

This statute will apply only where the right of entry accrues during or immediately after an issuable term, and not where an assize has occurred between an issuable term and the right of entry (*e*). The right to the six days' notice of trial would be waived by the party's appearing at the trial (*f*). It cannot be objected at nisi prius that the writ was not served within ten days after the right of entry accrued pursuant to the act, the matter amounting to an irregularity only.

Indorsement on Writ.

The 31st section of the Irish Common Law Procedure Act, 16 & 17 Vict. c. 113, which resembles the 14th and 15th sections of the English Common Law Procedure Act, 15 & 16 Vict. c. 76, applies to actions of ejectment, and the provisions of it are mandatory, and service of the plaintiff will not be held good, when the indorsement on the writ is not made within the time limited by that section (*g*).

SECT. 7.—*Judgment by Default.*

(a) *Affidavit of Service.*

Title of the Affidavit.

The General Rules of Hilary Term, 1853, s. 112, framed since the passing of the Common Law Procedure Act, 1852, direct that "no judg-

(*d*) Ante, 749.

(*e*) *Doe* d. *Milner* v. *Roe*, 2 Low. M. & P. 578; *Doe* v. *Roe*, 2 Cr. & Jer. 123; 1 Dowl. 304; *Doe* d. *Norris* v. *Roe*, 1 Dowl. 547.

(*f*) *Doe* v. *Jepson*, 3 Barn. & Ald. 402.

(*g*) *Vandeleur* v. *Smith*, 3 Ir. Law Rep. N. S., 86.

otherwise, shall be signed without first filing an affidavit of the service of the writ according to the Common Law Procedure Act, 1852, and a copy thereof, or where personal service has not been effected without first obtaining a judge's order or a rule of Court authorizing the signing such judgment, which said rule of Court or order or a duplicate thereof shall be filed, together with a copy of this writ."

It will, therefore, be advisable to retain the old decisions as to the requisites of an affidavit to entitle a party to judgment against the casual ejector.

It was necessary that the affidavit of service should be intituled in the cause; but where in a declaration the lessors of the plaintiff were described to be executors, it was not necessary that the affidavit should, in stating the name of the cause, notice the character of the lessors stated in the declaration (*h*). An affidavit intituled "Doe on the demise of, &c.," instead of "demises," with the declaration annexed, was sufficient (*i*); but omitting the names of the lessors (*j*), or only stating one of them (*k*), was bad. Transposing the order of the names of the lessors was immaterial (*l*). It was unnecessary that the title should show how the demises were laid in the declaration (*m*).

What the Affidavit must state generally.

The declaration having been served, the person who delivered it was bound to make an affidavit of the service; but the word "served" was not indispensably necessary in the affidavit, if it appeared that it had been served (*n*). It was necessary that it should be positive and clear; so that if it were false, the person who made it might be subjected to the penalties of perjury: therefore an affidavit of service on *A. B.* tenant in possession, or *C.* his wife, was not sufficiently certain as to *either* (*o*); so, service on the wives of *A.* and *B.* who, *or* one of them, are tenants, was held not good. Where there were several tenants it had to be sworn specifically that each was personally served (*p*); and the declaration annexed to the affidavit ought to have contained the names of all, where the names of each was inserted alone in the copies served (*q*). It was necessary that the affidavit should qualify the statement that a true copy of the declaration annexed was served. An affidavit omitting the year when the service was made was insufficient (*r*). Where the affidavit of service was defective, the Courts would, in general, allow of supplemental affidavits (*s*).

(*h*) *Doe* d. *Jenks* v. *Roe*, 2 Dowl. 55; 3 Tyr. 602.

(*i*) *Doe* d. *Walters* v. *Roe*, Will. Wol. & Dav. 75.

(*j*) *Doe* d. *Watson* v. *Roe*, 5 Dowl. 389; Will. Wol. & Dav. 75.

(*k*) *Doe* d. *Cousens* v. *Roe*, 7 Dowl. 53; 4 Mees. & Wels. 68; 1 Horn. & Hurl. 191; *Doe* d. *Pryme* v. *Roe*, 8 Dowl. 340.

(*l*) *Doe* d. *Montgomery* v. *Roe*, 1 Dowl. & Low. 695.

(*m*) *Doe* d. *Muller* v. *Roe*, Will. Wol. & Dav. 607; *Doe* d. *Barles* or *Bankes* v. *Roe*, 5 Dowl. 447; Mur. & Hurl. 3.

(*n*) *Doe* d. *Jenkins* v. *Roe*, 5 Dowl. 155.

(*o*) Barnes, 173, 174.

(*p*) *Doe* d. *Healy* or *Levi* v. *Roe*, 7 Dowl. 102; 1 Arn. 373; *Doe* d. *Cock* v. *Roe*, 6 Scott, N. R. 961; 6 Man. & Gran. 273.

(*q*) *Doe* d. *Ludford* v. *Roe*, 8 Dowl. 500; see also *Doe* d. *Field* v. *Roe*, 1 Har. & Wol. 516.

(*r*) *Doe* d. *Foster* v. *Roe*, 8 Dowl. 784; see ante, 771.

(*s*) This affidavit will in some cases be presumed; as after a long and quiet pos-

Must show Tenant to be in possession.

It was necessary that it should appear clearly from the affidavit of service, that the person who was the object of such service was the tenant in possession (*d*); and an affidavit of service on the "person" in possession was insufficient (*e*). An affidavit stating a service on "*W. S.*, tenant in possession, together with *A. B.*, *C. D.* and *E. F.*," was held sufficient (*f*). It was sufficient if it impliedly showed that the defendant was tenant in possession at the time the declaration was served (*g*). Stating that the deponent believed the party held the premises under a lease, and that she had not underlet them, was not sufficient (*h*). So service of the declaration, on a person whom the deponent *believed* to be the tenant in possession, was bad (*i*). In one case, under very special circumstances, judgment was granted on an affidavit which merely swore to belief (*k*). The affidavit ought not to have introduced any qualifying expressions: thus, where it was stated that the service was on *A. B.* and *C. D.*, tenants in possession, *as executors*, it was held to be insufficient (*l*). The affidavit of service on an administratrix ought to have called her tenant in possession, and have stated that the property was leasehold (*m*). In the case of a vacant possession, where one copy of the declaration was sworn to have been fixed on the premises, and another served on the lessee, but not on the premises, it was considered necessary to state that such lessee was tenant in possession at the time of such service (*n*).

Must show that the Nature of the Service was explained.

The affidavit ought to have shown that the declaration and notice were read over *and* explained, so as to make the tenant fully acquainted with the import of the service; and it was not sufficient, if they were read over only to the party served (*o*): and this was necessary to be done, though from the party's rank in life (a schoolmaster) it was probable that he would understand the object of the service (*p*). But where the tenant was an attorney, the Court held it was unnecessary to explain (*q*). Reading over the *notice* without explaining it has been

session: thus, where an ejectment was brought by a landlord against his tenant, under the statute, and judgment was had against the casual ejector by default, and possession thereupon delivered, and, nearly twenty years after, the tenant brought an ejectment against the same landlord for the same premises, his recovery in which depended on the proof by the landlord of his former recovery; it was held, that the landlord was not obliged to produce such an affidavit, for as it was essentially requisite, the Court would presume that such affidavit was regularly made at the time, and that the judgment was founded on it; *Doe* d. *Hitchings* v. *Lewis*, 1 Burr. 618.

(*d*) *Anon.*, 1 Price, 399; *Anon.*, 1 Chit. 118, (*a*); *Doe* d. *Fraser* v. *Roe*, 5 Dowl. 720; Will. Wol. & Dav. 392; *Doe* d. *Jones* v. *Roe*, 5 Dowl. 226; *Doe* d. *Jackson* v. *Roe*, 4 Dowl. 609; *Doe* d. *Dolby* v. *Hitchcock*, 2 Dowl. N. S. 1.

(*e*) *Doe* d. *Oldham* v. *Roe*, 4 Dowl. 714.

(*f*) *Doe* d. *Doulan* v. *Roe*, Will. Wol. & Dav. 220.

(*g*) *Anon.*, 1 Chit. 500.

(*h*) *Doe* d. *Talbot* v. *Roe*, 1 Har. & Wol. 367.

(*i*) *Doe* v. *Badtitle*, 1 Chit. 215.

(*k*) *Doe* d. *George* v. *Roe*, 3 Dowl. 22: *Doe* d. *Frost* v. *Roe*, 3 Dowl. 314.

(*l*) *Doe* v. *Roe*, 2 Cromp. & Jerv. 45; 2 Tyr. 158; 1 Dowl. 295; *S. C.* nom. *Doe* d. *Holmes* v. *Roe*, 1 Price's P. C. 139.

(*m*) *Doe* d. *Rigby* v. *Roe*, 4 Dowl. 14; 1 Har. & Wol. 368; *Doe* d. *Paul* v. *Hurst*, 1 Chit. 162; *Doe* d. *Atkins* v. *Roe*, 2 Chit. 173.

(*n*) *Doe* d. *Seabrook* v. *Roe*, 4 Moore, 358.

(*o*) *Doe* d. *Wade* v. *Roe*, 6 Dowl. 51; 3 Hodges, 210; overruling *Doe* v. *Roe*, 1 Dowl. 428.

(*p*) *Doe* d. *Scriven* v. *Roe*, 1 Will. Wol. & Hod. 584.

(*q*) *Doe* d. *Portland* (*Duke*) v. *Roe*, 1 Dowl. N. S. 183; 4 Scott, N. R. 22; 3 Man. & Gran. 397; and see *Doe* d. *Fowler* v. *Roe*, 4 Dow. & Low. 639.

held sufficient (*r*). It need not, however, have stated it to have been read, if the tenant read it over, and said that he understood the meaning and intention of it (*s*): so with a subsequent acknowledgment of such fact, the service would have been good, without any statement of the reading or explanation (*t*). A rule nisi could only be obtained, in the first instance, for judgment against the casual ejector, where the affidavit did not state that the import of the declaration was explained to the servant to whom it was delivered (*u*). But it is no answer to a rule calling on the tenant to show cause why service of a declaration on his daughter on the premises should not be deemed good service, that the notice was not read over or explained to the daughter, and that the service took place at ten o'clock of the night preceding the first day of term, unless it is sworn that the tenant was not acquainted with the nature and meaning of the proceedings before the first day of term (*x*). A refusal by the tenant or the party served to hear any reading or explanation, would have been equivalent to that being done (*y*): but the affidavit ought to have stated particularly what took place (*z*). In one case, a rule nisi was granted, where it appeared, from circumstances, that the parties understood the contents of the declaration, though the affidavit did not state that it was explained to them (*a*). Where it became necessary to employ an interpreter, in order to explain to the tenant the object of the service, it was held to be sufficient, though the interpreter was not upon oath (*b*).

Affidavit in Cases of Proceedings on the Statute 4 Geo. II. c. 28.

Where the proceedings were under the statute 4 Geo. II. c. 28, s. 2, which has been substantially re-enacted by 15 & 16 Vict. c. 76, s. 210 (*c*),—it was necessary (in addition to the points already noticed), that the affidavit required in moving for judgment should state,—that half-a-year's rent was in arrear before declaration served, that the lessor of the plaintiff had a right to re-enter,—that no sufficient distress was to be found on the premises, countervailing the arrears of rent then due,—that the premises were untenanted, or that the tenant could not be legally served with the declaration (as the case is),—and that a copy of the declaration was affixed on the most notorious (stating what) part of the premises. An affidavit which merely stated the deponent's belief that there was no sufficient distress, was held not to be sufficient (*d*). But it was held to be sufficient in a case where the premises were kept locked, and access refused by the parties in possession, so that it could not be ascertained whether there was a suffi-

(*r*) *Doe* v. *Roe*, 2 Dowl. 199.
(*s*) *Doe* d. *Jones* v. *Roe*, 1 Dowl. 518.
(*t*) *Doe* d. *Quintin* v. *Roe*, Adams, Eject. 204, 4th ed.; *S. P. Doe* d. *Thompson* v. *Roe*, 1 Chit. 186; *Doe* d. *Stone* v. *Roe*, 3 Hodges, 14.
(*u*) *Anon.*, 2 Chit. 182; *Doe* d. *Downes* v. *Roe*, 4 Dowl. 565; 1 Har. & Wol. 671.
(*x*) *Doe* d. *Kenrick* v. *Roe*, 5 Dowl. & Low. 578.
(*y*) *Doe* d. *George* v. *Roe*, 3 Dowl. 541.
(*z*) *Doe* d. *Ward* v. *Roe*, 6 Dowl. 51; 1 Will. Wol. & Hod. 206.
(*a*) *Anon.*, 2 Chit. 184.
(*b*) *Doe* d. *Probert* v. *Roe*, 2 Dowl. 335; *Doe* d. *Cuttell* v. *Roe*, 9 Dowl. 1023.
(*c*) See ante, 718.
(*d*) *Doe* v. *Roe*, 2 Dowl. 413; *Doe* d. *Hicks* v. *Roe*, 1 Dowl. N. S. 180.

cient distress thereon or not (*e*). If more than half-a-year's rent was due, it was necessary that the affidavit should confine the allegation of the insufficiency of the distress to a half-year's rent (*f*). And it must appear that the landlord had a power to re-enter in respect of the non-payment of half-a-year's rent at the time of affixing the declaration (*g*).

hat Affidavit Service on ife or Servant ust state.

An affidavit of service on the wife of the tenant was insufficient, unless it stated that the wife lived with the husband, or that the service was made on the premises, or at the husband's house (*h*). It has been held sufficient that the affidavit should state that deponent served the wife, instead of the usual form, "served the tenant by delivering to the wife (*i*)." Where the declaration was served upon a servant or other third person (*k*) on the premises, it ought to have appeared upon the affidavit that the tenant had acknowledged himself to have received the declaration, or to have known of the service thereof previously to the first day of the term (*l*); but it was not necessary that it should appear where the acknowledgment was made (*m*). Service upon the mother of infant children interested in a chattel lease was not good service where it did not appear that the children had been served (*n*).

hat Affidavit ust state here no Per- n is in Possession.

Where no one was in the house, and the declaration was stuck up thereon, the affidavit must have stated the deponent's belief that the party absconded with a view to avoid the service (*o*). It must have stated that a copy of the declaration was left as well as affixed on the premises; and that the deponent had used due means (stating what) to find out the tenant's residence, and verily believed he had absconded (*p*). Accordingly an affidavit, where the tenant had left the premises, not stating that the lessor did not know where he was, was held insufficient (*q*). It ought to have gone on to state, that the person who served the declaration searched for the defendant, and could not find him, or did not know where he was to be found (*r*). It was not sufficient to show that the lessor of the plaintiff had been unsuccessful in two attempts to find the defendant at his dwelling-house, and had therefore stuck up the declaration on the premises.

y and before hom Sworn.

The affidavit might have been made either by the person who served

(*e*) *Doe* d. *Cox* v. *Roe*, 5 Dowl. & Low. 272; *Doe* d. *Green* v. *Roe*, 5 ibid. 274, n.

(*f*) *Doe* d. *Powell* v. *Roe*, 9 Dowl. 548; Wol. P. C. 160; and see *Doe* d. *Gretton* v. *Roe*, 4 C. B. 576.

(*g*) *Doe* d. *Dixon* v. *Roe*, 7 C. B. Rep. 134.

(*h*) See ante, 763.

(*i*) *Doe* v. *Roe*, 17 Law J., N. S., Exch., 176.

(*k*) The form should in such case be that the deponent served the tenant in possession by doing such and such acts; *Doe* d. *Pigott* v. *Roe*, 4 Dow. & Low. 88.

(*l*) Adams, Eject. 197, 4th ed.; *Doe* d. *Tindale* v. *Roe*, 2 Chit. 180; *Doe* v. *Roe*, 1 Dowl. & Ryl. 563; *Doe* d. *Macdougal* v. *Roe*, 4 Moore, 20; *Anon.*, 2 Chit. 187; see ante, 763.

(*m*) *Doe* d. *Durrant* v. *Roe*, 8 Scott, 459; but see *Doe* d. *Elmsley* v. *Roe*, 1 Man. & Gr. 840; *Doe* d. *Figgins* v. *Roe*, 2 Scott, N. R. 448; 2 Man. & Gr. 294.

(*n*) *Anon.*, 12 Ir. Law Rep. 525.

(*o*) *Doe* d. *Lowe* v. *Roe*, 1 Chit. 505, n.; 2 Chit. 177; *Doe* d. *Batson* v. *Roe*, 2 Chit. 176; *Anon.*, 1 Chit. 101, (*a*).

(*p*) *Doe* d. *Tarbay* v. *Roe*, 1 Chit. 506.

(*q*) *Anon.*, 1 Chit. 505, n.

(*r*) *Anon.*, 2 Chit. 177.

heard it explained to the tenant in possession (*s*). The Court granted a rule to show cause why judgment should not be signed against the casual ejector, where the affidavit of service was jointly made by the person who served the declaration and the housekeeper of the tenant in possession; the former deponent stating a service, with the proper explanation, on the housekeeper; the latter stating that she had delivered the declaration to the tenant in possession (*t*). An affidavit which stated a memorandum at the back of the declaration, of a service four years before, in the handwriting of a person who had left the country, was held not sufficient (*u*). An indorsement by a deceased agent, in the usual course of business, of service of notice to quit, is admissible (*x*), and so are oral declarations made in like manner (*y*).

The affidavit might be sworn before the attorney in the cause (*z*).

Number of Affidavits necessary.

When several tenants had been served with copies of the declaration, if it were meant but as one ejectment, and to be followed by one judgment, one affidavit of the service of all was sufficient, annexed to the copy of one declaration; but if the ejectments were made several, so as to have separate judgments, writs of possession, &c., then an affidavit of the service had to be annexed to separate copies of the ejectment (*a*).

(b) *Motion for Judgment.*

If the defendant took the benefit of the insolvent act, and consequently did not appear at the trial, it was no reason why the lessor of the plaintiff should not have judgment (*b*). Where the tenants in possession, having undertaken to appear, entered into the common consent rule, pleaded instanter, and took short notice of trial, made no defence at the trial, but sued out a writ of error when judgment was signed: the Court allowed the lessor of the plaintiff to take his judgment against the casual ejector (*c*). In ordinary cases, under the former practice, the motion for judgment against the casual ejector was a mere side-bar rule of course; but where there was any thing in the service of the declaration out of the common way, it was right that it should be mentioned to the Court (*d*): and in cases where it was im-

(*s*) *Goodtitle* d. *Wanklen* v. *Badtitle*, 2 Bos. & Pul. 120.

(*t*) *Doe* v. *Roe*, 2 Dowl. 198.

(*u*) *Doe* d. *Twisden* v. *Roe*, 1 Har. & Wol. 218; but see *Doe* d. *Pateshall* v. *Turford*, 3 Barn. & Adol. 890.

(*x*) *Doe* d. *Pateshall* v. *Turford*, 3 Barn. & Adol. 890.

(*y*) *Stapylton* v. *Clough*, 2 El. & Bl. 933; *The Sussex Peerage*, 11 Cl. & Fin. 113; post, Book III., Chap. VI., Sect. 12 (b).

(*z*) *Doe* d. *Cooper* v. *Roe*, 2 You. & Jerv. 284.

(*a*) 2 Sell. Prac. 178.

(*b*) *Doe* d. *Westminster* (*Marquis*) v. *Suffield*, 5 Dowl. 660; Wil. Wol. & Dav. 359.

(*c*) *Doe* d. *Morgan* v. *Roe*, 3 Bing. 169.

(*d*) *Doe* d. *Welchon* v. *Roe*, 5 Dowl. 271; unless the rule for judgment be drawn up and taken away from the office of the clerk of the rules, within two days after the end of the term in which the ejectment is moved, no rule can be drawn up or entered, nor can any proceedings be had in such ejectment; Reg. Gen. Q. B. M. T., 31 Geo. III. 4 Term R. 1. Same rule in Common Pleas; Reg. Gen. C. P. E. T. 48 Geo. III. 1 Taunt. 317. The plaintiff, in an eject-

possible to effect a strictly regular service, the Court would grant a rule to show cause why the service which had been effected should not be deemed good; and the Court would prescribe the mode of serving the rule (*e*). After service on a company according to the mode prescribed by their act, the rule was absolute in the first instance (*f*). Where in ejectment against several tenants the name of each was prefixed to the notice served on him; it was held, that only one rule was necessary on a motion for judgment against the casual ejector (*g*); and several rules in another case were held improper (*h*). Where the notice was to appear "in the King's Bench," the Court having since become the Queen's Bench by the demise of the crown, the rule for judgment was granted (*i*). The Court of Common Pleas would not, on the last day of term, grant a rule for judgment on an affidavit to be afterwards made and filed (*k*).

(c) *Setting aside Judgment.*

When the Judgment might be set aside.

Although, under the old system, judgment against the casual ejector were signed, yet if no possession had been given or trial lost, it might, on affidavit of merits, and payment of costs, be set aside (*l*). Accordingly, the Court of Exchequer set aside a regular interlocutory judgment and writ of possession executed, on an affidavit by the attorney for the landlord and tenant, that he had received instructions for entering an appearance, but had neglected it, owing to matters personally affecting himself, which had prevented his attending to it (*m*). It has been held, that in the absence of any suggestion of collusion between the lessor of the plaintiff and the tenant, the Court would not set aside a regular judgment in ejectment on the ground that the landlord had not received notice of declaration in order that he might be let in to defend (*n*). But in other cases such an application has been acceded to (*o*). For instance, after writ of possession executed, and an action for mesne profits commenced, the Court allowed this to be done, the copies of the declaration served on the tenants by mistake not having been delivered to the landlord (*p*). And where, from the

ment on a vacant possession, was bound to proceed more regularly than in a contested possession; and if in such a case, having obtained judgment, he had neglected to take away the rule before the expiration of two days after the term in which the rule was obtained, the Court would not assist him in the next term; *Anon.*, 2 Chit. 188.

(*e*) Arch. Pract. 934, 8th ed.; *Sprightly* d. *Collins* v. *Dunch*, 2 Burr. 1116; *Methold* v. *Noright*, 1 W. Black. 290. See ante, Sect. 6, throughout, p. 758, &c.

(*f*) *Doe* d. *Bromley* v. *Roe*, 8 Dowl. 858.

(*g*) *Doe* d. *Burlton* v. *Roe*, 7 Term R. 477; *S. P. Doe* v. *Roe*, 2 Tyr. 724; 2 Cromp. & Jerv. 670; see also *Doe* d. *Field* v. *Roe*, 1 Har. & Wol. 516; and *Doe* d. *Ludford* v. *Roe*, 8 Dowl. 500.

(*h*) *Doe* d. *Vorley* v. *Roe*, 2 Dowl. N. S. 52.

(*i*) *Doe* d. *Davis* v. *Roe*, 6 Dowl. 36; Will. Wol. & Dav. 606.

(*k*) *Doe* d. *Morgan* v. *Roe*, 2 Scott, N. R. 584.

(*l*) Arch. Pract. 935, 8th ed.

(*m*) *Doe* d. *Shaw* v. *Roe*, 13 Price, 260; see also *Doe* d. *Mullarky* v. *Roe*, 11 Ad. & El. 333; 3 Per. & Dav. 316.

(*n*) *Doe* d. *Thompson* v. *Roe*, 2 Scott, 181; 4 Dowl. 115; *S. C.* nom. *Doe* d. *Martin* v. *Roe*, 1 Hodges, 223; see also *Doe* d. *Ledger* v. *Roe*, 3 Taunt. 506; *Goodtitle* v. *Baldwin*, 4 Taunt. 820.

(*o*) *Doe* d. *Meyrick* v. *Roe*, 2 Cromp. & Jerv. 682; *Doe* d. *Troughton* v. *Roe*, 4 Burr. 1996.

(*p*) *Doe* d. *Butler* v. *Roe*, 2 Har. & Wol. 130.

ignorance of a party and of his attorney, judgment had been signed, he was let in to defend on payment of costs (*q*). Where there was collusion, even after a writ of possession executed, the landlord might be let in to defend (*r*). An averment in the affidavit in support of the motion to set aside the judgment, that the deponent believed the parties to have a good defence to the action, was sufficient, without adding "on the merits."

SECT. 8.—*Appearance.*

(a) *By Tenant.*

Appearance to the Action by the Tenant in Possession.

By the common law, no person was permitted to defend in ejectment, unless he was the tenant, and had been in possession of the premises, or receipt of the rent; for it was champerty for any other person to interpose and cover the possession with this title. Besides this, if the party wished to make any person defendant with another, who was not concerned in the possession of the tenements, it was a mischief at the common law; because, if the plaintiff recovered against one of the defendants, the stranger had no remedy for his costs. This, however, was remedied by statute 8 & 9 Will. III. c. 11, s. 1 (*s*), whereby costs were given to such strangers, unless the judge certified immediately on the trial, that the party had probable cause for making him a defendant. The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 169, enacts, that the writ in ejectment "shall state the names of all the persons in whom the title is alleged to be, and command the persons to whom it is directed to appear within sixteen days after service thereof, in the Court from which it is issued, to defend the possession of the property sued for, or such part thereof as they may think fit, and it shall contain a notice that in default of appearance they will be turned out of possession." By sect. 171, "The persons named as defendants in such writ, or either of them, shall be allowed to appear within the time appointed." Sections 172 and 173 apply to appearances by landlords and others; see post, 782. By section 174, "Any person appearing to such writ shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in a notice intituled in the Court and cause, and signed by the party appearing or his attorney; such notice to be served within four days after appearance upon the attorney whose name is indorsed on the writ, if any, and if none, then to be filed in the Master's office; and an appearance without such notice confining the defence to part, shall be deemed an appearance to defend for the whole." Section 176 enacts, "that the Court or a judge shall have

15 & 16 Vict. c. 76, s. 169.

Sects. 171, 172, 173.

Sect. 174.

Sect. 176.

(*q*) *Doe* d. *Pollen* v. *Roe*, Will. Wol. & Dav. 371.

(*r*) *Doe* d. *Grocers' Company* v. *Roe*, 5 Taunt. 205.

(*s*) See also 3 & 4 Will. IV. c. 42, s. 32.

power to strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants." By sect. 177, "In case no appearance shall be entered into within the time appointed, or if an appearance be entered, but the defence be limited to part only, the plaintiffs shall be at liberty to sign a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply, which judgment, if for all, may be in the Form contained in the Schedule (A.) to this act annexed, marked No. 14 (*t*), or to the like effect, and if for part, may be in the form contained in the Schedule (A.) to this act annexed, marked No. 15, or to the like effect (*u*)." By section 178, "In case an appearance shall be entered, an issue may at once be made up, without any pleadings, by the claimants or their attorney, setting forth the writ, and stating the fact of the appearance, with its date, and the notice limiting the defence, if any, of each of the persons appearing, so that it may appear for what defence is made, and directing the sheriff to summon a jury; and such issue, in case defence is made for the whole, may be in the form contained in Schedule (A.) to this act annexed, marked No. 16 (*x*), or to the like effect, and in case defence is made for part, may be in the form contained in the Schedule (A.) to this act annexed, marked No. 15 (*u*), or to the like effect." By the 183rd section, "if the claimant appears, and the defendant does not appear, the claimant shall be entitled to recover as heretofore, without any proof of his title." This section is expanded and interpreted by the 114th rule of Hilary Term, 1853, which directs that "If the plaintiff in ejectment appears at the trial, and the defendant does not appear, the defendant shall be taken to have admitted the plaintiff's title, and the verdict shall be entered for the plaintiff, without producing

Sect. 177.

Sect. 178.

Sect. 183.

(*t*) *Judgment in Ejectment in case of Non-appearance.*

In the Queen's Bench:

The day of , 18 .

[*Date of Writ.*]

Lancashire } On the day and year above
to wit. } written, a writ of our lady the Queen issued forth of this Court, in these words; that is to say,

Victoria, by the grace of God [*here copy the writ*]; and no appearance has been entered or defence made to the said writ: Therefore it is considered that the said [*here insert the names of the persons in whom title is alleged in the writ*] do recover possession of the land in the said writ mentioned, with the appurtenances.

(*u*) In the Queen's Bench:

On the day of , A.D. 18 .

Cumberland } On the day and year above
to wit. } written, a writ of our lady the Queen issued forth of this Court, in these words; that is to say,

Victoria, by the grace of God [*here copy the writ*]; and *C. D.* has, on the day of , appeared by his attorney [*or* in person] to the said writ, and has defended for a part of the land in the writ mentioned: that is to say [*here state the part*], and no appearance has been entered or defence made to the said writ, except as to the said part: Therefore it is considered that the said *A. B.* [*the claimant*] do recover possession of the land in the said writ mentioned, except the said part, with the appurtenances, and that he have execution thereof forthwith; and as to the rest, let a jury come, &c.

(*x*) In the Queen's Bench:

On the day of , A.D. 18 .

Cumberland } On the day and year above
to wit. } written, a writ of our lady the Queen issued forth of this Court, in these words; that is to say,

Victoria, by the grace of God [*here copy the writ*]; and *C. D.* has, on the day of appeared by his attorney [*or* in person], to the said writ, and defended for the whole of the land therein mentioned; therefore let a jury come, &c.

suit as in other cases.

The following cases, decided under the old form of proceeding, may not be inapplicable. Where a person who was served entered into the consent rule, but was not in possession of any part of the premises, the Court ordered his name to be struck out of the appearance and consent rule, upon his undertaking to permit execution to issue for any part of which it might turn out he was in possession (*y*). The lessor of the plaintiff could not compel a person to appear and plead to issue in an action of ejectment, without serving him with a copy of a declaration, although the premises were unoccupied, and a copy had been affixed on the outer door thereof (*z*). The Court would not set aside an appearance entered by the tenant in possession who had been served, on a suggestion that he had no interest and was a mere pauper, he swearing that he had an interest as assignee (*a*). Until appearance the tenant could not object to the form of the declaration (*b*).

Tenant's Notice to his Landlord of Service.

15 & 16 Vict. c. 76, s. 209.

The Common Law Procedure Act, 15 & 16 Vict. c. 76, following the provisions of the 11 Geo. II. c. 19, s. 12, enacts, sect. 209, that "Every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack rent of the premises, demised or holden in the possession of such tenant, to the person of whom he holds, to be recovered by action in any Court of common law having jurisdiction for the amount." This improved or rack rent does not necessarily mean the rent specified in any previous lease, but such a rent as the landlord and tenant might fairly agree on, at the time of delivering the declaration in ejectment, in case the premises were then to be let (*c*). The statute extends to such cases only where ejectments are brought which are inconsistent with the landlord's title; and, therefore, a tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee, to enforce an attornment, is not liable to the penalties of the statute; for the act expressly permits an ejectment to be brought for such purpose (*d*). The Courts would, in some cases, set aside judgments at the instance of the landlord, on the ground that he had not received notice of the service of the declaration (*e*).

(*y*) *Doe* d. *Snape* v. *Snape*, 2 Cromp. & Jerv. 214; 2 Tyr. 343; 1 Dowl. 314.

(*z*) *Doe* d. *Younghusband* v. *Roe*, 6 Moore, 480.

(*a*) *Doe* d. *Turner* v. *Gee*, Wol. P. C. 173; 9 Dowl. 612.

(*b*) *Doe* d. *Williamson* v. *Roe*, 3 Dow. & Low. 328; *Doe* d. *Manners* v. *Roe*, 1 Will. Wol. & Hod. 32; *S. C.* nom. *Doe* d. *Simpson* v. *Roe*, 6 Dowl. 469.

(*c*) *Croker* v. *Fothergill*, 2 Barn. & Ald. 652.

(*d*) *Buckley* v. *Buckley*, 1 Term R. 647.

(*e*) See ante, Sect. 7, (c), p. 778.

Appearance to the Action by the Landlord.

(b) *By Landlord.*

To remedy the inconvenience pointed out in the last division, the statute 11 Geo. II. c. 19, s. 13, was passed, by which it was enacted, that it might be lawful for the Court, where an ejectment should be brought, to suffer the landlord to make himself defendant, by joining with the tenant, in case he should appear (*e*); and in case such tenant should neglect or refuse to appear, judgment should be signed against the casual ejector, for want of such appearance; but if the landlord of any part of the premises for which such ejectment was brought should desire to appear by himself, and consent to enter into the like rule that, by the course of the Court, the tenant in possession, in case he or she had appeared, ought to have done, then the Court, where such ejectment shall be brought, should and might permit such landlord so to do, upon such judgment against the casual ejector, until they should make further order therein, and order a stay of execution. By the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 173, "any person appearing to defend as landlord in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord; and such person shall be at liberty to set up any defence which a landlord appearing in an action of ejectment has heretofore been allowed to set up, and no other:" and by section 174 he may "limit his defence to part only of the property mentioned in the writ." In the construction of the statute of 11 Geo. II. c. 19, the word "landlord" was extended to all claiming title consistent with the possession of the occupier; it was not necessary that it should be the actual landlord, but it was sufficient if he had an interest only in the land; a purchaser, therefore, of a reversion, which appeared to be a pretended title, and where no rent had ever been paid, was held to be admissible as a defendant. So the Court would permit a mortgagee to be made defendant even though out of possession (*f*); but he had to show that he was bonâ fide interested in the result (*g*). An heir, who had never been in possession, might be admitted to defend under the statute of 11 Geo. II. c. 19 (*h*); but a cestui que trust, who had never been in possession, could not (*i*): a devisee in trust, however, might (*k*). And by the 15 & 16 Vict. c. 76, s. 172, "any other person not named in the writ shall, by leave of the Court or a judge, be allowed to appear and defend on filing an affidavit showing that he is

15 & 16 Vict. c. 76, s. 173.

Sect. 174.

Sect. 172.

(*e*) The landlord's right to be joined in defending the premises is affirmed by this statute, for he had such right before; and it is optional with him to be made defendant or not, for the Court cannot compel him.

(*f*) *Doe* d. *Tilyard* v. *Cooper*, 8 Term R. 645; *Doe* d. *Pearson* v. *Roe*, 6 Bing. 613; 4 Moore & Pay. 437.

(*g*) *Doe* d. *Pearson* v. *Roe*, 6 Bing. 613; 4 Moore & Pay. 437.

(*h*) *Doe* d. *Hebblethwaite* v. *Roe*, 3 Term R. 783, n.

(*i*) *Lovelock* d. *Norris* v. *Doncaster*, 3 Term R. 783.

(*k*) *Lovelock* d. *Norris* v. *Doncaster*, 4 Term R. 122.

in possession of the land either by himself or his tenant." And see the General Rules of Hilary Term, 1853, sect. 113, p. 784. A landlord who, under this section (172), had satisfied the Court or a judge that he was in possession of the land either by himself or his tenant, was held by the Court of Exchequer, dissentiente Parke, B., to be entitled to appear and defend the action as a matter of right; and that it was not competent to the Court or a judge to impose on him any condition, such as the giving security for costs, and this though he were a foreigner residing out of the jurisdiction (*l*). Upon an application under this section by a party to be allowed to appear and defend an ejectment in respect of a part of the premises sought to be recovered, the Court will not consider nice questions as to the applicant's right of possession. It is enough if a primâ facie case can be shown by affidavit, stating that the applicant is in possession by himself or his tenant. Where, therefore, in an ejectment to recover the Opera House, in the Haymarket, it was stated upon affidavit that some of the boxes had been let to the applicant for a term of years, with free and uninterrupted ingress, egress and regress, and the full use of the same by tickets of admission during the nights of public performance (except balls and masquerades), and all profits and advantages and appurtenances belonging to the said boxes, with a covenant for quiet enjoyment; and further, that after the execution of the lease the applicant entered into possession of the boxes, and fitted them up, and had ever since continued and still was in possession of the same, with all the rights, privileges and appurtenances thereto belonging, and that the applicant was advised that it was material for the protection of his interests that he should be permitted to defend; it was held, that enough appeared to entitle the applicant to be allowed to appear and defend the action. But where the applicant was a tenant by elegit, who had recovered the premises in ejectment against the defendant, but had never been put into actual possession, the Court declined to permit him to come in and defend (*m*). If an ejectment were brought by one claiming as heir of a copyhold, and the lord of a manor—who claimed by escheat for want of heirs—applied to be admitted defendant, either with the tenant or alone, the Court would direct the lord to bring the action against the heir, and the heir would be admitted to defend (*n*). Where a landlord defrayed the costs of defending an ejectment in the name of an illiterate tenant, who gave a retraxit of the plea and cognovit of the action, the practice of the Court of Common Pleas was to set aside the retraxit and cognovit, and permit the plaintiff to defend as landlord (*o*). Where a person claimed in oppo-

(*l*) *Buller* v. *Meredith*, 19 Jurist, 450; and see *Doe* d. *Hudson* v. *Jameson*, 4 Man. & R. 490.

(*m*) *Croft* v. *Lumley*, 24 L. J., Q. B., 78.

(*n*) *Fairclaim* d. *Fowler* v. *Shamtitle*, 3 Burr. 1290; 1 W. Black. 357.

(*o*) *Doe* d. *Locke* v. *Franklin*, 7 Taunt. 9; 1 Chit. 390, (*a*).

sition to the title of the tenant in possession, he could not defend as landlord (*p*). Where the defendant was described by mistake in the consent rule as "landlord" he was not precluded from showing at the trial that the person in possession was tenant to the lessor of the plaintiff (*q*). Where a mortgagor entered into the consent rule as tenant, it was held he was not prevented from setting up as a defence that there were tenancies from year to year in persons who had not received notice to quit (*r*). If a party were admitted to defend as landlord, whose title was inconsistent with the possession of the tenant, the plaintiff might apply to the Court or to a judge at chambers, and have the rule discharged with costs (*s*); and the same rule, it is apprehended, would apply under the 15 & 16 Vict. c. 76. If a mere pauper were made assignee of a lease, and then was admitted to defend as landlord, but had no real interest in the premises, it would seem that the Court would give some relief to the plaintiff (*t*). If under the old practice judgment had been signed, it was in strictness too late for the landlord to be made defendant, but he might in some cases be let in on terms after judgment, as when it was signed in consequence of the tenant's not giving notice (*u*).

(d) *Appearance by Third Persons.*

Appearance to the Action by Third Persons.

It was at one time considered that the Courts had no jurisdiction to admit any person except the landlord to defend instead of the tenant. In some particular cases, however, under the old system, if a third person wished to defend, who was neither tenant nor actual landlord, but had some interest to sustain, he was bound to move the Court, on an affidavit of the fact, to be made a defendant, instead of or with the casual ejector; and the tenant's consent was not necessary. But now, by 15 & 16 Vict. c. 76, s. 172, any other person not named in the writ in ejectment "shall, by leave of the Court or a judge, be allowed to appear and defend, on filing an affidavit, showing that he is in possession of the land either by himself or his tenant." And by the Reg. Gen., Hilary Term, 1853, s. 113, "where a person not named in the writ in ejectment has obtained leave of a Court or a judge to appear and defend, he shall enter an appearance according to the Common Law Procedure Act, 1852, entitled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's attorney, or to the plaintiff, if he sues in person." Under the old practice, a third person could not defend as landlord, where it appeared that the tenant in

(*p*) *Driver* d. *Oxenden* v. *Lawrence*, 2 W. Black. 1259.

(*q*) *Doe* d. *Fellowes* v. *Alford*, 1 Dow. & Low. 470.

(*r*) *Doe* d. *Bowman* v. *Lewis*, 13 Mees. & Wels. 241.

(*s*) *Doe* d. *Harwood* v. *Lippencott*, Adams, Eject. 217, 4th ed.

(*t*) *Doe* d. *Carr* v. *Jordan*, 4 Scott, 807.

(*u*) See ante, 778, as to setting aside judgments.

possession came in as tenant to the lessor of the plaintiff, and paid rent to him under an agreement which had expired (*x*). A mere servant of a beneficial occupier could not be made defendant in an ejectment; but where a servant, in the visible occupation of premises, assumed the character of tenant in possession, and defended an ejectment, his conduct was evidence to go to the jury to presume that he was tenant in possession, unless the fact were rebutted by other evidence (*y*). Where, upon an ejectment against the tenant in possession, who came into possession as tenant of the lessor of the plaintiff, a third person having an adverse title entered into a consent rule to defend as landlord, the Court discharged the consent rule with costs (*z*).

SECT. 9.—*Practice.*

(a) *Particulars.*

When Particulars may be obtained.

Where, prior to the Common Law Procedure Act, the plaintiff declared generally, and the defendant had any doubt what lands the plaintiff meant to proceed for, he might call upon him by a judge's order to specify them (*a*). And now, by the 175th section of the Common Law Procedure Act, "Want of 'reasonable certainty' in the description of the property, or part of it, in the writ or notice, shall not nullify them, but shall only be ground for an application to a judge for better particulars of the land claimed or defended, which a judge shall have power to give in all cases." Under the old practice, and it is apprehended the same rule would apply under the new system, in ejectment, brought on the forfeiture of a lease, the Courts would compel the plaintiff to deliver a particular of the breaches of covenant on which he intended to rely (*b*): and when the forfeiture was for non-payment of rent, a difference between the amount of rent proved to be due, and the amount demanded in the plaintiff's particular, was held not to be material (*c*). So when ejectment was brought against a lessee on the ground that the lease was granted under a power not properly executed, the Court would compel a particular of the defects to be given (*d*). But an order for particulars will only be granted under special circumstances (*e*). On the other hand, the plaintiff might call upon the defendant to specify for what he defended, when that was not ascertained by the consent rule. When the plaintiff was unknown to the defendant, the latter might call for a particular of his residence or place of abode from the opposite attorney; and if he refused to give it, or gave in a fictitious account of a person who could

(*x*) *Doe* d. *Knight* v. *Smythe*, 4 Maule & Selw. 347.

(*y*) *Doe* d. *James* v. *Staunton*, 1 Chit. 119; 2 Barn. & Ald. 371.

(*z*) *Doe* d. *Horton* v. *Rhys*, 2 You. & J. 88.

(*a*) *Doe* d. *Saunders* v. *Newcastle* (*Duke*), 7 Term R. 332, n.

(*b*) *Doe* d. *Birch* v. *Phillips*, 6 Term R. 597.

(*c*) *Tenny* d. *Gibbs* v. *Moody*, 3 Bing. 3; 10 Moore, 252.

(*d*) *Doe* d. *Egremont* (*Earl*) v. *Williams*, 7 Queen's B. Rep. 686.

(*e*) *Doe* d. *Saxton* v. *Turner*, 11 Com. B. 896.

not be found, the Court would stay the proceedings until security were given for the payment of costs (*f*). In all these cases, where an order was made for particulars of breaches, of premises, or residence, the Court, on a motion for a rule to show cause, or a judge at chambers, by an order, would stay the proceedings until the particular required was obtained. By the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 180, "The particulars of the claim and defence, if any, or copies thereof, shall be annexed to the record by the claimants." The particulars above mentioned refer to a description of the land and not to the nature of the title.

(b) *Security for Costs.*

Staying Proceedings till Costs secured or paid.

In some cases the Courts will stay proceedings in ejectment until security be given for costs. The first case is where an infant sues; in this case the Courts will oblige the prochein amy, guardian or attorney, to give security for the costs, even though the infant is a pauper (*g*); secondly, where the plaintiff resides abroad, but not where one only of two plaintiffs is abroad (*h*); and lastly, where the plaintiff is unknown to the defendant, who has demanded an account of his residence or place of abode from the plaintiff's attorney, who has refused to give it, or has given a fictitious account of a person who cannot be found (*i*). So then where the costs of a prior ejectment upon the same title or between the same parties, were left unpaid, the practice was for the Courts to stay proceedings in a second ejectment, but not to order security for costs (*k*). But now, where a second ejectment has been brought, the Courts, under the 17 & 18 Vict. c. 125, s. 93, will order security for costs (*l*). Where the plaintiff, who claimed a life interest, died after verdict, it was considered that the proceedings might be stayed till the plaintiff had given the defendant security for his costs (*m*). But where he claimed in fee, the Court refused an application for that purpose (*n*). In all cases of applications of this nature, it must appear that application has been previously made to the party (*o*).

Recognizance under Statutes 15 & 16 Vict. c. 76, s. 213, and 1 Geo. IV. c. 87, for Costs given by the Defendant.

In cases where the ejectment is brought under the provisions of the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 213, the landlord

(*f*) 2 Tidd's Prac. 1231.

(*g*) *Doe* d. *Roberts* v. *Roberts*, 6 Dowl. 556.

(*h*) *Doe* d. *Bawden* v. *Roe*, 1 Hodges, 315.

(*i*) Adams, on Eject. 311, 4th ed.

(*k*) *Doe* d. *Selby* v. *Alston*, 1 Term R. 491. See post, Sect. 17. *Doe* d. *Brayne* v. *Bather*, 18 Law J., 3 Q. B.; Adams, on Eject. 312, 4th ed.

(*l*) The 93rd section is as follows:—"If any person shall bring an action of ejectment after a prior action of ejectment for the same premises has been or shall have been unsuccessfully brought by such person, or by any person through or under whom he claims against the same defendant, or against any person through or under whom he defends, the Court or a judge may, if they or he think fit, on the application of the defendant at any time after such defendant has appeared to the writ, order that the plaintiff shall give to the defendant security for the payment of the defendant's costs, and that all further proceedings in the cause shall be stayed until such security be given, whether the prior action has been or shall have been disposed of by discontinuance, or by nonsuit, or by judgment for the defendant."

(*m*) *Thrustout* d *Turner* v. *Grey*, 2 Stra. 1056; see also *Doe* d. *Egremont* (*Earl*) v. *Stephens*, 2 Dow. & Low. 993.

(*n*) *Doe* d. *Cozens* v. *Cozens*, 9 Dowl. 1340; 1 Queen's B. Rep. 426.

(*o*) *Adams* v. *Brown*, 1 Dowl. 273.

sureties for the payment of the costs and damages, in case the landlord recovers in the suit. As this section is similar to 1 Geo. IV. c. 87, s. 1 (*p*), which is not repealed, the decisions under the latter statute will be applicable. The latter statute applied to all interests which the tenants had, by lease or written agreement, for however short a period, whether they held for a term or number of years *certain*, or from year to year: thus an agreement, in writing, for apartments for three months certain, came within the meaning of the statute (*q*): but a holding as tenant from quarter to quarter, with an agreement to quit at the end of any quarter upon notice, was not a holding for a term certain (*r*). Where, after entering into an agreement for a tenancy from year to year, the parties the same day made another agreement for the tenancy to continue as long as the lessor continued vicar of a parish, it was held, nevertheless, to be a case within the statute (*s*). It would seem, also, that where the tenant was assignee of the original lessee, he was within the act (*t*). It did not, however, extend to the case of a tenant holding from year to year, without a lease or agreement in writing (*u*); nor to a tenancy for years determinable on lives (*x*): nor to the case of a lessee holding over above a year, without the landlord taking any step to recover the premises (*y*): nor after notice to quit given *by the tenant*, where his tenancy had not expired by effluxion of time (*z*): nor to the case where the right of entry was claimed for non-performance of the covenants (*a*): nor to the case of a lessee, who had surrendered his term, refusing to quit (*b*): nor to cases where the title to the premises was disputed between the parties (*c*). A landlord who was tenant in common, seeking to recover possession of his undivided part, was within the act (*d*).

Practice on obtaining a Rule under the Statute 1 Geo. IV. c. 87, and 15 & 16 Vict. c. 76, s. 213.

The time within which the undertaking and security required by the statute was to be given, was to be fixed by the Court or a judge at the time the rule was granted for the purpose (*e*). Where a landlord applied to the Court to compel his tenant to give the securities, it might perhaps also have been made a part of the rule, in order to save time, that the landlord should be at liberty to sign judgment against the casual ejector, in case of a default on the part of the tenant to give

(*p*) See ante, 749, note (*g*).
(*q*) *Doe* d. *Phillips* v. *Roe*, 5 Barn. & Ald. 766; 1 Dowl. & Ryl. 433.
(*r*) *Doe* d. *Carter* v. *Roe*, 10 Mees. & Wels. 670; 2 Dowl. N. S. 449.
(*s*) *Doe* d. *Newstead* v. *Roe*, 10 Jur. 925.
(*t*) *Doe* d. *Watts* v. *Roe*, 5 Dowl. 213; 2 Har. & Wol. 335.
(*u*) *Doe* d. *Bradford* (*Earl*) v. *Roe*, 5 Barn. & Ald. 770.
(*x*) *Doe* d. *Pemberton* v. *Roe*, 7 Barn. & Cres. 2.
(*y*) *Doe* d. *Thomas* v. *Field*, 2 Dowl. 542.
(*z*) *Doe* d. *Cardigan* v. *Roe*, 1 Dowl. & Ryl. 540.
(*a*) *Doe* d. *Cundey* v. *Sharpley*, 15 Mees. & Wels. 558.
(*b*) *Doe* d. *Tindal* v. *Roe*, 2 Barn. & Adol. 922; 1 Dowl. 143.
(*c*) *Doe* d. *Sanders* v. *Roe*, 1 Dowl. 4.
(*d*) *Doe* d. *Mayor* v. *Rotheram*, 3 Dowl. 690; 1 Gale, 157.
(*e*) 15 & 16 Vict. c. 76, s. 213; and see ante, 748; *Doe* d. *Anglesea* (*Marquis*) v. *Brown*, 2 Dowl. & Ryl. 688.

the required securities (*f*). Under the Common Law Procedure Act, s. 213, the tenant is to enter into a recognizance in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff. This includes the mesne profits, s. 214. Under the statute 1 Geo. IV. c. 87, the Courts gave a year's value of the premises and a reasonable sum for the costs of the action, and nothing for the mesne profits (*g*). The Court would not include in the security the damages caused to the trade of the premises by the tenant's shutting them up (*h*). On moving for the rule for the tenant to enter into the recognizance under 1 Geo. IV. c. 87, it has been held that the affidavit of the execution of the written instrument, under which the tenant held, need not be made by the attesting witness (*i*); but that decision has been since questioned (*k*). The execution, however, had to be positively sworn to (*l*). The original instrument under which the tenant held had to be produced, and it ought to be properly stamped (*m*). It had to be shown by affidavit that the tenancy was determined by a regular notice to quit (*n*): and the notice to quit under the statute must appear to have been given by the authority of the landlord (*o*). Where the tenant was gone to America, his wife being still in possession of the premises, a service of demand of possession left on the premises, the wife having refused to take it, was held sufficient to entitle the landlord to a rule to show cause why the service should not be deemed good, in order to entitle him to a rule under the statute (*p*). If the notice to find the security was signed by an agent of the lessor of the plaintiff, it was not necessary that there should be an affidavit that he was in fact the agent (*q*): a notice signed "*A. B.*, agent of the plaintiff," and requiring the tenant to appear and be made defendant, and find such bail, &c., "and for such purposes as are specified in the act of parliament," was sufficient (*r*).

(c) *Staying Proceedings.*

Staying Proceedings generally.

The Courts of common law have no jurisdiction to stay proceedings in ejectment, brought on a clause of re-entry for breach of covenant to repair (*s*). Indeed the only cases where those Courts will now stay

(*f*) *Doe* v. *Roe*, 2 Dowl. 180; see also *Doe* d. *Sampson* v. *Roe*, 6 Moore, 54.

(*g*) *Doe* d. *Sampson* v. *Roe*, 6 Moore, 54; *Doe* d. *Levi* v. *Roe*, 6 Com. B. Rep. 272. The amount of security usually required in the Queen's Bench was twice the annual rent, together with 40*l* for the costs.

(*h*) *Doe* d. *Marks* v. *Roe*, 6 Dowl. & Low. 87.

(*i*) *Doe* d. *Mayor* v. *Rotheram*, 3 Dowl. 690; 1 Gale, 157; *Doe* d. *Gowland* v. *Roe*, 6 Dowl. 35; Will. Wol. & Dav. 605.

(*k*) *Doe* d. *Avery* v. *Roe*, 6 Dowl. 518; 1 Will. Wol. & Hod. 178.

(*l*) *Doe* d. *Beard* v. *Roe*, Tyr. & Gr. 870; 2 Gale, 131.

(*m*) *Doe* d. *Wood* or *Caulfield* v. *Roe*, 2 Bing. N. C. 329; 3 Scott, 756; 5 Dowl. 365; 2 Hodges, 279; *Doe* d. *Holder* v. *Rushworth*, 4 Mees. & Wels. 74.

(*n*) *Doe* d. *Topping* v. *Boast*, 7 Dowl. 467.

(*o*) *Doe* d. *Beard* v. *Roe*, Tyr. & Gr. 870; 2 Gale, 131.

(*p*) *Doe* d. *Selgood* v. *Roe*, 1 Will. Wol. & Hod. 346.

(*q*) *Doe* d. *Geldart* v. *Roe*, 1 Will. Wol. & Hod. 346.

(*r*) *Doe* d. *Beard* v. *Roe*, 1 Mees. & Wels. 360; 2 Gale, 48; Tyr. & Gr. 870.

(*s*) *Doe* d. *Mayhew* v. *Ashby*, 10 Ad. & El. 71; and 2 Per. & Dav. 302.

proceedings so as to give equitable relief, are those mentioned below, and cases where a second action of ejectment is brought for the same premises (*t*). Where an ejectment for a forfeiture was pending in one Court, another Court refused to stay proceedings in a second action on a subsequent forfeiture (*u*).

Staying Proceedings on Payment of Rent and Costs under 4 Geo. II. c. 28.

By the statute 4 Geo. II. c. 28, it is provided, s. 4, that if the tenant shall at any time before trial pay or tender to the landlord, or pay into Court all the rent (*x*) and arrears, together with the costs, all further proceedings shall be stayed (*y*). Previous to that statute it seems that the Courts of common law exercised a similar discretion of staying proceedings in all cases of ejectments for non-payment of rent, and even after trial if before execution (*z*): and it has been contended, that that discretion was not taken away by the statute, but that it was thereby made obligatory in cases where there was no sufficient distress on the premises within the second section (*a*) of the statute, and an application was made before trial: it has, however, been decided that the application must now be made before trial, even in cases not within the second section (*b*); and that, after a writ of possession has been executed, it is too late, unless by consent (*c*). In one case the Court made a rule to stay proceedings, on payment of all the rent due and costs, after judgment against the casual ejector, and before the writ of possession executed (*d*). In ejectment by a landlord, founded on the act, and also on a clause of re-entry in a lease for not repairing, a rule was made absolute to stay proceedings upon payment of the rent in arrear and costs, with liberty for the plaintiff to proceed upon any other title (*e*). Where the plaintiffs were both devisees and executors, and in each capacity rent was due to them; and the defendant moved to stay proceedings on payment of the rent due to the lessors of the

(*t*) See post, Sect. 17, and Chap. X., Sect. 7.

(*u*) *Doe* d. *Henry* v. *Gustard*, 5 Scott, N. R. 818; 2 Dowl. N. S. 615; 4 Man. & Gran. 987.

(*x*) Upon a motion to set aside an ejectment and restore the possession, upon payment of the rent due and costs, the rent must be calculated only to the last rent day, not to the day of computing; *Doe* d. *Harcourt* v. *Roe*, 4 Taunt. 883.

(*y*) See ante, 718. In proceedings in ejectment under the second section for a forfeiture for non-payment of rent, it is expressly provided, "that nothing herein contained shall extend to bar the right of any mortgagee or mortgagees of such lease, or any part thereof, who shall not be in possession; so as such mortgagee or mortgagees shall and do, within six calendar months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor, or persons entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which on the part and behalf of the first lessee or lessees ought to be performed."

(*z*) Adams, Eject. 122, 4th ed.

(*a*) See ante, 718.

(*b*) *Roe* d. *West* v. *Davis*, 7 East, 363; *Doe* d. *Harris* (*Clerk*) v. *Masters*, 2 Barn. & Cres. 490; 4 Dowl. & Ryl. 45. In the first of these cases, however, the observations of Lord Ellenborough on the language of the statute are not correct, and his judgment is at variance with the previous decision of Lord Kenyon in *Doe* d. *Forster* v. *Wandlass*, 7 Term Rep. 117, which was not adverted to, and which is recognized law as to the 2nd section; see ante, 718; see Adams, Eject. 124, 127, 4th ed.

(*c*) *Anon.*, T. T. 1 Geo. III. MS.; *Doe* d. *Lambert* v. *Roe*, 3 Dowl. 557.

(*d*) *Goodtitle* v. *Holdfast*, 2 Stra. 900. This case was decided about the time the statute was enacted; but as there is no allusion to the statute in the report of the case, it is probable that the decision took place before it passed into a law.

(*e*) Bull. N. P. 97.

plaintiff as devisees, they not being entitled to bring any ejectment as executors; and, there appearing to be a mutual debt due to the defendant by simple contract, the defendant offered to go into the whole account, taking in demands, both as devisees and as executors, having just allowances, which the lessors of the plaintiff refused; the rule was made absolute to stay proceedings, on payment of the rent due to the lessors as devisees, and costs (*f*). Where the rent was tendered before notice of the action, the proceedings were set aside for irregularity; and the fact of the landlord having given directions respecting the matter to his attorney, was held to amount to nothing (*g*). An under-lessee may have the benefit of the statute (*h*), and also a mortgagee (*i*). The application to stay the proceedings is made in term to the Court, and in vacation to a judge at chambers.

Staying Proceedings on payment of mortgage money, under 7 Geo. II. c. 20.

In ejectment by a mortgagee, for the recovery of the possession of the mortgaged premises, where no suit in equity is depending for a foreclosure or redemption, by statute 7 Geo. II. c. 20, s. 1, if the person having a right to redeem shall, at any time pending the action, pay to the mortgagee, or in case of his refusal, bring into Court, all the principal monies and interest due on the mortgage, and also costs to be computed by the Court, or proper officer appointed for that purpose (*k*), the same shall be deemed and taken to be in full satisfaction and discharge of the mortgage; and the Court shall discharge the mortgagor of and from the same accordingly (*l*). Similar powers are given by the 15 & 16 Vict. c. 76. Section 219 enacts, that "Where an action of ejectment shall be brought by any mortgagee, his heirs, executors, administrators or assignees, for the recovery of the possession of any mortgaged lands, tenements or hereditaments, and no suit shall be then depending in any of her Majesty's Courts of Equity in that part of Great Britain called England, for or touching the foreclosing or redeeming of such mortgaged lands, tenements or hereditaments, if the person having right to redeem such mortgaged lands, tenements or hereditaments, and who shall appear and become defendant in such action, shall, at any time pending such action, pay unto such mortgagee, or, in case of his refusal, shall bring into Court where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage (such money for principal, interest and costs to be ascertained and computed by the Court where such action is or shall be depending, or by the proper officer by such Court to be appointed for that purpose), the monies so paid to such

(*f*) 2 Sell. Prac. 127.

(*g*) *Goodright* d. *Stevenson* v. *Noright*, 2 W. Black. 747.

(*h*) *Doe* d. *Wyatt* v. *Byron*, 1 Com. B. Rep. 623; 3 Dow. & Low. 31.

(*i*) *Doe* d. *Whitfield* v. *Roe*, 3 Taunt. 402; but see Adams, Eject. 125, note (*a*), 4th ed.

(*k*) The costs are to be taxed as between party and party; *Doe* d. *Cappe* v. *Cappe*, 3 Bing. N. C. 768; 5 Dowl. 634; 4 Scott. 468; 3 Hodges, 136.

(*l*) 2 Tidd's Prac. 1235.

mortgagee, or brought into such Court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court shall and may discharge every such mortgagor or defendant of and from the same accordingly; and shall and may, by rule of the same Court, compel such mortgagee, at the costs and charges of such mortgagor, to assign, surrender or reconvey such mortgaged lands, tenements and hereditaments, and such estate and interest as such mortgagee has therein, and deliver up all deeds, evidences and writings in his custody, relating to the title of such mortgaged lands, tenements and hereditaments, unto such mortgagor, who shall have paid or brought such monies into the Court, his heirs, executors or administrators, or to such other person or persons as he or they shall for that purpose nominate or appoint." This section will extend to an action by a mortgagee on a bond or covenant (*m*), but will not apply when the mortgagee is in possession or has attempted to exercise the right of sale (*n*). The application may be made to a judge at chambers (*o*). By section 220, "Nothing herein contained shall extend to any case where the person, against whom the redemption is or shall be prayed, shall (by writing under his hand, or the hand of his attorney, agent or solicitor, to be delivered before the money shall be brought into such Court of law, to the attorney or solicitor for the other side), insist, either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums, than what appear on the face of the mortgage or shall be admitted on the other side; or to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted or questioned by or between different defendants in the same cause or suit; or shall be any prejudice to any subsequent mortgage or subsequent incumbrance, anything herein contained to the contrary thereof in anywise notwithstanding." A delivery of a notice under this section after the rule nisi had been obtained would be an answer to the application (*p*). If there be any doubt as to the amount of what is due, the Courts will refer to the officer whose duty it is to tax the costs; and if the debt and costs are not paid, the plaintiff must proceed in the action, and cannot have an attachment. The party applying to the Court under the statute must be the very party entitled to redeem, and also the defendant in the ejectment (*q*); and it sufficiently appears that he is defendant, if it is sworn that he has entered the usual appearance (*r*). The Courts will not stay proceedings in an ejectment brought by a mortgagee against a mortgagor, on the latter paying principal, interest and costs, where he had agreed to

(*m*) *Smeeton* v. *Collier*, 1 Exch. Rep. 457.
(*n*) *Sutton* v. *Rawlings*, 3 Exch. Rep. 407.
(*o*) *Smeeton* v. *Collier*, 1 Exch. Rep. 457.
(*p*) *Filbee* v. *Hopkins*, 6 Dowl. & Low. 264.
(*q*) *Doe* d. *Hurst* v. *Clifton*, 4 Ad. & El. 814; 6 Nev. & Man. 857; 2 Har. & Wol. 285.
(*r*) *Doe* d. *Cox* v. *Brown*, 6 Dowl. 471; 1 Will. Wol. & Hod. 204.

convey the equity of redemption to the mortgagee (*s*); nor where by the terms of the mortgage deed the principal, payable at a day not named, is due on default made in the payment of the interest, will they stay proceedings on payment of arrears of interest and costs (*t*). The defendant is entitled to have the proceedings stayed upon payment of the principal and interest due on the mortgage deed, with the costs incurred at law and in equity, without paying any bygone interest, or the expense of preparing the mortgage deed, or any assignment of it (*u*). Again, where a motion was to stay proceedings in ejectment, on payment of mortgage money and costs, pursuant to the statute, and on showing cause, the plaintiff produced an affidavit, that the mortgagee had been at great expense in necessary repairs of part of the premises in his possession, the ejectment being brought for the residue; and therefore prayed that the prothonotary might be directed to make allowance for such repairs; the Court said, the rule must follow the words of the statute; and that the prothonotary would make just allowances and deductions (*x*). Where there are two mortgages, the Court will not stay proceedings, and compel a redemption of one mortgage only, upon payment of the principal, interest and costs, on that mortgage, without paying the rest (*y*). If a mortgagee recover possession of the mortgaged premises, under a judgment in an undefended ejectment, the Court has no jurisdiction to restore, on payment of the debt, interest and costs, the possession to the mortgagor, who has not appeared; but if the recovery is had against a tenant of the mortgagor, the Court will set aside the judgment, and let in the mortgagor to defend as a landlord, that he may be in a condition to apply to the Court to stay proceedings on the terms of the statute (*z*). The mode of applying to stay proceedings, on payment of the mortgage, principal and interest, is by motion to the Court in term, and summons of a judge in vacation; and the Court will not compel the mortgagee to pay the costs of such an application, because he has refused a tender of the sum due (*a*).

On other Terms.

Where an order was made by *consent* in an action of ejectment "that the proceedings be stayed, the defendant to pay his own costs of a former ejectment, and the lessor of the plaintiff to pay 5*l*. towards the defendant's costs, and to grant a lease of the premises for twenty-one years at the rent of one shilling a year, on the same conditions as other parts of the estates of the lessor of the plaintiff in the parish were

(*s*) *Goodtitle* d. *Taysum* v. *Pope*, 7 Term Rep. 185.

(*t*) *Goodtitle* d. *Green* v. *Notitle*, 11 Moore, 491.

(*u*) *Doe* d. *Blagg* v. *Steel*, 1 Dowl. 359.

(*x*) 2 Sell. Prac. 220. Where a mortgagee brings an ejectment to get possession, and the mortgagor moves to stay proceedings on payment of what is due and costs; if the mortgagee gives notice of other demands, as cause against the order, he must specify the nature and amount of such demands; *Goodtitle* d. *Leon* v. *Lansdown*, 3 Anst. 937; *Doe* d. *Harrison* v. *Leach*, 7 Dowl. & Low. 270; and see *Filber* v. *Hopkins*, ibid. 264.

(*y*) *Roe* d. *Kaye* v. *Soley*, 2 W. Black. 736.

(*z*) *Doe* d. *Tubb* v. *Roe*, 4 Taunt. 837.

(*a*) *Doe* d. *Simpson* v. *Bunn*, 1 Will. Wel. & Hod. 49.

held," and the defendant declined to accept a lease and execute a counterpart, the Court refused to grant an attachment against him, on the ground that the granting of the lease by the lessor of the plaintiff was a boon to the defendant, which the latter was at liberty to decline (*b*).

(d) *Injunction—Payment of Costs.*

Injunction—Costs.

The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 211, enacts, that "in case the said lessee, his assignee or other person claiming any right, title or interest, in law or equity, of, in or to the said lease, shall, within the time aforesaid, proceed for relief in any Court of Equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant in such ejectment, bring into Court, and lodge with the proper officer such sum and sums of money as the lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the Court; and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he shall really and bonâ fide, without fraud, deceit or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord, what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands." And by section 212, "If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold and enjoy the demised lands, according to the lease thereof made, without any new lease."

(e) *Consolidation and Discontinuance.*

When Actions may be consolidated.

Under the old practice, where there were several defendants, to whom the plaintiff delivered declarations, who were severally concerned in interest, the Court would not formerly, on the motion of the

(*b*) *Doe* d. *Cardigan* (*Earl*) v. ——, 7 C. B. Rep. 794.

plaintiff, join them all in one declaration (c); but since the statutes 8 & 9 Will. III. c. 11, s. 1, and 3 & 4 Will. IV. c. 42, s. 32, which give one of several defendants who was acquitted his costs, the Court might perhaps act otherwise (d). Where, however, several ejectments were brought for the same premises, upon the same demise, the Court on motion,—which was for a rule nisi,—or a judge at his chambers, would order them to be consolidated (e).

When a Plaintiff may discontinue.

Discontinuance was allowed under the old practice in this action as well as in any other action. The Courts would not, however, give the plaintiff leave to discontinue the action after a special verdict had been had in order to adduce fresh proof in contradiction to the verdict (f). By the 15 & 16 Vict. c. 76, s. 200, "The claimant in ejectment shall be at liberty at any time to discontinue the action as to one or more of the defendants, by giving to the defendant or his attorney a notice headed in the Court and cause, and signed by the claimant or his attorney, stating that he discontinues such action; and thereupon the defendant to whom such notice is given shall be entitled to and may forthwith sign judgment for costs, in the form contained in the schedule (A.) to this act annexed, marked No. 18 (g), or to the like effect." The 201st section enacts, that "in case one of several claimants shall be desirous to discontinue, he may apply to the Court or a judge to have his name struck out of the proceedings, and an order may be made thereupon, upon such terms as to the Court or a judge may seem fit, and the action shall thereupon proceed at the suit of the other claimants."

(f) *Amendment.*

When Amendment may be made generally.

The legislature, acting in conformity with the enlightened views of modern times, has authorized and directed Courts and judges to make amendments in a more liberal and less technical spirit than heretofore. Accordingly the 222nd section of the 15 & 16 Vict. c. 76, enacts, that "It shall be lawful for the superior Courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the Court or a judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real

(c) Run. Eject. 187.
(d) Arch. Prac. 950, 8th ed.
(e) 2 Tidd's Prac. 1232.
(f) *Roe* d. *Gray* v. *Gray*, 2 W. Black. 815; Adams. Eject. 178, 179, 4th ed.
(g) "In the Queen's Bench:
"On the —— day of ——, 18—.
"Lancashire, } On the day and year above
to wit. } written, a writ of our lady the queen issued forth from this Court in these words, that is to say,
"Victoria, by the grace of God [*here copy the writ*], and C. D. has on the —— day of —— appeared by ——, his attorney [*or 'in person'*], to the said writ, and A. B. has discontinued the action: therefore it is considered that the said C. D. be acquitted, and that he recover against the said A. B. £— for his costs of defence."

question in controversy between the parties *shall* be so made." A similar provision is contained in the 17 & 18 Vict. c. 125, s. 96. It may be convenient to retain the cases decided under the old mode of procedure. An amendment, by inserting a new demise, has been allowed after verdict, and a rule for a new trial (*h*). A declaration in ejectment has been amended even after judgment and writ of error brought, by leaving out the word "tenements" (*i*). A plaintiff has even been permitted to amend his declaration, on payment of costs, by adding a new count on another demise after three terms had elapsed, and the roll had been made up and carried in (*k*). An error, by inserting the name of the tenant in possession in the declaration, may, it seems, be amended (*l*). An amendment has been made at the trial in the name of the parish, under the 3 & 4 Will. IV. c. 42, s. 23 (*m*), even though the ejectment was brought for a forfeiture (*n*). Where the declaration was on a supposed joint demise by two, and it appeared in evidence that they had not such an interest that they could join in a demise to the plaintiff, an amendment, by severing the demises, was refused under the 3 & 4 Will. IV. c. 42, s. 23 (*o*). An amendment of the nisi prius record was allowed by consent after the jury was sworn, the name of the real defendant not having been substituted for that of the casual ejector (*p*). The Court refused to amend a mistake in the Christian name of the lessor of the plaintiff, of John instead of James, no one having appeared (*q*). But an amendment has been allowed at the trial, by striking out the Christian name of a lessor of the plaintiff, where he was only known by his surname (*r*). In certain cases, the Court permitted an amendment to be made in the notice at the bottom of a declaration in ejectment (*s*). After verdict, if the objection were grounded upon the mere mistake of the clerk, or a trifling nicety, there was no need of any actual amendment at all; the Court would overlook the exception (*t*). This distinction was important; if there were evidence at the trial, upon such of the counts only as were good and consistent, a general verdict might be altered by the notes of the judge, and entered only on those counts; but, if there were any evidence applicable to the other bad or inconsistent counts, the postea could not be amended; the only remedy was by a venire de novo (*u*).

Amendment in the Time of the Demise.

An amendment in ejectment might be made even in the time of the

(*h*) *Doe* d. *Bacon* v. *Bridges*, 6 Man. & Gr. 1034; 7 Scott, N. R. 966; 1 Dow. & Low. 954.

(*i*) *Doe* d. *Lawrie* v. *Dyball*, 1 Moore & Pay. 330; 8 Barn. & Cres. 70; 2 Man. & Ryl. 184; *S. P. Anon.*, 1 Chit. 537.

(*k*) *Doe* d. *Beaumont* v. *Armitage*, 1 Dowl. & Ryl. 173; 2 Chit. 302.

(*l*) *Doe* d. *Cobbey* v. *Roe*, Adams, Eject. 170, 4th ed.

(*m*) See ante, 794.

(*n*) *Doe* d. *Marriott* v. *Edwards*, 6 Car. & Pay. 208; 1 Mood. & Rob. 319.

(*o*) *Doe* d. *Poole* v. *Errington*, 1 Ad. & El. 750; 3 Nev. & Man. 646.

(*p*) *Doe* d. *Stanway* v. *Rock*, 1 Car. & Mar. 549.

(*q*) *Doe* d. *Street* v. *Roe*, 8 Dowl. 444.

(*r*) *Doe* d. *Miller* v. *Rogers*, 1 Car. & Kir. 390.

(*s*) *Doe* d. *Bass* v. *Roe*, 7 Term. Rep. 469; *Doe* d. *Darwent*, v. *Roe*, 3 Dowl. 336.

(*t*) *Roe* d. *Wrangham* v. *Hersey*, 3 Wils. 275.

(*u*) Run. Eject. 235.

demise, to prevent the party from being barred (*x*): thus, where the ejectment was to avoid a fine, and the demise was laid *before* the plaintiff had made the entry, instead of *after*, it was, on motion, ordered to be amended. So an amendment was allowed where the day of the demise was laid before the title accrued (*y*). So, upon payment of the costs of the application, by laying the demise anterior to the time of forfeiture, even after the record was made up and the cause set down for trial (*z*); but an amendment was refused by altering it to a day subsequent to the day of the delivery of the declaration (*a*). Where the demise was stated on a certain day of the month, but the year was omitted, the defendant ought to have applied to the Court to compel the insertion of the year; if he did not, the declaration would be applicable to any year, though the judge at the trial could not amend as for a variance by inserting the year (*b*). An amendment might be made at the trial under the statute 3 & 4 Will. IV. c. 42, s. 23, in the day of the demise, it having been laid too soon in an action for a forfeiture (*c*); and it was immaterial whether the wrong day was laid, or an impossible day (*d*). In ejectment, where the day of the accruing of the plaintiff's title was laid on a day prior to the day of the demand of possession, the Court held, Moore, J., dissentiente, that the judge was right in allowing the date of the title to be altered to a day subsequent to the demand of possession (*e*).

Term enlarged by Amendment.

If the term demised to the plaintiff had expired, or was likely to expire before trial, the Court would at any time before trial, upon motion to amend, enlarge it upon payment of costs: thus, in one case, the term was enlarged after it had expired twelve years, though the cause was at issue, a special jury struck, and the parties had gone down to trial before the mistake was discovered (*f*); but it was in another case considered too late to apply after the cause had been called on (*g*). In another case still stronger, after a judgment in ejectment from Ireland affirmed, the Court amended the declaration by enlarging the term, on payment of costs, though the record was remitted to Ireland (*h*): but where an ejectment had been brought, and judgment recovered in 1798, and the term of the demise laid in the declaration had since expired, the Court refused to grant a rule for

(*x*) *Doe* d. *Hardman* v. *Pilkington*, 4 Burr. 2447.

(*y*) *Doe* d. *Rumford* v. *Miller*, 1 Chit. 536; *S. P. Anon.*, 1 Chit. 536.

(*z*) *Doe* d. *Rumford* v. *Miller*, Adams, Eject. 180, 4th ed.

(*a*) *Doe* d. *Foxlow* v. *Jeffries*, Adams, Eject. 181, 4th ed.

(*b*) *Doe* d. *Parsons* v. *Heather*, 8 Mees. & Wels. 158; 1 Dowl. N. S. 64.

(*c*) *Doe* d. *Edwards* v. *Leach*, 3 Scott, N. R. 509; 3 Man. & Gran. 229; 9 Dowl. 877.

(*d*) *Doe* d. *Simpson* v. *Hall*, 5 Man. & Gr. 795; 6 Scott, N. R. 689; 1 Dow. & Low. 49. Amendment by striking out the name of one party refused under 3 & 4 Will. IV. c. 42, s. 23, *Doe* d. *Wilton* v. *Beck*, 13 C. B. 329. But see 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96.

(*e*) *Goucher* v. *Goucher*, 1 Ir. Law Rep. 663, N. S.

(*f*) *Roe* d. *Lee* v. *Ellis*, 2 W. Black. 940.

(*g*) *Doe* d. *Manning* v. *Hay*, 1 Mood. & Rob. 243.

(*h*) *Vicars* v. *Heydon* (in error), Cowp. 841.

enlarging the term, and issuing a scire facias, the possession having changed, and the person who was the owner having since died (*k*). The Court would enlarge the time, even though the effect might be to deprive the defendant of the benefit of the Statute of Limitations (*l*). Again, where judgment in ejectment was signed sixty years ago, when the Court of Chancery granted an injunction to stay execution, and nothing appeared to have been done in the cause since; the Court of Queen's Bench refused to enlarge the term in the declaration, for the purpose of enabling a descendant of the original plaintiff to sue out a scire facias in order to revive the judgment and take out a writ of possession against the heir at law of the original defendant, unless it were quite clear that such amendment would work no injustice (*m*).

Power and Jurisdiction of the Courts.

By the 221st section of the Common Law Procedure Act, it is enacted, that "The several Courts and the judges thereof respectively shall and may exercise over the proceedings the like jurisdiction as heretofore exercised in the action of ejectment, so as to ensure a trial of the title and of actual ouster, when necessary, only, and for all other purposes for which such jurisdiction may at present be exercised; and the provisions of all statutes not inconsistent with the provisions of this act, and which may be applicable to the altered mode of proceeding, shall remain in force and be applied thereto."

(g) *Judgment by Confession.*

When and by whom and how the Action may be confessed.

It would seem that a cognovit in ejectment may still be given, pursuant to 1 & 2 Vict. c. 110, s. 9, notwithstanding the 15 & 16 Vict. c. 76, s. 203, and that a judgment may be thereupon signed in the usual manner (*n*). But in practice it will be found more convenient to proceed under the 15 & 16 Vict. c. 76, the 203rd section of which enacts, that "A sole defendant or all the defendants in ejectment shall be at liberty to confess the action as to the whole or part of the property, by giving to such claimant a notice headed in the Court and cause, and signed by the defendant or defendants, such signature to be attested by his or their attorney; and thereupon the claimant shall be entitled to and may forthwith sign judgment and issue execution for the recovery of possession and costs in the form contained in the Schedule (A.) to this act annexed, marked No. 20, or to the like effect (*o*)." Section 204 enacts, that "In case one of several defend-

(*k*) *Doe* d. *Rendell*, 1 Chit. 535.

(*l*) *Doe* d. *Rabbits* v. *Welch*, 4 Dow. & Low. 115.

(*m*) *Bradney* v. *Hasselden*, 1 Barn. & Cres. 121; 2 Dowl. & Ryl. 227.

(*n*) It has been held that the statute 1 & 2 Vict. c. 110, s. 9, which requires an attorney to be present and attest warrants of attorney and cognovits on the part of defendants, does not apply to a warrant of attorney given in an action of ejectment; *Doe* d. *Kingston* v. *Kingston*, 1 Dowl. N. S. 263; but does apply to a cognovit; *Doe* d. *Rees* v. *Howell*, 12 Ad. & El. 696; Wol. P. C. 87; 4 Per. & Dav. 361.

(*o*) "In the Queen's Bench:

"The —— day of ——, 18—.

"Lancashire, } On the day and year above
to wit. } written, a writ of our lady the Queen issued forth of this Court in these words, that is to say,

"Victoria, by the grace of God [*here copy*

ants in ejectment, who defends separately for a portion of the property for which the other defendant or defendants do not defend, shall be desirous of confessing the claimant's title to such portion, he may give a like notice to the claimant; and thereupon the claimant shall be entitled to and may forthwith sign judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same, and the action may proceed as to the residue." By section 205 it is enacted, that "In case one of several defendants in ejectment, who defends separately in respect of property for which other defendants also defend, shall be desirous of confessing the claimant's title, he may give a like notice thereof; and thereupon the claimant shall be entitled to and may sign judgment against such defendant for the costs occasioned by his defence, and may proceed in the action against the other defendants to judgment and execution." The effect of a judgment by confession is precisely the same as a judgment by default; and a writ of possession grounded upon it may be issued. A warrant of attorney to enter up a judgment in this action may be enforced (*i*).

(h) *Neglect to try Cause.*

Neglect to try.

By the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 100, the 14 Geo. II. c. 17, so far as it relates to judgment in cases of a nonsuit in this as well as in other actions (*k*), is repealed, and by section 202 it is enacted, that "If after appearance entered the claimant, without going to trial, allow the time allowed for going to trial, by the practice of the Court in ordinary cases after issue joined, to elapse, the defendant in ejectment may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and if the claimant afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, and the time for going to trial shall not be extended by the Court or a judge, the defendant may sign judgment in the form contained in the Schedule (A.) to this act annexed, marked No. 19, and recover the costs of defence." In ejectment against a landlord, it was held to be no answer to a motion for a judgment, that in case of a nonsuit the tenants had given up possession to the plaintiff (*l*). So in an action brought on a breach for non-payment of rent and other breaches, where the rent in arrear with

the writ]; and C. D. has on the —— day of —— appeared by ——, his attorney [*or* 'in person'], to the said writ, and the said C. D. has confessed the said action [*or* 'has confessed the said action as to part of the said land, that is to say,' [*here state the part*]: Therefore, it is considered that the said A. B. do recover possession of the land in the said writ mentioned [*or* 'of the said part of the said land'], with the appurtenances, and £—— for costs."

(*i*) *Doe* d. *Beaumont* v. *Beaumont*, 2 Dowl. N. S. 972.

(*k*) *Doe* d. *Leigh* v. *Holt*, 130.

(*l*) *Doe* d. *Draycott* v. *Dyas*, 2 Cromp. M. & Ros. 60; 1 Gale, 160; *S. C.* nom. *Doe* d. *Draper* v. *Roe*, 3 Dowl. 696.

costs was paid into Court and taken out by the plaintiff, it was held, that the defendant was entitled to judgment as in case of a nonsuit (*m*).

(i) *Special Case.*

By the 179th section of the Common Law Procedure Act, it is enacted, that "By consent of the parties, and by leave of a judge, a special case may be stated according to the practice heretofore used." The words "heretofore used" refer apparently to a special case stated under the Common Law Amendment Act, 3 & 4 Will. IV. c. 42, s. 25, after issue joined. A question may arise whether ejectment is within sections 45 and 48 of that act.

SECT. 10.—*Appearance, Issue and Nonsuit.*

Appearance.

By the 15 & 16 Vict. c. 76, pleas in ejectment are abolished and an appearance is substituted in lieu thereof, the 169th and 171st sections directing the persons to whom the writ is directed to appear within sixteen days after service. By section 172, "Any other person not named in the writ shall, by leave of the Court or a judge, be allowed to appear and defend on filing an affidavit showing that he is in possession of the land either by himself or his tenant." By section 173, "Any person appearing to defend as landlord in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord; and such person shall be at liberty to set up any defence which a landlord appearing in an action of ejectment has heretofore been allowed to set up, and no other." Section 174 enacts, "That any person appearing to such writ shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in a notice intituled in the Court and cause and signed by the party appearing, or his attorney, such notice to be served within four days after appearance upon the attorney whose name is indorsed on the writ, if any, and if none, then to be filed in the Master's office; and an appearance without such notice, confining the defence to part, shall be deemed an appearance to defend for the whole." By section 175, "Want of 'reasonable certainty' in the description of the property, or part of it, in the writ or notice, shall not nullify them, but shall only be ground for an application to a judge for better particulars of the land claimed or defended, which a judge shall have power to give in all cases." By section 176, "The Court or a judge shall have power to strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants." Section 177 enacts, "In case no appearance shall be entered into within the time ap-

(*m*) *Doe* d. *Stanley* v. *Towgood*, 2 Dowl. 404.

pointed, or if an appearance be entered, but the defence be limited to part only, the plaintiffs shall be at liberty to sign a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof, to which the defence does not apply, which judgment, if for all, may be in the form contained in the Schedule (A.) to this act annexed, marked No. 14(*n*), or to the like effect; and if for part, may be in the form contained in the Schedule (A.) to this act annexed, marked No. 15(*o*), or to the like effect." Section 178, "In case an appearance shall be entered, an issue may once be made up without any pleadings by the claimants or their attorney setting forth the writ, and stating the fact of the appearance, with its date and the notice limiting the defence, if any, of each of the persons appearing, so that it may appear for what defence is made, and directing the sheriff to summon a jury; and such issue, in case defence is made for the whole, may be in the form contained in Schedule (A.) to this act annexed, marked No. 16, or to the like effect, and, in case defence is made for part, may be in the form contained in the Schedule (A.) to this act annexed, marked No. 15, or to the like effect." Section 183, "If the defendant appears and the claimant does not appear at the trial, the claimant shall be nonsuited, and if the claimant appears and the defendant does not appear the claimant shall be entitled to recover as heretofore, without any proof of his title (*p*)." It would seem that under such circumstances the defendant would be entitled to his costs, and that the judge would have power, under the 1 Will. IV. c. 70, s. 38, to certify for immediate possession.

It is a general rule in this action, that whatever bars the right of entry, is a bar to the plaintiff's title: the plaintiff must, therefore, prove seisin within twenty years in himself or his ancestors: or must prove seisin in a third person of a particular estate in the land, and that he claimed within twenty years after the reversion accrued; or that he or she was an infant, feme covert, non compos, imprisoned, or beyond

(*n*) "*Judgment in Ejectment in case of Non-appearance.*

"In the Queen's Bench:

"The —— day of ——, 18—.

"[*Date of Writ*].

"Lancashire, } On the day and year above
to wit. } written, a writ of our lady the Queen, issued forth of this Court in these words, that is to say,

"Victoria, by the grace of God [*here copy the writ*]; and no appearance has been entered or defence made to the said writ: Therefore, it is considered that the said [*here insert the names of the persons in whom title is alleged in the writ*] do recover possession of the land in the said writ mentioned, with the appurtenances."

(*o*) "In the Queen's Bench:

"On the —— day of ——, A.D. 18—.

"Cumberland, } On the day and year above
to wit. } written, a writ of our lady the Queen issued forth of this Court, in these words, that is to say,

"Victoria, by the grace of God [*here copy the writ*]; and C. D. has on the —— day of —— appeared by ——, his attorney [*or* 'in person'] to the said writ, and has defended for a part of the land in the writ mentioned, that is to say [*here state the part*], and no appearance has been entered or defence made to the said writ, except as to the said part: Therefore, it is considered that the said A. B. [*the claimant*] do recover possession of the land in the said writ mentioned, except the said part, with the appurtenances, and that he have execution thereof forthwith; and as to the rest, let a jury come, &c."

(*p*) See Reg. Gen. Hil. T. 1853 (Pl.), 14; ante, 780.

the sea, at the time when the title accrued, and that he claimed within twenty years, after he came of age, &c., or otherwise became a free agent by such disability ceasing.

SECT. 11.—*Death of Parties.*

Death of either Party, 15 & 16 Vict. c. 76, s. 190.

The Common Law Procedure Act, 15 & 16 Vict. c. 76, has introduced important and valuable alterations into the law respecting the death of parties to the action of ejectment. The 190th section enacts, that "The death of a claimant or defendant shall not cause the action to abate." This was the rule in the old proceeding in ejectment, but as the costs depended upon the consent rule there were no means of enforcing payment of them after the death of the actual parties. The 191st section enacts, that "In case the right of the deceased claimant shall survive to another claimant, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant, and if such a suggestion shall be made before the trial, then the claimant shall have a verdict and recover such judgment as aforesaid, upon its appearing that he was entitled to bring the action either separately or jointly with the deceased claimant."

Death before Trial where Right survives, sect. 191.

Section 192. "In case of the death before the trial of one of several claimants, whose right does not survive to another or others of the claimants, where the legal representative of the deceased claimant shall not become a party to the suit, in the manner hereinafter mentioned, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant for such share of the property as he is entitled to and costs."

Death before Trial where Right does not survive, sect. 192.

Section 193. "In case of a verdict for two or more claimants, if one of such claimants die before execution executed, the other claimant may, whether the legal right to the property shall survive or not, suggest the death in manner aforesaid, and proceed to judgment and execution for recovery of possession of the entirety of the property and the costs; but nothing herein contained shall effect the right of the legal representative of the deceased claimant, or the liability of the surviving claimant to such legal representative, and the entry and possession of such surviving claimant under such execution shall be considered as an entry and possession on behalf of such legal representative, in respect of the share of the property to which he shall be entitled as such representative, and the Court may direct possession to be delivered accordingly."

Death of One Claimant having obtained a Verdict, sect. 193.

Section 194. "In case of the death of a sole claimant, or before trial of one of several claimants, whose right does not survive to another or others of the claimants, the legal representative of such claimant may, by leave of the Court or a judge, enter a

Death of Claimant where Right does not survive, sect. 194.

[illegible] he is such legal representative, [illegible] proceed; and if such suggestion be [illegible] of the suggestion shall be tried [illegible] of the deceased claimant, and such [illegible] verdict in favour of or against the per- [illegible] as hereinbefore provided, with reference [illegible] such claimant; and in case such sugge- [illegible] claimant be made after trial and before exe- [illegible] possession thereupon, and such sugge- [illegible] within eight days after notice thereof, [illegible] Court or a judge may allow, then such [illegible] upon trial thereof a verdict shall pass [illegible] such suggestion, be shall be entitled to such [illegible] recovery of possession, and for the costs [illegible] such suggestion; and in case of a verdict for the [illegible] shall be entitled to such judgment as afore- [illegible] In case of the death before or after [illegible] defendants in ejectment, who defend jointly, [illegible] death, which suggestion shall not [illegible] be subject to be set aside if untrue, and the [illegible] the surviving defendant to judgment and [illegible] In case of the death of a sole defendant or [illegible] in ejectment before trial, a suggestion may be [illegible] such suggestion shall not be traversable, but only [illegible] as if untrue, and the claimants shall be entitled [illegible] recovery of possession of the property, unless some [illegible] appear and defend within the time to be appointed for [illegible] Court or a judge, to be made upon [illegible] claimants; and it shall be lawful for the Court [illegible] such suggestion being made, and upon such application [illegible] order that the claimants shall be at liberty to sign [illegible] such time as the Court or judge may think fit, unless [illegible] in possession, by himself or his tenant or the legal [illegible] of the deceased defendant, shall within such time appear [illegible] action; and such order may be served in the same [illegible] and in case such person shall appear and defend [illegible] proceedings may be taken against such new defendant as if [illegible] appeared and defended the action, and if no appearance be entered and defence made then the claimant shall be at liberty [illegible] pursuant to the order." Section 197. "In case of the death of a sole defendant or of all the defendants in ejectment after verdict, the claimants shall nevertheless be entitled to judgment as if no such death had taken place, and to proceed by execution for recovery of possession without suggestion or revivor, and to proceed for the recovery of the costs, in like manner as upon any other judgment for

[illegible]

[illegible]

Death of all Defendants before Trial, sect. [illegible]

Death of all Defendants after Verdict, sect. 197.

money against the legal representatives of the deceased defendant or defendants." Section 198. "In case of the death before trial of one of several defendants in ejectment, who defend separately for a portion of the property, for which the other defendant or defendants do not defend, the same proceedings may be taken as to such portion, as in the case of the death of a sole defendant, or the claimants may proceed against the surviving defendants in respect of the portion of the property for which they defend." Section 199. "In case of the death before trial of one of several defendants in ejectment, who defend separately in respect of property, for which surviving defendants also defend, it shall be lawful for the Court or a judge at any time before the trial to allow the person, at the time of the death, in possession of the property, or the legal representative of the deceased defendant, to appear and defend on such terms as may appear reasonable and just, upon the application of such person or representative; and if no such application be made or leave granted, the claimant, suggesting the death in manner aforesaid, may proceed against the surviving defendant or defendants to judgment and execution."

Death before Trial of Defendant defending separately for Part, sect. 198.

Death of Defendant defending separately for Property for which others also defend, sect. 199.

SECT. 12.—*Evidence.*

(a) *General Points.*

A complete title must be shown in the plaintiff (*p*), and where several matters are necessary, in order to establish a complete title, the plaintiff must prove all those requisites. Where a plaintiff produces an original lease of a long term, and proves possession for seventy years, the mesne assignments shall be presumed (*q*): so the production of an old counterpart of a lease, with evidence of the payment of rent to the lessee by his under-tenants for a number of years, is sufficient evidence of the lessee's interest under the lease (*r*). In ejectment, a counterpart of an old lease produced from the plaintiff's muniment room, executed by the lessee only, was held admissible evidence, without accounting for the lease itself (*s*).

What Evidence of Title is necessary.

In ejectment by a landlord against his tenant, proof of title is unnecessary, because of the privity there is between the parties; for a person will not be allowed to dispute the original right of him by

When Evidence of Title is necessary in Actions by Landlord against Tenant.

(*p*) See ante, Sect. 4 (a), 726, and (c), 733.

(*q*) *Earl* d. *Godwin* v. *Baxter*, 2 W. Black. 1228. As to the doctrine of presumption, which has considerable weight in the scale of evidence, this general principle must be attended to, namely, that generally, length of time alone is nothing; but presumption must arise from some facts or circumstances arising within that time: for there are two sorts of presumption—one a presumption of law, not to be contradicted; the other a species of evidence; and there can be no presumption of the nature of evidence in any case, without something from whence to make it; some ground on which to found the presumption. Every presumption may be encountered, or to speak more technically, rebutted by contrary evidence.

(*r*) *Doe* d. *Manton* v. *Austin*, 9 Bing. 41; 2 Moore & Scott, 107.

(*s*) *Doe* d. *Egremont* (*Earl*) v. *Pulman*, 3 Queen's B. Rep. 622; and see *Hall* v. *Ball*, 3 Man. & Gr. 242; 3 Scott, N. R. 577.

whom he has been admitted into possession (*t*). This rule, however, applies only to cases where the privity exists; for the defendant is at full liberty to show that the right has expired; thus, in ejectment by a landlord against his tenant, whose lease has expired, the latter is not barred from showing that his landlord's title has expired (*u*). So where a tenant paid his rent to *A.*, a termor, by whom he was not let into possession, but who was lessor of *B.*, his immediate landlord, and, after the expiration of *A.*'s term, the tenant, not knowing it had expired, entered into a parol agreement with *A.* for a tenancy, and paid him rent; it was held, he was not estopped from showing *A.*'s title had expired (*x*). If a tenant, who has been in possession under a former owner, enters into an agreement to hold of one who has no title, being ignorant of that fact, he is not estopped (*y*). But where a person, who had been in possession, entered into a new agreement with one who represented he was devisee of the former landlord; it was held, that he could not, in ejectment by the devisee, give evidence that the devise was void by reason of incapacity of the testator, there appearing no fraud on the part of the devisee (*z*). Where a second mortgagee let part of the premises, after which the first mortgagee gave notice of the mortgage to the tenant, who paid rent accordingly to the first mortgagee, in ejectment by the second mortgagee, the tenant may defend himself by showing the first mortgage (*a*). Lands vested in trustees for the repairs of a parish church, were, after the statute 59 Geo. III. c. 12, s. 17, passed, demised for a term of years; at the end of which time the tenant continued in possession and paid rent to the trustees, and the trustees then assigned to new trustees; held, whatever might be the rights of the parish officers under the statute, the tenant was estopped from contesting the title of the new trustees (*b*). In cases where the privity exists, it will be sufficient to prove that the defendant, or those under whom he claims,—for the rule extends to under-tenants,—were admitted into possession of the premises in question by the lessor of the plaintiff, and that the right to the possession has ceased. So a person defending as landlord is bound by the same estoppel as the tenant in possession (*c*) Upon

(*t*) See ante, Book I., Chap. IV., Sect. 19, 169, 170; Book III., Chap. IV., Sect. 1 (b), 614, 615; and Chap. V., Sect. 5 (h), 694.

(*u*) *England* d. *Syburn* v. *Slade*, 4 Term Rep. 682; *S. P. Doe* d. *Jackson* v. *Ramsbotham*, 3 Maule & Selw. 516. And see *Doe* d. *Colemere* v. *Whitroe*, 1 Dowl. & Ryl. N. P. C. 1; *Doe* d. *Johnson* v. *Baytup*, 3 Ad. & El. 188; 4 Nev. & Man. 837; 1 Har. & Wol. 270; *Doe* d. *Leeming* v. *Skirrow*, 7 Ad. & El. 157; 2 Nev. & Per. 123; Will. Wol. & Dav. 517; *Doe* d. *Strode* v. *Seaton*, 2 Cromp. M. & Ros. 728; 1 Gale, 303; Tyr. & Gr. 19; *Downs* v. *Cooper*, 1 Gale & Dav. 573; 2 Queen's B. Rep. 256; *Hopcraft* v. *Keys*, 9 Bing. 613; 2 Moore & Scott, 760.

(*x*) *Claridge* v. *Mackensie*, 4 Man. & Gr. 143; 4 Scott, N. R. 796.

(*y*) *Gregory* v. *Doidge*, 3 Bing. 474; 11 Moore, 394; *Claridge* v. *Mackensie*, 4 Man. & Gr. 143; 4 Scott, N. R. 796.

(*z*) *Doe* d. *Marlow* v. *Wiggins*, 4 Queen's B. Rep. 367; 3 Gale & Dav. 504.

(*a*) *Doe* d. *Higginbotham* v. *Barton*, 11 Ad. & El. 307; 3 Per. & Dav. 194. See also ante, 197, 198.

(*b*) *Gouldsworth* v. *Knights*, 11 Mees. & Wels. 337; see also *Webb* v. *Austin*, 7 Man. & Gr. 701; 8 Scott, N. R. 419; and see *Hildings* v. *Thompson*, 5 Exch. Rep. 58. ante, 614.

(*c*) *Doe* d. *Manners* (*Earl*) v. *Mizen*, 2 Mood. & Rob. 56.

the same principle, if the defendant has held as tenant to some third person, under whom the plaintiff claims, although the derivative title of the claimant, from such third person, must be proved in addition to the evidence necessary in the last instance, proof of the title of the third person himself will not be required (*d*). In an ejectment for mines against a member of a mining company, the defendant is estopped from disputing the title of the plaintiff, who had leased the mines to the company of which he was a partner at the time of the action, but not at the time he granted the lease (*e*). Where premises were in the possession of a tenant under an indenture of lease, and a party claiming them by an alleged title adverse to that of the lessor, prior to that lease, demanded them of the lessee, and ultimately obtained possession by paying him 20*l.*; and the landlord afterwards brought ejectment against the party so in possession, the term having been forfeited; it was held, that the defendant could not set up his adverse title against the landlord (*f*). So where a tenant of parish officers was induced by the lord of the manor to give him possession, and he put in another tenant, the latter cannot, in ejectment by the parish officers, set up any title which the original tenant could not (*g*). Where a person fraudulently obtained possession of premises by obtaining leave to get vegetables in the garden, and then set up a claim to title, it was held, that he could not dispute the title of the person who gave the licence, in ejectment brought by him (*h*). Where the only evidence of the tenancy is payment of rent by the defendant to the lessor of the plaintiff, the defendant may explain the payment, and show that the plaintiff received it as agent for a third person (*i*).

Proof of the Agreement of Tenancy.

The contract under which the tenant is in possession of the premises must be proved according to its nature: if it was verbal merely, its existence must be shown by some one competent to speak to the facts: if by written agreement, or deed, the document must be produced, and its execution must be shown by proving the handwriting of the defendant (*k*). If it is lost, or in the hands of the opposite party, secondary evidence of its contents may be given, after having satisfactorily accounted for its absence; for the best evidence the nature of the case admits need only be produced. It may be observed, that a deed, above thirty years old, proves itself, without any evidence of its execution.

Proof of Locality of the Premises.

This being an action of trespass, the place mentioned in the declaration is material: thus, where in ejectment for a house in the parish

(*d*) Adams, Eject. 232, 4th ed.

(*e*) *Francis* v. *Doe* d. *Harvey*, 4 Mees. & Wels. 331; 1 Horn. & Hurl. 362.

(*f*) *Doe* d. *Bullen* v. *Mills*, 2 Ad. & El. 17; 1 Nev. & M. 25; *S. C.* 1 Mood. & R. 385.

(*g*) *Doe* d. *Haden* v. *Burton*, 9 Car. & Pay. 254.

(*h*) *Doe* d. *Johnson* v. *Baytup*, 3 Ad. & El. 188; 4 Nev. & Man. 837; 1 Har. & Wol. 270.

(*i*) *Doe* d. *Harvey* v. *Francis*, 2 Mood. & Rob. 57.

(*k*) As to verbal proof where there is a written contract, see ante, Chap. IV., Sect. 4, 631; 17 & 18 Vict. c. 125, s. 24.

of St. Peter, in the ward of Cheap, the defendant proved it to be in the ward of Farringdon Within, and that no part of the parish of St. Peter was in the ward of Cheap, the plaintiff was nonsuited (*l*): in such a case, however, an amendment would probably now be allowed under the 15 & 16 Vict. c. 76, s. 222, and the 17 & 18 Vict. c. 125, s. 96. Where there was no doubt as to the identity of the premises sought to be recovered, with those for which the tenant defends, the lessor of the plaintiff was not required to produce the consent rule (*m*). The identity and locality of the premises can always be proved without difficulty, when a privity exists between the parties, by the fact of payment of rent, or acknowledgment of tenancy. When there is no privity, other evidence must be adduced.

Proof of Act of Forfeiture.

To support an ejectment on the forfeiture of a lease, by non-performance of a covenant, if the covenant be to do an act, the plaintiff must give some evidence of the omission of the act (*n*): he must show that the covenant has been broken by the same description of evidence as would be required in an action of covenant: and if he has given a particular of the breaches, upon which he intends to rely, he will be precluded from giving evidence of breaches different from those contained in the particular: therefore, evidence of bad cultivation cannot be given under a particular of non-cultivation (*o*). Where the forfeiture is by non-payment of rent, if the proceedings are at common law, the plaintiff, after proving the lease, must show that the rent has been demanded with all the requisite formalities (*p*); where the case is within the statute 15 & 16 Vict. c. 76, s. 210, which is substantially

(*l*) *Boddy* v. *Smith*, 1 Stra. 595. As to amendments, see ante, 852. It is laid down, generally, by Lord C. B. Gilbert, that an old terrier, or survey of a manor, whether ecclesiastical or temporal, may be given in evidence; for there are no other ways of ascertaining the old tenures or boundaries. Accordingly, the survey of a religious house, taken in 1563, was allowed to be good evidence to prove the vicar's right to small tithes. But this opinion seems to relate, with regard to terriers, to such as are signed, not only by the parson, but by the churchwardens and substantial inhabitants of the parish, or at least by the churchwardens, not being of the parson's nomination; and, in respect to surveys, to such as are signed by the tenants of the manor, or appear to have been made at a court of survey. For then, being of a public nature, they cannot be supposed to have been framed and attested to have served the private interest of any individual; upon which principle, also, court rolls, or at least parish books, are admitted in evidence, when the rights of third persons are concerned. Surveys, although of a private nature, have been admitted in evidence, where circumstances could be adduced to show the improbability of their being taken to serve any interested purpose in the maker: thus, where two manors were in the hands of the same person, and a survey was taken, and afterwards one of them was conveyed to another person, and after a long time there were disputes between the lords of the two manors, this old survey was held to be evidence. So an old map of lands was allowed to be evidence: as when it came along with the writings, and agreed with the boundaries adjusted in an ancient purchase. But where a terrier or survey is not attended with such circumstances, and is the mere private memorial of the party for whom it is made, it seems only admissible as evidence against him.

A map is only evidence where it is undisputed that at the time the map was made the property belonged to the person from whom both parties claim; *Doe* d. *Hughes* v. *Lakin*, 7 Car. & Pay. 481.

(*m*) *Doe* d. *Greaves* v. *Raby*, 2 Barn. & Adol. 948; *Doe* d. *Flemming* v. *Arnfield*, 1 Dowl. N. S. 327; and see *Doe* d. *Lamble* v. *Lamble*, Mood. & Malk. 237.

(*n*) *Doe* d. *Chandless* v. *Robson*, 2 Car. & Pay. 245.

(*o*) *Doe* d. *Winnall* v. *Brown*, 2 Scott, N. R. 685; Drinkw. 113; 2 Man. & Gr. 523.

(*p*) See ante, 275, n.

similar to the 4 Geo. II. c. 28, s. 2 (*q*), instead of the demand, he must show the fact and the time of the service of the writ in ejectment (*r*), that there were six months' rent in arrear, and no sufficient distress upon the premises. To prove a forfeiture under a covenant to keep in repair, it is not necessary to show that the premises were not in repair on the day of the demise; but if proved to be out of repair a short time previously, it is incumbent on the defendant to give evidence that they have been put into repair before the right of re-entry accrued (*s*). If the forfeiture be for not insuring, the plaintiff must prove that no insurance has been effected, and refusal to show the policy or non-production of it at the trial, after notice, is not primâ facie evidence against the tenant (*t*). But it has since been held to be primâ facie evidence against the tenant that a previous assignee of the premises had a few years before ceased to insure them at an office where he had formerly insured them, even though there was a covenant to produce the receipts, and no evidence of a demand of them was given (*u*). On a forfeiture by underletting, if a person is found upon the premises appearing as tenant, it has been held to be primâ facie evidence of an underletting (*x*); but it has been since held, in another case, that it is not sufficient to prove a stranger in possession of the premises, who said that they were demised to him by another stranger (*y*).

Proof of Determination of the Tenancy.

The tenancy is shown to have been determined by efflux of time, by computation, upon proof being given of the lease. When the tenancy is ended by forfeiture, evidence must be given of the act amounting to forfeiture, according to the circumstances. When by notice to quit, proof of the service of a regular notice must be given (*z*). Where it was the usual course of practice in an attorney's office for the clerks to serve notices to quit, and to indorse on duplicates of such notices the fact and time of service; and on one occasion the attorney himself prepared a notice to serve on a tenant, took it out with him, together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant, and two of them were found to have been delivered by him on that occasion; it was held in ejectment after the attorney's death, that the indorsement was admissible evidence to prove the service of the third notice (*a*). Service may be inferred from the tenant speaking of "the notice to

(*q*) See ante, 718.
(*r*) *Doe* d. *Gooch* v. *Knowles*, 1 Dow. & Low. 198.
(*s*) *Doe* d. *Hemmings* v. *Durnford*, 2 Cromp. & Jer. 667.
(*t*) *Doe* d. *Bridger* v. *Whitehead*, 8 Ad. & El. 571; 3 Nev. & Per. 557; 1 Will. Wol. & Hod. 521.
(*u*) *Doe* d. *Ive* v. *Scott*, Arn. & Hod. 76.
(*x*) *Doe* d. *Hindley* v. *Rickarby*, 5 Esp. 4.
(*y*) *Doe* v. *Payne*, 1 Stark. 86.
(*z*) Notice to produce the original notice served need not be given; *Doe* d. *Fleming* v. *Somerton*, 7 Queen's B. Rep. 58.
(*a*) *Doe* d. *Pateshall* v. *Turford*, 3 Barn. & Adol. 890; and see *Stapylton* v. *Clough*, 2 Ell. & Bla. 933; and *The Sussex Peerage*, 11 Cl. & Fin. 113.

quit which he had received (*b*)." When a witness said he guessed that the tenancy expired on a Tuesday or Wednesday, but had no recollection which, and the notice was to quit on Wednesday, it was held not to be sufficient (*c*).

(b) *Particular Titles.*

Evidence in Actions by Assignees.

Assignees of bankrupts must prove the bankrupt's title to the premises; they must also prove their own right to sue, by showing the necessary facts to establish the bankruptcy, as in ordinary cases, and by putting in and proving the certificate of their appointment as assignees under the fiat (*d*). In ejectment by an assignee under the compulsory clause of the Lords' Act, it is sufficient for the plaintiff to produce the assignment by the prisoner, without proving the previous notices; at all events it is sufficient if the rule for the prisoner's discharge be also produced (*e*).

Evidence in Actions by Mortgagees.

When ejectment is brought for a forfeiture of a mortgage against the mortgagor himself, no further evidence than the mortgage deeds is required; but if the action be against his tenant, the mortgagee must prove, in addition, the tenancy; and either that it has regularly determined, or that it has been created subsequent to the mortgage, and has never been acknowledged (*f*). Proof of the mortgage by a deed of release, which recites the lease for a year, is sufficient, without putting in the lease for a year itself (*g*). Where a deed of assignment of a mortgage by demise, to which the mortgagor, who was tenant in fee, and the mortgagee, were parties, recited the mortgage deed, it was held, in ejectment by the executor of the assignee of the mortgagee, that this recital afforded sufficient evidence of title without producing the mortgage deed (*h*). The son and heir of a mortgagor, who was party to the mortgage deed, after his death appointed a receiver by deed, in which he acknowledged himself in occupation of the premises; some years after he entered into the consent rule as "tenant:" in an action of ejectment brought by the mortgagee; it was held, that the defendant was not estopped from setting up as a defence, that there were outstanding tenancies from year to year in tenants who had paid rent to the mortgagee (*i*). In ejectment by a mortgagee, an indorsement on the mortgage deed, by the defendant, of his having made a further charge on the premises, is an admission

(*b*) *Doe* d. *Simpson* v. *Hall*, 5 Man. & Gr. 795; 6 Scott, N. R. 689.

(*c*) *Doe* d. *Finlayson* v. *Bayler*, 5 Car. & Pay. 67.

(*d*) See 2 & 3 Will. IV. c. 114, and 12 & 13 Vict. c. 106, s. 232, et seq.

(*e*) *Doe* d. *Milburn* v. *Edgar*, 2 Bing. N.C. 391; 2 Scott, 581; 1 Hodges, 431.

(*f*) *Thunder* d. *Weaver* v. *Belcher*, 3 East, 449.

(*g*) Statute 4 & 5 Vict. c. 21; *Doe* d. *Pember* v. *Wagstaffe*, 7 Car. & Pay. 477.

(*h*) *Doe* d. *Rogers* v. *Brook*, 3 Ad. & El. 513; 1 Har. & Wol. 400; see *Doe* d. *Smith* v. *Webber*, 3 Nev. & Man. 746.

(*i*) *Doe* d. *Bowman* v. *Lewis*, 13 Mees. & Wels. 241.

that he is in possession under the original mortgagor, who, being estopped from denying the plaintiff's title, the defendant is also (*k*).

Evidence in Actions by Execution Creditors.

If a tenant by elegit be the plaintiff, it will be necessary for him to prove—the judgment,—the elegit taken out upon it, and the inquisition and return thereupon, by which the land in question is assigned to him (*l*). This, when the debtor is himself in possession, is done by merely producing an examined copy of the judgment roll; and where a third person is in possession, by showing in addition, that such person came into possession from the debtor; in no case is it necessary to prove a copy of the elegit and inquisition (*m*). The return to an elegit gave the name of a farm, and stated it to contain, by estimation, nineteen acres; it was held, that the whole farm might be recovered, containing thirty acres and several cottages (*n*). In ejectment by the conusee of a statute-merchant, he must prove—a copy of the statute, —and of the capias si laicus, and the extent returned,—and also the liberate returned; for though, by the return of the extent, an interest is vested in the conusee, yet the actual possession of the interest is by the liberate; an extent giving only a possession in law (*o*). A lessor in ejectment, who claims title as a purchaser from the sheriff, who sells by virtue of a fieri facias at the suit of such lessor, must against a stranger prove the judgment as well as the writ (*p*): but against the defendant in execution, it is sufficient to produce the fi. fa. without proving a copy of the judgment (*q*). Where the term sold had been granted to the defendant's father, and on his death, intestate, the defendant's brother entered and took out administration, and was possessed till his death, and on his death the defendant entered, and by indenture, to which the defendant was a party, concerning other premises, it was recited that the defendant was the legal personal representative of his brothers; it was held, this was primâ facie evidence that the term was vested in the defendant (*r*). An assignment by the sheriff in writing must be also proved (*s*).

Evidence in Actions for Copyhold Lands.

In ejectment for a copyhold on a forfeiture, it ought to be proved, that the plaintiff is lord,—that the defendant is a copyholder,—and that he committed a forfeiture; but the presentment of the forfeiture need not be proved, nor the entry or seizure of the lord for the forfeiture. If an ejectment be brought against the lessee for years of a copyholder, relying upon the lease as a forfeiture, the plaintiff must prove an actual admittance of the copyholder; and it will not be suf-

(*k*) *Doe* d. *Gaisford* v. *Stone*, 3 Com. B. R. 176; 15 Law J. (N. S.) C. P. 234; 10 Jur. 480.

(*l*) Bull. N. P. 104; *Hammond* v. *Wood*, 2 Salk. 563.

(*m*) *Ramsbottom* v. *Brickhurst*, 2 Maule & Selw. 565.

(*n*) *Doe* d. *Roberts* v. *Parry*, 13 Mees. & Wels. 356.

(*o*) Bull. N. P. 104.

(*p*) *Doe* d. *Bland* v. *Smith*, 2 Stark. 199; *Hoffman* v. *Pitt*, 5 Esp. 22.

(*q*) *Doe* d. *Batten* v. *Murless*, 6 Maule & Selw. 110.

(*r*) Ibid.

(*s*) *Doe* d. *Hughes* v. *Jones*, 9 Mees. & Wels. 372; 1 Dowl. N. S. 352; *Doe* d. *Stevens* v. *Donston*, 1 Barn. & Ald. 230; ante, 223.

ficient to prove the father admitted, and that the estate descended to the defendant's lessor as son and heir, and that he had paid quit rents; for a copyholder cannot make a lease, except to try a title, before admittance and an actual entry; and, therefore, if after admittance he were to surrender without making an actual entry, the surrender would be void. In ejectment by a surrenderee of copyhold lands, he must prove the surrender to his use, and his subsequent admittance; but it is immaterial whether the admittance be before or after the day of the demise in the declaration (*t*). The court rolls of the manor, containing an entry of and presentment by the homage of a surrender out of court and of admittance, are evidence of the surrenderee's title against the alleged surrenderor without producing the surrender (*u*).

Evidence in Ejectment by Parsons.

In ejectment for parsonage houses, glebe, or tithes, the parson must prove his admission, institution, and induction; but he need not show a title in his patron (*x*). Upon a question of tithes, the books of an incumbent respecting them may be evidence for his successor; which is almost the only instance in which the law permits the private memoranda of a person deceased to affect the rights of third parties (*y*).

Defendant's Evidence in Ejectment.

The principle that a claimant in ejectment must recover on the strength of his own title, is now so clearly established, that the defendant's evidence is confined to merely falsifying his adversary's proofs, or rebutting the presumptions which may arise out of them; he need not show that he has any claim whatever himself to the premises, nor even give evidence of a title in a third person: it is sufficient if he make it appear that a legal and possessory title does not subsist in the lessor of the plaintiff (*z*).

SECT. 13.—*Trial, Verdict and Judgment.*

Course of Proceeding at the Trial, 15 & 16 Vict. c. 76, s. 182.

The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 182, enacts, that "The Court or a judge may, on the application of either party, order that the trial shall take place in any county or place other than that in which the venue is laid; and such order being suggested on the record the trial may be had accordingly." The time for the application would be after the making up of the issue. And by the 180th section, "the question at the trial shall, except in certain cases thereafter mentioned, be, whether the statement in the writ of the title of the claimants is true or false, and, if true, then which of the claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question; and the entry of the verdict may be made in the form contained in the Schedule (A.) to this act annexed, marked No. 17, or to the like effect, with such modifications as may be neces-

Sect. 180.

(*t*) Adams, Eject. 263, 4th ed.

(*u*) *Doe* d. *Garrod* v. *Olley*, 12 Ad. & El. 481; 4 Per. & Dav. 275.

(*x*) Bull. N. P. 105; see ante, 803, 804.

(*y*) *Glynn* v. *Bank of England*, 2 Ves. 43, cited.

(*z*) Adams, Eject. 279, 4th ed.

sary to meet the facts (*a*)." If in an ejectment a landlord and tenant defend by different attorneys, and have different counsel, but it appear that the tenant claims no title but what he derives from the landlord, the judge at the trial will only allow one counsel to address the jury for the defence, but the party's counsel who does not address the jury will be at liberty to cross-examine and also to call witnesses (*b*). If after the pleadings are opened by the junior counsel for the plaintiff, the defendant's counsel expresses himself ready to admit the claimant's whole primâ facie case, but sets up a new title, it will authorize him to open the case, and make the first address to the jury (*c*). So the defendant is entitled to the general reply, where the claimant claiming by descent proves his pedigree and stops, and the defendant sets up a new case in his defence, which is answered by evidence on the part of the claimant (*d*). Proof of the service of the declaration on the tenant in possession was formerly sufficient, without producing the landlord's rule, to show that the defendant came in as landlord (*e*). Proof having been offered in support of the title of each of two several lessors of the plaintiffs, the defendant tendered evidence after the close of the plaintiff's case, which was admissible as against the title of one of the lessors only; and it was held, that the plaintiff might at that stage abandon the demise by that lessor, and that then the evidence was inadmissible against the title of the other lessor (*f*).

Verdict.

By the verdict, the plaintiff recovers according to the title he makes out, and the true question is, who has the possessory right (*g*); therefore where the plaintiff declared on a demise for seven years, but had title to five only, he recovered according to his title notwithstanding (*h*). So the plaintiff may recover as many acres as he proves title to, though he declare for more: and when the declaration proceeded for several things, and there was a general verdict, though the declaration were bad as to part, yet the plaintiff might recover for the remainder (*i*). The defendant in ejectment was entitled to have the verdict entered for him as to any part of the premises named in the consent rule as to which he succeeded (*k*). A verdict cures a defect in setting out the title, though it cannot cure a defective title (*l*). In one case the Court

(*a*) "Afterwards on the —— day of ——, A.D. ——, before —— and ——, justices of our lady the Queen assigned to take the assizes in and for the within county, come the parties within mentioned; and a jury of the said county being sworn to try the matters in question between the said parties, upon their oath say, that *A. B.* [*the claimant*] within mentioned, on the —— day of ——, A.D. ——, was, and still is, entitled to the possession of the land within mentioned, as in the writ alleged: Therefore, &c."

(*b*) *Doe* d. *Hogg* v. *Tindale*, 3 Car. & Pay. 565; Mood. & Malk. 314.

(*c*) *Fenn* d. *Wright* v. *Johnson*, Adams, Eject. 238, 4th ed.; *Doe* d. *Tucker* v. *Tucker*, Mood. & Malk. 536.

(*d*) *Goodtitle* d. *Revett* v. *Braham*, 4 Term R. 497. (Trial at bar.)

(*e*) *Doe* d. *Giles* v. *Warwick*, 5 Maule & Selw. 393.

(*f*) *Doe* d. *Rowlandson* v. *Wainwright*, 5 Ad. & El. 520; 1 Nev. & Per. 8; 2 Har. & Wol. 391.

(*g*) Bull. N. P. 106.

(*h*) *Doe* d. *Shore* v. *Porter*, 3 Term R. 13.

(*i*) 2 Esp. N. P. 490.

(*k*) *Doe* d. *Bowman* v. *Lewis*, 13 Mees. & Wels. 241; 2 Dow. & Low. 667; reversing *Doe* d. *Davenport* v. *Rhodes*, 11 Mees. & Wels. 600; 1 Dow. & Low. 292.

(*l*) *Roe* d. *Wrangham* v. *Hersey*, 3 Wils. 275.

refused to set aside the verdict, on the ground that there was a variance between the description of the premises in the nisi prius record and the issue, it not being stated how the premises were described in the declaration delivered (*m*). The above cases decided under the old system will be found useful, with reference to the provisions of the Common Law Procedure Act, 15 & 16 Vict. c. 76. By the 181st section of the above act it is enacted, that "In case the title of the claimant shall appear to have existed as alleged in the writ, and at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant shall, notwithstanding, be entitled to a verdict according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit."

15 & 16 Vict. c. 76, s. 181.

Mesne Profits, 1 Geo. IV. c. 87, s. 2; 15 & 16 Vict. c. 76, s. 214.

By statute 1 Geo. IV. c. 87, s. 2, in ejectments by landlords against their tenants, the plaintiff, whether there be an appearance or not, after proof of his right to recover (*n*), may give evidence of, and the jury may find the mesne profits which have accrued from the determination of the tenant's interest to the time of trial, or to some preceding day to be specially mentioned in the verdict; provided that this is not to prevent a landlord from bringing mesne profits for any period subsequent to the verdict, or such preceding day therein mentioned down to the time of delivering possession (*o*). Damages may be recovered under this statute for the mesne profits down to the day of trial, though no notice of trial has been proved (*p*). By the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 214, "Wherever it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the claimant on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the writ in ejectment, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the claimant shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession and costs, but also for the mesne profits found by the jury: provided always, that nothing hereinbefore

(*m*) *Doe* d. *Cotterill* v. *Wylde*, 2 Barn. & Ald. 472.

(*n*) See ante, 808.

(*o*) As to the action for mesne profits, see ante, Chap. IV., Sect. 6, p. 652.

(*p*) *Doe* d. *Thompson* v. *Hodgson*, 12 Ad. & El. 135; 2 Mood. & Rob. 283; 4 Per. & Dav. 142.

contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment." This is similar to 1 Geo IV. c. 87, s. 2, the 6th section of which act as amended by 5 & 6 Vict. c. 67, s. 2, will, by virtue of the 221st section of the Common Law Amendment Act, still be applicable. Under the 214th section, although the defendant does not appear, the plaintiff must prove his right to recover possession before he can give evidence of mesne profits (*q*).

Sect. 214.

By the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 184, "The jury may find a special verdict, or either party may tender a bill of exceptions."

Special Verdict. Bill of Exceptions.

By the same act, s. 177, judgment may be signed by the claimant for want of appearance or defence. (See the section, ante, 799.) But by the Reg. Gen., Hilary Term, 1853, s. 112, "No judgment in ejectment for want of appearance or defence, whether limited or otherwise, shall be signed without first filing an affidavit of the service of the writ, according to the Common Law Procedure Act, 1852, and a copy thereof, or where personal service has not been effected without first obtaining a judge's order, or a rule of Court authorizing the signing such judgment; which said rule or order, or a duplicate thereof, shall be filed, together with a copy of the writ." The 15 & 16 Vict. c. 76, s. 185, also enacts, that "Upon a finding for the claimant judgment may be signed, and execution issue for the recovery of possession of the property, or such part thereof as the jury shall find the claimant entitled to, and for costs within such time not exceeding the fifth day in term after the verdict, as the Court or judge before whom the cause is tried shall order, and if no such order be made, then on the fifth day in term after the verdict or within fourteen days after such verdict, whichever shall first happen." Section 186 enacts, that "Upon a finding for the defendants, or any of them, judgment may be signed, and execution issue for costs against the claimants named in the writ, within such time, not exceeding the fifth day in term after the verdict, as the Court or judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen."

Judgment in Ejectment, 15 & 16 Vict. c. 76, s. 177.

Sect. 185.

Sect. 186.

The judgment in ejectment is for a recovery of the possession, not of the seisin or freehold, without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it, in truth and substance can only be possessed according to right; for possession under a judgment in ejectment can never amount to a disseisin of the freehold, but will enure according to the right of the party reco-

(*q*) *Howard* v. *Williams*, 21 Law T. 264.

vering, whether it be a right of freehold in possession, in tail or in fee (r). Accordingly, if he has a freehold, he is in as a freeholder; if he has a chattel interest, he is in as a termor; if he has no title, he is in as a trespasser—and, without any re-entry by the true owner, is liable to account for the profits. Pursuant to the old practice, under a demise of the whole, the plaintiff might recover an undivided moiety (s); yet, where the plaintiff declared for the whole of certain premises, of which he recovered a moiety only, the judgment ought not to be for a moiety only, but that the plaintiff recover his term; and he had to take out execution for no more than he had a right to recover. Where a declaration contained two demises by two different lessors, of two distinct undivided thirds, and judgment was given that the plaintiff "do recover his said terms;" and on error, it appeared from the facts stated on a bill of exceptions to the judge's directions on a point of law, that the ejectment respected only one undivided third; it was held well enough on the record, where the point was only raised by a bill of exceptions (t): and it would seem that it would have been sufficient even on special verdict. If by any intendment a faulty judgment in ejectment, after a verdict, can be made good, the Court will do it (u). The Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 206, enacts, that "It shall not be necessary before issuing execution upon any judgment under the authority of this act to enter the proceedings upon any roll, but an incipitur thereof may be made upon paper, shortly describing the nature of the judgment according to the practice heretofore used, and judgment may thereupon be signed, and costs taxed, and execution issued, according to the practice heretofore used: provided nevertheless, that the proceedings may be entered upon the roll whenever the same may become necessary for the purpose of evidence, or of bringing error, or the like." And by section 207, "The effect of a judgment in an action of ejectment under this act shall be the same as that of a judgment in the action of ejectment heretofore used."

Sect. 206.

Sect. 207.

SECT. 14.—*Costs.*

Claimant's Remedy for Costs, 15 & 16 Vict. c. 76, s. 185.

Incident to the judgment are the costs or expenses of the action, which are therefore next to be treated of. And here we may observe, that a material improvement with respect to the costs in ejectment has been made by the Common Law Procedure Act, 15 & 16 Vict. c. 76, the right of recovering costs being placed on the same footing as in an ordinary action; for by the 185th section, "Upon a finding for the claimant, judgment may be signed, and execution issue for the recovery of possession of the property, or such part thereof as the jury

(r) *Doe* d. *Atkyns* v. *Horde*, Cowp. 702.
(s) *Doe* d. *Bryant* v. *Wippell*, 1 Esp. 360.
(t) *Rowe* v. *Power* (*in error*), 2 New R. 1.
(u) *Morris* v. *Barry* (*in error*), 1 Wils. 1; 2 Stra. 1180.

shall find the claimant entitled to, and for costs, within such time, not exceeding the fifth day in term after the verdict, as the Court or judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen." And by the 186th section, "Upon a finding for the defendants, or any of them, judgment may be signed, and execution issue for costs against the claimants named in the writ, within such time, not exceeding the fifth day in term after the verdict, as the Court or judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen." Section 187 provides, that "Upon any judgment in ejectment for recovery of possession and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs, at the election of the claimant." Under this section, therefore, the claimant may have a separate writ of fi. fa. or ca sa. for the costs, or he may have a fi. fa. or a ca. sa. added to the habere facias possessionem in the same writ.

Defendant's Remedy for Costs, sect. 186.

Sect. 187.

If there are several defendants, and they fail, each of them is answerable for the whole costs (*x*). Where three ejectments were brought against a landlord and his two tenants, and the plaintiff recovered a verdict against one of the tenants, which by a consolidation rule was to guide the other, the Court compelled the landlord to pay the costs of that one (*y*). And where a party comes into Court in another name, and abuses the process of the Court, he is liable to pay costs as a suitor. The following case illustrates this position:—Two parties entered an appearance for the tenants in possession, and defended the action by attorney, having no interest in the premises, but conducting the defence solely for the benefit of another person whom they reasonably believed to be the person entitled to the premises: it was held by the Court of Queen's Bench (dissentiente Erle, J.), that the parties would have been, before the passing of the Common Law Procedure Act, 1852, liable to pay the plaintiff's costs in the action, and that that act had made no difference in the case (*z*). The above case appears to shake the authority of *Doe* d. *Wright* v. *Smith* (*a*), which decided, that where an insolvent defendant was induced and assisted to defend the action by a third person, who claimed no interest in the property, the Court would not compel him to pay the costs. It has been doubted whether the statute 3 & 4 Vict. c. 24 (*b*), relating to costs, applies to the action of ejectment (*c*).

(*x*) Bull. N. P. 335.

(*y*) *Thrustout* d. *Jones* v. *Shenton*, 10 Barn. & Cres. 110.

(*z*) *Hutchinson* v. *Greenwood*, 24 Law J., Q. B., 2.

(*a*) *Doe* d. *Wright* v. *Smith*, 8 Dowl. 517; and see *Hayward* v. *Giffard*, 4 Mees. & Wels. 194; *Berkeley* v. *Dimery*, 10 Barn. & Cres. 113; and *Doe* d. *Masters* v. *Gray*, ibid. 615.

(*b*) Ante, 727.

(*c*) *Doe* d. *Hughes* v. *Derry*, 9 Car. & Pay. 494.

ts where re are se- Issues.

By the 1st Rule of Hilary Term, 2 Will. IV. sect. 74, no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs. That rule was held to give a defendant the costs of an issue found for him on a demise in ejectment (*d*). Where there was but one count, and the lessor of the plaintiff recovered judgment for part only of the lands claimed, the defendant succeeding as to the chief question in dispute; it was held, that he was entitled to have his costs, as to the part found for him, set off against the costs of the lessor of the plaintiff under the rule (*e*).

& 16 Vict. 76, s. 183.

By the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 183, "If the defendant appears, and the claimant does not appear at the trial, the claimant shall be nonsuited, and the defendant will be entitled to his costs in the ordinary way. If a stranger carried on a suit in another's name, who had title, and yet was so poor that he could not pay the costs; in case he failed, the Court, on affidavit of the circumstances, would order the person who carried on the suit to pay costs to the defendant (*f*). So where husband and wife were lessors, and the former died after entering into the rule; the wife was notwithstanding held liable to the payment of costs, because they were to be paid by the lessor of the plaintiff, and both of them were such.

Double Costs.

By the late statute 5 & 6 Vict. c. 97, double costs are not now recoverable in any case; consequently the enactment of the statute 1 Geo. IV. c. 87, s. 1 (*g*), giving double costs, is repealed.

Sect. 15.—*Execution and Scire Facias.*

Mode of obtaining Execution in Ejectment, 15 & 16 Vict. c. 76, s. 185.

As the plaintiff in ejectment recovers only the possession of the property in question, the execution is of course for the possession only. The plaintiff, having judgment to recover his term, may enter without suing out a writ of execution, which is called an habere facias possessionem;—for where the land recovered is certain, the recoverer may enter at his own peril; and the assistance of the sheriff is only to preserve the peace (*h*). By the 185th section of the Common Law Procedure Act, 15 & 16 Vict., it is enacted, that "Upon a finding for the claimant, judgment may be signed, and execution issue for the recovery of possession of the property, or such part thereof as the jury shall find the claimant entitled to, and for costs, within such time, not exceeding the fifth day in term after the verdict, as the Court or judge before whom the cause is tried shall order; and if no such order

(*d*) *Doe* d. *Smith* v. *Webber*, 2 Ad. & El. 448; 4 Nev. & Man. 381; 4 Har. & Wol. 10.

(*e*) *Doe* d. *Errington* v. *Errington*, 4 Dowl. 602; 1 Har. & Wol. 502; and see *Doe* d. *Bowman* v. *Lewis*, 13 Mees. & Wels. 241.

(*f*) Run. Eject. 417.

(*g*) See ante, 749, 787.

(*h*) Run. Eject. 424; 2 Sell. Prac. 202.

be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen." Section 186 enacts, that "Upon a finding for the defendants, or any of them, judgment may be signed, and execution issue for costs against the claimants named in the writ, within such time, not exceeding the fifth day in term after the verdict, as the Court or judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen." By section 187 it is enacted, that "Upon any judgment in ejectment for recovery of possession and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs, at the election of the claimant." Where the landlord of premises, after notice to quit, brought an action of ejectment against the tenant, and obtained a verdict, and the latter still continuing in possession, he distrained on him for rent, which became due after the verdict, and which he paid; it was held, that the execution in the ejectment could not be stayed, as the tenant should have disputed the distress (*i*). In order to save the expense of executing a writ of possession, it is not unusual for the tenant in possession to attorn to the lessor of the plaintiff.

Sect. 186.

Sect. 187.

Certificate for immediate Execution.

By statute 11 Geo. IV. & 1 Will. IV. c. 70, s. 38, it is enacted, that in all cases of trials of ejectment, at Nisi Prius, when the verdict is given for the plaintiff, or the plaintiff is nonsuited for want of the defendant's appearance to confess lease, entry and ouster, the judge may certify his opinion on the back of the record, that a writ of possession ought to issue immediately; and upon such certificate, a writ of possession may issue immediately, and the costs may be taxed and judgment signed and executed afterwards at the usual time, as if no such writ had issued: provided, that such writ, instead of reciting a recovery by judgment in the common form, shall recite shortly, that the cause came on for trial at Nisi Prius at such a time and place, and before such a judge (naming them), and that thereupon the said judge certified his opinion, that a writ of possession ought to issue immediately (*k*). The judge has no discretion under this statute as to the time at which the plaintiff shall have possession; he may either certify for *immediate* possession, or let the case take its regular course (*l*): but if the judge should think that some time ought to be allowed to the defendant, he will grant a certificate for immediate execution, the lessor of the plaintiff undertaking not to enforce it for a certain time (*m*). Since the passing of the Common Law Procedure Act (see s. 185), it may be expected that applications for immediate execution under the 11 Geo. IV. & 1 Will. IV. c. 70, s. 38, will fall into disuse. The

(*i*) *Doe* d. *Holmes* v. *Davies*, 2 Moore, 581.

(*k*) The act for speedy executions, 1 Will. IV. c. 7, does not affect these provisions; see the 5th section of that act.

(*l*) Ibid.

(*m*) *Doe* d. *Packer* v. *Hilliard*, 5 Car. & Pay. 132.

Sect. 215.

215th section of the Common Law Procedure Act relates to execution after the tenant has been compelled to find bail under the 213th section. It enacts, that "In all cases in which such security shall have been given as aforesaid, if upon the trial a verdict shall pass for the claimant, unless it shall appear to the judge before whom the same shall have been had that the finding of the jury was contrary to the evidence, or that the damages given were excessive, such judge shall not, except by consent, make any order to stay judgment or execution, except on condition that within four days from the day of the trial the defendant shall actually find security, by the recognizance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw or manure produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be."

Manner of issuing the Habere.

The usual and regular way of obtaining execution, is to sue out a writ of habere facias possessionem. This writ being ingrossed, signed and sealed is carried to the office of the sheriff, who makes out a warrant thereon, and will put the plaintiff in possession.

Nature and Effect of the Writ of Habere.

In an ejectment against a feme sole, who married before trial, and verdict and judgment against her by her original name; it was held, that it was not irregular to issue an habere facias possessionem and fi. fa. against her by the same name, though the fi. fa. was inoperative(n). It is no objection to the legality of a writ of habere facias possessionem, that the names of the officers to whom it was directed were inserted by interlineation after the writ was sealed, and while it remained in the hands of the under-sheriff(o).

Plaintiff's Duty in executing the Habere.

The plaintiff must take care not to take in execution more than he has a right to recover: and in order that the sheriff may not be under any difficulty in executing the writ of possession, the practice now is, —for the plaintiff himself, not merely to point out to the sheriff, that of which he is to deliver him possession, in execution of the writ, but to take possession at his peril of that only to which he has title; for should he take more than he has recovered and shown title to, the Court will in a summary way set it right (p). Where the plaintiff in ejectment, as tenant in common, recovered possession of five-eighths of a cottage, with the appurtenances; and a writ of possession was executed by the sheriff, who turned the tenant out of possession of the whole, and locked up the door, as appeared by affidavit; the Court

(n) *Doe* d. *Taggart* v. *Butcher*, 3 Maule & Selw. 557.

(o) *Rex* v. *Harris*, 2 Leach, C. C. 929; 1 East, P. C. Add. xviii.; 1 Rum. C. & M. 513.

(p) Run. Eject. 432.

said "this is wrong; the writ ought to have pursued the verdict; let there be a rule upon the sheriff and the lessor of the plaintiff, to restore the tenant to the possession of three-eighth parts of the premises; otherwise he would be forced to bring another ejectment for the same (q)." It is now the practice for the plaintiff to give the sheriff security, to indemnify him from the defendant, and then for the sheriff to give execution of what the plaintiff demands (r).

Sheriff's Duty in executing the Habere.

If there are several messuages in possession of different tenants, the sheriff must go to all their houses, and turn them out: the delivery of the possession of one tenement in the name of all is not sufficient (s). He must give possession of land, where the number of acres is mentioned, according to the common estimation of the country where the lands lie (t). The words of the writ being quod habere facias possessionem, there must be a full and actual possession given by the sheriff; and consequently, all power necessary for this end must be given him: if, therefore, the recovery be of a house, the sheriff may justify breaking open the door, if he be denied entrance by the tenant, because the writ cannot be otherwise executed (u). Indeed, in all cases of obstruction, the sheriff may call out the posse comitatûs, to assist him in the execution of a writ of habere facias possessionem. If a tenant be ejected, and possession given to the landlord, whilst there are crops lying upon the ground, the Court of Common Pleas will not refer it to the officer of the Court to ascertain the value of the crops, and deduct the sum from the rent due (x). The sheriff is bound to execute the writ within a reasonable time; but if he refuses to execute it when he has an opportunity, and is required to do it, and nothing occurs to prevent him, he will be liable for any expenses the plaintiff has been put to, though the judgment has been afterwards set aside, on payment of costs, in order to let in the landlord to defend the action (y). This writ may, under 3 & 4 Will. IV. c. 67, s. 2, be made returnable immediately after the execution (z).

Proceeding when the Execution is disturbed.

If the officer be disturbed in the execution of the writ, the Court will, on affidavit of the circumstances, grant an attachment against the party, whether he be the defendant or a stranger; for a recent ouster is a contempt; and the process is not understood to be executed completely till the sheriff and his officers are gone, and the plaintiff left in quiet possession (a). If, therefore, the sheriff turns out all persons he can find in the house, and gives the plaintiff, as he thinks, quiet possession, and after the sheriff is gone, some persons appear to be lurking in the house, that is no good execution, and the plaintiff, it is

(q) *Roe* d. *Saul* v. *Dawson*, 3 Wils. 49.
(r) Run. Eject. 434.
(s) 2 Sell. Prac. 203; 2 Roll. Abr. 886.
(t) Roll. Rep. 410.
(u) 5 Co. Rep. 91 b.
(x) *Doe* d. *Upton* v. *Witherwick*, 3 Bing. 11; 10 Moore, 267.
(y) *Mason* v. *Paynter*, 1 Queen's B. Rep. 974.
(z) *Doe* d. *Howson* v. *Roe*, 21 Law J., 359, Q. B.
(a) *Kingsdale* v. *Mann*, 6 Mod. 27; 2 Salk. 322.

said, shall have a new habere facias possessionem (*b*). It is now said, however, that after possession once given, the plaintiff cannot sue out another writ of possession, though he be disturbed by the same defendant, and though the sheriff have not yet returned the former writ (*c*). Where the lessor of the plaintiff was put in possession by the sheriff under a writ of restitution, and the tenant on the same day forcibly resumed possession; the Court ordered another writ of restitution to be issued (*d*). In one case an attachment was granted, absolute in the first instance, against the tenant in possession, on affidavit that he had been served with a rule of Court, made absolute for delivering up the possession, and had refused so to do (*e*). Where a sheriff's officer, taking possession under a habere facias, is dispossessed before he delivers possession to the plaintiff, it is necessary that it should appear that the persons dispossessing are acting in concert with the defendant (*f*).

Setting aside an Execution.

The Courts in their discretion will set aside a writ of habere facias possessionem executed, and let in a landlord to try an ejectment, on a suggestion of collusion (*g*).

Writ of Restitution.

A writ of restitution may be awarded in some cases: thus, where a judgment irregularly obtained was set aside, and the possession that had been given upon the execution ordered to be restored, but from the lessor of the plaintiff, who held the possession, having absconded, the rule became ineffectual, a writ of restitution was awarded (*h*); and it would seem that such writ need not be founded on matter of record (*i*). A plaintiff having obtained possession under an irregular judgment, a judge at chambers ordered that the judgment and writ of possession should be set aside, and the sheriff restore possession of the premises. Before the order was made a rule of Court, the defendant took out a writ of restitution. The writ was sealed, but not

(*b*) Leon. 145.

(*c*) *Doe* d. *Pate* v. *Roe*, 1 Taunt. 55; but see *Doe* d. *Lloyd* v. *Roe*, 2 Dowl. (N. S.) 407. The law seems to make a difference where, after possession given either on the habere facias, or by agreement of the parties, the plaintiff is turned out of possession by the defendant, and where by a stranger. When it is done by the defendant himself, the plaintiff may have either a new habere facias, or an attachment, because the defendant shall never, by his own act, keep the possession, which the plaintiff has recovered from him by due course of law: but where a stranger turns the plaintiff out of possession, after execution fully executed, the plaintiff is put to his new action; or to an indictment for the forcible entry, by which means the force will be punished. The reason is, that the title was never tried between the plaintiff and the stranger, who possibly may claim the land by a title paramount to that of the plaintiff, or he may come in under him; and then the recovery and execution in the former action ought not to hinder the stranger from keeping possession to which he may have a right. Were the law otherwise the plaintiff might, by virtue of a new habere facias, turn out even his own tenants, who come in after the execution is executed, whereas the possession was given him only against the defendant in the action, and not against those who were not parties to the suit. 1 Keb. 779, 785.

(*d*) *Doe* d. *Pitcher* v. *Roe*, 9 Dowl. 971.

(*e*) *Davis* d. *Povey* v. *Doe*, 2 W. Black. 892.

(*f*) *Doe* d. *Thompson* v. *Mirehouse*, 2 Dowl. 200.

(*g*) *Doe* d. *Grocers' Company* v. *Roe*, 5 Taunt. 205. See ante, Sect. 7, (c), p. 773.

(*h*) 2 Sell. Prac. 122; *Doe* d. *Whittington* v. *Hards*, 20 Law J., Q. B., 406.

(*i*) Ibid.

signed. It recited that John Doe had recovered the premises from Richard Roe, and obtained a writ of possession under an irregular judgment; and it directed the sheriff to restore possession to W. W., the real defendant: it was held, that the writ of restitution was irregular; and that the judge's order was irregular, in directing the sheriff to restore possession, whereas the order should have been upon the party in possession (*k*). Where after judgment and execution the landlord was let in to defend on the ground he had had no notice of the proceedings, and the lessor of the plaintiff undertook to proceed to trial at the next assizes, which he failed to do, the Court afterwards granted a writ of restitution (*l*). Where a writ of possession was sued out on a judgment more than a year old without previously issuing a scire facias, and the writ of possession was set aside by a judge, the Court refused to grant a writ of restitution, but directed the plaintiff to restore the possession of the land (*m*).

Scire Facias to revive a Judgment.

If the plaintiff neglect to sue out his writ of possession for a year and a day after judgment, he must revive the judgment by scire facias, as in other cases: else the Court will award a restitution quare erronicè emanavit (*n*). A scire facias, however, is not necessary where the stay of execution is by consent of the parties for the year, or the defendant brings error, and is afterwards nonsuited (*o*); nor where the party has taken out execution within the year, and although it has not been acted upon, has continued it down until it is executed. If, however, the delay be by injunction of the Court of Chancery, there must be a scire facias: for an injunction, not being a matter of record, a Court of Law will not take notice of it (*p*). The omission to issue a scire facias is not an irregularity merely; and an application to set aside an execution for such an omission may be made by the tenant in possession, though he did not appear (*q*).

Scire Facias to make third Persons Parties.

If the plaintiff—where he is a real person—die within a year and a day after judgment, his executors cannot take out an execution without a scire facias; for they are not parties to the judgment; though if execution has been regularly sued out in the lifetime of the testator, the sheriff may execute it after his death; because the authority is from the Court, and not from the party (*r*). If, after judgment, and before execution, the defendant in ejectment dies, and a scire facias goes, it must be against the terre-tenants of the land, and not against the executor, without naming him terre-tenant (*s*).

(*k*) *Doe* d. *Williams* v. *Williams*, 2 Ad. & El. 381; 4 Nev. & Man. 259.

(*l*) *Doe* d. *Stratford* v. *Shail*, 2 Dow. & Low. 161.

(*m*) *Doe* d. *Stevens* v. *Lord*, 7 Ad. & El. 610; 2 Nev. & Per. 604; 6 Dowl. 256; Will. Wol. & Dav. 652.

(*n*) *Doe* d. *Ramsbottom* v. *Roe*, 2 Dowl. & S. 690.

(*o*) *Withers* v. *Harris*, 2 Lord Raym. 806; 2 Salk. 258, 319; 7 Mod. 50; 2 Sell. Prac. 204; *Booth* v. *Booth*, 5 Mod. 288; 2 Salk. 322.

(*p*) *Winter* v. *Lightbound*, 1 Stra. 301.

(*q*) *Goodtitle* d. *Murrell* v. *Badtitle*, 9 Dowl. 1009.

(*r*) Run. Eject. 429.

(*s*) 2 Sell. Prac. 204; but see the Common Law Procedure Act, 15 & 16 Vict. c. 76, ss. 193, 195, 197.

SECT. 16.—*Error.*

To what Court.

By statute 11 Geo. IV. & 1 Will. IV. c. 70, s. 8, all writs of error from any of the superior Courts are to be returnable only in the Court of Exchequer Chamber, in the first instance.

When Error may be brought in Ejectment.

By statute 16 & 17 Car. II. c. 8, ss. 3, 4, it is enacted, that no execution shall be stayed by writ of error, upon any judgment after verdict in ejectment, unless the plaintiff in error shall become bound in a reasonable sum to pay the plaintiff in ejectment all such costs, damages, and sums of money, as shall be awarded to such plaintiff, upon judgment being affirmed, or on a nonsuit or discontinuance had; and in case of affirmance, discontinuance, or nonsuit, the Court may issue a writ to inquire as well of the mesne profits, as of the damages by any waste committed after the first judgment, and are thereupon to give judgment, and award execution for the same, and also for costs of suit. This "reasonable sum" is double the yearly value, and double costs of the ejectment (*t*): and as the statute says nothing as to who are to enter into the recognizance, by reasonable construction, it is sufficient if the plaintiff in error procure proper sureties to enter into the recognizance, or enter into it himself; the sureties and the plaintiff in error may be examined as to their sufficiency. The provisions of this statute have been enlarged and extended by the Common Law Procedure Act, which enacts in s. 208, that "Error may be brought in like manner as in other actions upon any judgment in ejectment, after a special verdict found by the jury, or a bill of exceptions, or by consent after a special case stated, but, except in the case of such consent as aforesaid, execution shall not be thereby stayed, unless the plaintiff in error shall, within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed, be bound unto the claimant, who shall have recovered judgment in such action of ejectment, in double the yearly value of the property, and double the costs recovered by the judgment, with condition, that if the judgment shall be affirmed by the Court of error, or the proceedings in error be discontinued by the plaintiff therein, then the plaintiff in error shall pay such costs, damages, and sum or sums of money as shall be awarded upon or after such judgment affirmed or discontinuance; and it shall be lawful for the Court wherein execution ought to be granted upon such affirmation, or discontinuance, upon the application of the claimant, to issue a writ to inquire as well of the mesne profits as of the damage by any waste committed after the first judgment in ejectment, which writ may be tested on the day on which it shall issue, and be returnable immediately after the execution thereof; and upon the return thereof judgment shall be given, and execution awarded for

15 & 16 Vict. c. 76, s. 208.

(*t*) Reg. Gen. of all the Courts, H. T., 2 Will. IV. 2 Cromp. & Jer. 175.

such mesne profits and damages, and also for costs of suit (*u*)." Under stat. 1 Geo. IV. c. 87, s. 3, the defendant must give two additional sureties on bringing error, although he has before given two sureties on commencing the action (*x*). Even where the lessor of the plaintiff swore that the defendant was insolvent, and also that he, the lessor, had a mortgage upon the land to more than it was worth, the Court held, that the defendant was entitled to his writ of error, upon entering into the recognizance himself (*y*). Nothing shall be assigned for error that will make it necessary to go again into the title of the premises (*z*). Where the plaintiff brought a writ of error in parliament, the Court obliged him to enter into a rule, not to commit waste or destruction during the pendency of the writ (*a*).

SECT. 17.—*Second Ejectment.*

When a Second Ejectment may be brought.

A judgment in ejectment, it may be remembered, is a mere recovery of the possession, without prejudice to the right; it therefore is not final between the parties, so as to protect either the defendant or plaintiff (if he succeeds) from any further suit: for the same plaintiff, if he be nonsuited, or have verdict against him, may bring another ejectment against the same defendant; or if he succeed in the action, and get possession, he is still liable to an ejectment from the defendant in the former action (*b*). This, in one respect, may be deemed an advantage; because the parties are not concluded by one trial, in case the real merits, from accident, partiality, want of evidence which might be afterwards supplied, or the like, happen not to have been fairly tried between them: but in another respect, much mischief may result from it, as the spirit of litigation is thereby kept alive. The Courts of Equity will sometimes interfere and grant perpetual injunctions after several trials, not only where the ejectments have been in consequence of proceedings in a Court of Equity, but also where the ejectments have been commenced in the usual way at common law (*c*). Proceedings in a second ejectment have been stayed till a special verdict in the former was determined (*d*): but then, no new ejectment

(*u*) See the 14 & 15 Vict. c. 99, s. 2; *Keene* d. *Byron* (*Lord*) v. *Deardon*, 8 East, 298.

(*x*) *Roe* d. *Durant* v. *Moore*, 7 Bing. 124; 4 Moore & P. 761; 1 Dowl. 203. See ante, 748, 786, 787.

(*y*) *Thomas* v. *Goodtitle*, 4 Bur. 2501.

(*z*) Hob. 5.

(*a*) *Wharod* v. *Smart*, 3 Bur. 1823.

(*b*) 2 Sell. Prac. 230. The reason why in ejectments one trial does not bind the inheritance, is not from any rule or maxim of law, that one trial cannot conclude the right; for in proper actions that may be done; but from the peculiar nature of the action, in which no judgment as to the inheritance can be given, *Lomax* v. *Ryder*, 7 Bro. Parl. Cas. 145; for it is impossible, from the structure of the record in this action, to plead a former in bar of another ejectment brought. A judgment in ejectment is, however, evidence to go to the jury in a subsequent ejectment brought upon the demise of the same lessor against the same defendant; *Doe* d. *Strode* v. *Seton*, 2 Cromp. M. & Ros. 728; 1 Gale, 303; Tyr. & Gr. 19; *S. P. Doe* d. *Tatham* v. *Wright*, 1 Ad. & El. 3.

(*c*) Adams, Eject. 309, 4th ed.

(*d*) *Smith* d. *Dormer* v. *Parkhurst*, 2 Stra. 1105.

can be brought by the defendant after a recovery against him, till he has quitted the possession, or the tenant has attorned to the plaintiff (*e*). Where three actions of ejectment had been stayed upon terms by consent in the Court of King's Bench, the Court of Common Pleas ordered another for the same premises, but on a later demise, also to be stayed (*f*).

Terms as to Costs upon which a Second Ejectment may be brought.

As the costs of the ejectment are deemed the recompense, though in truth but a poor one, the Court will not suffer either the plaintiff to bring a new ejectment, or the defendant to bring an ejectment against the successful plaintiff, until the costs of the former action are paid (*g*). They accordingly will stay the proceedings in a second ejectment, until the costs are paid of a prior one, even though it be brought by a third person, or for different premises, if the title be the same (*h*): thus, where the defendant succeeded in the first action, the Court stayed the proceedings in a second, commenced by the devisee of the plaintiff in the first against the devisee of the defendant, on the same title (*i*): so also where *A.*, having brought an ejectment, had judgment of nonsuit against him, after he was discharged under the Insolvent Debtors' Act, the costs being inserted in his schedule as a debt; his assignee having brought a second ejectment upon the insolvent's original title, the Court stayed proceedings in it until the costs of the first were paid (*k*). So where the second action turned on the same question of title as the first, although a different parcel of land was claimed, and a different person made defendant, and although the party who was sole defendant in the first action made his wife a joint lessor of the plaintiff in the second (*l*). But where the second ejectment was against the heir of the former defendant, who, not being personal representative, had no interest in the former costs, the Court refused to stay proceedings until they were paid, where the former ejectment had not been decided on the merits, the record having been withdrawn (*m*). Proceedings will be stayed as well where the former ejectment was in another, as where it was in the same Court. Accordingly, in one case, proceedings were stayed by the Court of Common Pleas, after a long delay, the day before trial, till the costs of a former ejectment in the King's Bench were paid (*n*). Proceedings were stayed at the instance of a person who has obtained an order to be admitted to defend, though no consent rule had been entered into (*o*). In a previous case

(*e*) Run. Eject. 420.

(*f*) *Doe* d. *Carthew* v. *Brenton*, 6 Bing. 469; 4 Moore & Pay. 186.

(*g*) 2 Sell. Prac. 231.

(*h*) *Doe* d. *Law* and *Fairclaim* v. *Thrustout*, 1 Tidd's Prac. 583; 3 Dougl. 465; *S. P. Keene* d. *Angel* v. *Angel*, 6 Term Rep. 740; *Doe* d. *Lawson* v. *Law*, 4 Dougl. 250; *Doe* d. *Feldon* v. *Roe*, 8 Term Rep. 645; *Doe* d. *Rees* v. *Thomas*, 4 Ad. & El. 348; *Doe* d. *Bailey* v. *Bennett*, 9 Dowl. 1012.

(*i*) *Doe* d. *Mudd* v. *Roe*, 8 Dowl. 444.

(*k*) *Doe* d. *Standish* v. *Roe*, 5 Barn. & Adol. 878; 2 Nev. & Man. 468. See also *Doe* d. *Heighley* v. *Harland*, 10 Ad. & El. 761.

(*l*) *Doe* d. *Brayne* v. *Bather*, 12 Q. B. Rep. 941.

(*m*) *Doe* d. *Blackburn* v. *Standish*, 2 Dowl. N. S. 26.

(*n*) *Doe* d. *Chadwick* v. *Law*, 2 W. Black. 1158.

(*o*) *Doe* d. *Mudd* v. *Roe*, 8 Dowl. 444.

the Court refused to stay proceedings at the instance of the tenant who was served, he not having entered into the consent rule (*p*). Under the old system, proceedings have also been stayed even where the former action was discontinued before consent rule or plea (*q*). Where an heir at law brought ejectment for part of the devised premises, and failed, and then brought a second against other parties for other parts, the Court refused to stay proceedings until the costs of the first were paid (*r*). Where the defendant was prevented going into the real question of title by the plaintiff, on the ground that he was estopped from contesting the title of his landlord, the Court nevertheless compelled the defendant to pay the costs before he proceeded with another action of ejectment, as he had improperly obtained the tenant right instead of himself commencing an ejectment in the first instance (*s*). The Court refused, under the particular circumstances of the case, to stay proceedings in an action of ejectment until the costs of a former ejectment were paid, there having been a still priôr ejectment, the costs of which were due to the plaintiff (*t*). A motion to stay proceedings in a second ejectment till the costs of a former one had been paid was held to be in time, though a term had elapsed since the action was commenced, and notice of trial had been given; and such a rule will not be enlarged in order to set off the costs claimed against any to which the lessors of the plaintiff may become entitled on the trial of a second ejectment (*u*). The Court has, even after judgment and execution, set them aside for the purpose of compelling payment of the costs of a former ejectment (*x*). Where the costs may be considered as paid by the party having been taken in execution for them, the proceedings will not be stayed: thus, where the plaintiff has been taken into custody upon an attachment for costs, that being in the nature of a capias ad satisfaciendum, there is no reason to grant the rule to stay proceedings in another action brought by the same plaintiff on the same demise (*y*). But where the plaintiff in the first action has taken growing crops under the writ of possession of sufficient value to cover the costs, the Court will nevertheless stay proceedings in a second action brought by the former defendant (*z*). The rule appears to be strictly confined to proceedings by ejectment in both cases: thus proceedings cannot be stayed until the taxed costs of a bill in equity, filed by the same party for the recovery of the same

(*p*) *Doe* d. *Crockett* v. *Roe*, 1 Har. & Wol. 351.

(*q*) *Doe* d. *Langdon* v. *Langdon*, 5 Barn. & Adol. 864; 2 Nev. & Man. 840; *S. P. Smith* d. *Ginger* v. *Barnardiston*, 2 W. Black. 904.

(*r*) *Doe* d. *Thomas* v. *Harris*, 4 Man. & Ryl. 569; but see *Doe* d. *Heighley* v. *Harland*, 10 Ad. & El. 761.

(*s*) *Doe* d. *Thomas* v. *Shadwell*, 7 Dowl. 527; 1 Will. Wol. & Hod. 574.

(*t*) *Doe* d. *Evans* v. *Snead*, 2 Dow. & Low. 119.

(*u*) *Doe* d. *Green* or *Maslin* v. *Packer*, 2 Dowl. 373; 2 Cr. & Mees. 457; 4 Tyr. 144.

(*x*) *Harvey* d. *Beal* v. *Baker*, 2 Dowl. N. S. 75.

(*y*) 2 Sell. Prac. 232.

(*z*) *Doe* d. *Chapman* v. *Bluck*, 1 Arn. 537.

premises, are paid (*a*): nor could proceedings in a writ of right be formerly stayed until payment of the costs of two ejectments previously brought (*b*).

Staying Proceedings under 17 & 18 Vict. c. 125, s. 93.

By the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 93, a claimant who has failed in a prior ejectment, and who brings a second ejectment for same premises against the same defendant, may be ordered to give security for costs (*c*).

SECT. 18.—*On Vacant Possession.*

Proceedings on Vacant Possession. 15 & 16 Vict. c. 76, s. 170.

The law with respect to the mode of proceeding in case of vacant possession has been much simplified and improved by the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 170, which enacts, that "In case of vacant possession, the writ in ejectment shall be served by posting a copy thereof upon the door of the dwelling-house or other conspicuous part of the property." In order to warrant proceedings as upon a vacant possession, the premises must not only be empty, but they must be *wholly* deserted by the tenant, and the plaintiff not be able to find out where the tenant is, to serve him with a writ of ejectment (*d*).

Declaration and subsequent Proceedings.

In cases of a vacant possession, no person claiming title will be let in by the Courts to defend; and the lessor of the plaintiff may therefore immediately proceed to judgment against the defendant (*e*).

SECT. 19.—*Ejectment in Inferior Courts.*

As to proceedings in the County Courts established under the statute 9 & 10 Vict. c. 95, to obtain possession of small tenements, see post, Chap. IX., Sect. 3.

Removal from Inferior Courts.

An ejectment may be removed from an inferior Court, either by a writ of certiorari, or of habeas corpus cum causâ (*f*); and if there be any ground for believing that there cannot be an impartial trial in the inferior Court, it is a sufficient ground for removal (*g*). It has been held, that a judgment in ejectment in a Court of inferior jurisdiction is not within the meaning of the 19 Geo. III. c. 70, s. 4, whereby power is given, in case the defendant leaves the jurisdiction of the inferior Court, to remove the judgment into a superior Court for the purpose of obtaining execution (*h*). The recent enactment of 1 & 2 Vict. c. 110, s. 22, is more extensive in its language, but the reason given for the above decision would equally apply to it.

(*a*) *Doe* d. *Williams* v. *Winch*, 3 Barn. & Ald. 602.

(*b*) *Bowyear* v. *Bowyear*, 9 Bing. 670; 3 Moore & Scott, 65; 2 Dowl. 207; *S. P. Chatfield* v. *Souter*, 3 Bing. 167; 10 Moore, 572.

(*c*) See the section, ante, Sect. 9 (b), p. 786.

(*d*) See ante, Sect. 6, p. 769.

(*e*) Arch. Prac. 966, 8th ed.

(*f*) *Goodright* d. *Sadler* v. *Dring*, 1 Barn. & Cres. 253; 2 Dowl. & Ryl. 407.

(*g*) *Patterson* d. *Gradridge* v. *Eales*, 3 Barn. & Cres. 550; 5 Dowl. & Ryl. 445.

(*h*) *Doe* d. *Stansfield* v. *Shipley*, 2 Dowl. 408.

CHAPTER VII.

PROCEEDINGS BEFORE JUSTICES.

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SECT. 1.—*Where a Tenant deserts the Premises.*

Enactments of 11 Geo. II. c. 19, s. 16.

THE injury that the landlord would sustain in his profits by his lands remaining uncultivated, and his buildings going to decay, owing to the desertion of his tenant, and the actual possession of the premises remaining in no one, which is called a vacant possession, is remedied by the statutes 11 Geo. II. c. 19, s. 16, and 57 Geo. III. c. 52. The statute 11 Geo. II. c. 19, s. 16, enacts, "That if any tenant holding any lands, tenements or hereditaments, at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent, (extended by 57 Geo. III. c. 52, to one half year's rent,) shall desert the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had, to countervail the arrears of rent, it shall and may be lawful to and for two or more justices of the peace of the county, riding, division, or place (having no interest in the demised premises), at the request of the lessor or landlord, lessors or landlords, or his, her or their bailiff or receiver, to go upon and view the same, and to affix or cause to be affixed on the most notorious part of the premises, notice in writing what day (at the distance of fourteen days at least) they will return to take a second view thereof (*a*); and if upon such second view the tenant, or some person on his or her behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and the lease thereof to such tenants, as to any demise therein contained only, shall from thenceforward become void (*b*)."

(*a*) See the form of this notice, post, Book IV., Chap. V., Sect. 3, (a).

(*b*) This statute, which gives a summary remedy to landlords, by *requesting* two justices, on their own view, to deliver possession, does not require the request or complaint to be made *upon oath*; therefore, where in trespass against two magistrates for turning a tenant out of possession under this act, a record of the proceedings, drawn up conformably to the statute, was given in evidence; it was held, that it was a complete defence to the action, though they did not appear to have acted on the oath of the landlord; *Basten* v. *Carew*, 3 Barn. & Cres. 649; 5 Dowl. & Ryl. 558. In this and all other the like cases, the justices ought to make a record of the whole proceedings.

Section 17 of the 11 Geo. II. c. 19, provides, "That such proceedings of the said justices shall be examinable in a summary way by the next justice or justices of assize (*c*) of the respective counties in which such lands or premises lie; and if they lie in the city of London or county of Middlesex, by the judges of the Courts of Queen's Bench or Common Pleas; and if in the counties palatine of Chester, Lancaster or Durham, then before the judges thereof; and if in Wales, then before the courts of grand sessions respectively; who are hereby respectively empowered to order restitution to be made to such tenant, together with his or her expenses and costs, to be paid by the lessor or landlord, lessors or landlords, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs not exceeding five pounds for the frivolous appeal."

Enactments of 57 Geo. III. c. 52.

It having been decided that the statute 11 Geo. II. c. 19, s. 16, did not apply to cases where the landlord had not, by the terms of the lease, a right of entry (*d*), the statute 57 Geo. III. c. 52, extended the powers thereby given to the case of tenants "who shall hold such lands and tenements or hereditaments under any demise or agreement either written or verbal, and although no right or power of re-entry be reserved or given to the landlord in case of non-payment of rent (*e*)."

(*c*) In *The Queen* v. *Sewell*, 8 Queen's B. Rep. 161, it was held, that this appeal must be made to the judge or judges going the circuit, in their individual capacity, not to the justices of assize under the commission of assize, and that hence an order, signed by the deputy clerk of assize, and sealed with his official seal, was not proof of an allegation, in an indictment for disobedience to the order, that the two judges made an order of restitution. Patteson, J., intimated that he was of opinion that the order ought to have been signed by the two judges. See note (*h*), post, p. 829.

(*d*) Easter T. 41 Geo. III. MS.; Ex parte *Pilton*, 1 Barn. & Ald. 369.

(*e*) Where the premises are within the metropolitan police district, the stat. 3 & 4 Vict. c. 84, enacts (sect. 13), that, after the passing of that act, "none of the police magistrates within that district (see stats. 10 Geo. IV. c. 44, and 2 & 3 Vict. c. 47 and c. 71,) shall be required to go upon any deserted lands, tenements or hereditaments, for the purpose of viewing the same, or affixing any notices thereon, or of putting the landlord or landlords, lessor or lessors, into the possession thereof," under the provisions of the statutes 11 Geo. II. c. 19, and 57 Geo. III. c. 52; "but that, in every case within the metropolitan police district, in which by the said acts or either of them two justices are authorized to put the landlord or lessor into the possession of such deserted premises, it shall be lawful for one of the police magistrates, upon the request of the lessor or landlord, or his or her bailiff or receiver, made in open court, and upon proof given to the satisfaction of such magistrate of the arrear of rent and desertion of the premises by the tenant as aforesaid, to issue his warrant, directed to one of the constables of the metropolitan police force, requiring him to go upon and view the premises, and to affix thereon the like notices as under the said acts or either of them are required to be affixed by two justices of the peace; and upon the return of the warrant, and upon proof being given to the satisfaction of the magistrate before whom the warrant shall be returned, that it has been duly executed, and that neither the tenant, nor any person on his or her behalf, has appeared and paid the rent in arrear, and that there is not sufficient distress upon the premises, it shall be lawful for such magistrate to issue his warrant to a constable of the metropolitan police force, requiring him to put the landlord or lessor into the possession of the premises; and every constable to whom any such warrant shall be directed shall duly execute and return the same, subject to the provisions contained" in the stat. 2 & 3 Vict. c. 47, "as to the execution of warrants directed to constables of the metropolitan police force; and upon the execution of such second warrant, the lease of the premises to such tenant, as to any demise therein contained only, shall thenceforth be void."

The act to facilitate the performance of the duties of justices, 11 & 12 Vict. c. 43, does not interfere with the statutes 10 Geo. IV. c. 44, 2 & 3 Vict. c. 47 and c. 71, and 3 & 4 Vict. c. 84.

Decisions on these Statutes.

It has been decided, where a tenant ceased to reside on the premises for several months, and left them without any furniture or sufficient other property to answer the year's rent, that the landlord might properly proceed under the statute to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on the premises, when they first went to view the same (*f*). Where magistrates had given possession of a dwelling-house as *deserted* and unoccupied, and the judges of assize, on appeal, made an order for restitution with costs, and the tenant brought an action of trespass for the eviction against the magistrates, the constable, and the landlord; it was held, that the record of the proceedings before the magistrates was an answer to the action on behalf of all the defendants (*g*). It seems doubtful whether a landlord can proceed under these acts, if the tenant has a set-off against the rent (*h*). In the same case, the Court refused a mandamus to compel *the justices of the peace* to cause restitution to be made, in conformity with an order of the justices of assize, on appeal, that order not being directed to any one (*i*). The Court will not compel justices to act if they doubt their jurisdiction, though incorrectly (*k*).

SECT. 2.—*Where a Tenant holds over.*

Proceedings before Justices under 1 & 2 Vict. c. 74.

In order to save the landlords of small tenements the expense and delay of a proceeding by ejectment to recover possession, where a

(*f*) Ex parte *Pilton*, 1 Barn. & Ald. 369. See ante, Chap. VI., Sect. 6 (a), pp. 769, 770.

(*g*) *Ashcroft* v. *Bourne*, 3 Barn. & Adol. 684.

(*h*) *Wilson* v. *Sewell*. This was an application to two justices under these acts; and the tenant alleged that, having a set-off against the landlord, there was not half a year's rent in arrear: the justices, however, thought they could take no notice of the set-off, and put the landlord into possession: the tenant then appealed to Lord Abinger, C. B., and Littledale, J., at the Spring Assizes for Surrey, 1840, when Lord Abinger expressed an opinion that the case could not be one contemplated by the legislature. Littledale, J., doubted, as the landlord might have distrained notwithstanding the set-off, and therefore he felt a difficulty in saying that the rent was not in arrear within the statutes. Those learned judges, however, made an order directing restitution to be made. Afterwards, this order not having been obeyed, the tenant brought an action against the landlord for maliciously proceeding against him under the statutes; and on the trial at the Spring Assizes, 1842, an agreement was set up by the tenant, made before the rent became due, that he should be at liberty to set off his rent against the landlord's debt; but Alderson, B., said, that he could not say there was no want of reasonable or probable cause for the defendant's proceedings, as he thought the justices of the peace had done right in giving possession, and that the justices of assize had done wrong in ordering restitution; and that as regarded the agreement of set-off, if made out in evidence, it was of no avail, as it was a concord before breach. A rule for a new trial was, however, afterwards made absolute, some points not having been properly left to the jury. Patteson, J., intimated, that the mere fact of the tenant having a debt due to himself by the landlord, would not prevent the operation of the statute, as the landlord might nevertheless distrain, and then the set-off could not be pleaded in bar to an avowry (ante, 691); but he also intimated, that under some circumstances it might be so pleaded, as where, after rent became due, it was agreed that a debt due by the landlord should be set off. On a second trial a verdict was again found for the defendant. Afterwards the landlord was indicted for disobedience to the order of restitution, and a verdict was found for the defendant under the direction of Parke, B. See ante, 828, note (*c*).

(*i*) *Reg.* v. *Traill*, 12 Ad. & El. 761; 4 Per. & Dav. 325; Arn. & Hod. 78.

(*k*) Ex parte *Fulder*, 8 Dowl. 535.

tenant refuses to quit at the determination of his interest in the premises, the statute 1 & 2 Vict. c. 74, s. 1, enacts, that "when and so soon as the term or interest of the tenant of any house, land or other corporeal hereditaments held by him at will, or for any term not exceeding seven years, either without being liable to the payment of any rent, or at a rent not exceeding the rate of twenty pounds a year, and upon which no fine shall have been reserved or made payable, shall have ended, or shall have been duly determined by a legal notice to quit or otherwise, and such tenant or (if such tenant do not actually occupy the premises, or only occupy a part thereof), any person by whom the same, or any part thereof, shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord of the said premises, or his agent, to cause the person so neglecting or refusing to quit and deliver up possession to be served (in the manner hereinafter mentioned) with a written notice in the form set forth in the schedule to this act (*l*), signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this act; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices hereinafter mentioned reasonable cause why possession should not be given under the provisions of this act, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to such justices proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof; and where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession, and upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division or place within which the said premises, or any part thereof, shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace officers of the district (*m*), division or place within which the said premises, or any part thereof, shall be situate, commanding them, within a period to be therein named, not less than twenty-one nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent: provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday or Christmas Day, or at any time except

(*l*) See the form, post, Book IV., Chap. V., Sect. 1, (g).

(*m*) This is material: see *Jones* v. *Chapman*, 14 Mees. & Wels. 124; 2 Dow. & Low. 907.

between the hours of nine in the morning and four in the afternoon: provided also, that nothing herein contained shall be deemed to protect any person, on whose application and to whom any such warrant shall be granted, from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession, where such person had not, at the time of granting the same, lawful right to the possession of the same premises: provided also, that nothing herein contained shall affect any rights to which any person may be entitled as outgoing tenant, by the custom of the country or otherwise."

Sect. 2 enacts, "that such notice of application intended to be made under this act, may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the persons so holding over as aforesaid, and that the person serving the same shall read over the same to the person served, or with whom the same shall be left as aforesaid, and explain the purport and intent thereof: provided, that if the person so holding over cannot be found, and the place of abode of such person shall either not be known, or admission thereto cannot be obtained for serving such summons, the posting up of the said summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person."

Sect. 3 enacts, "that in every case in which the person to whom any such warrant shall be granted had not at the time of granting the same lawful right to the possession of the premises, the obtaining of any such warrant as aforesaid shall be deemed a trespass by him against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant; and in case any such tenant or occupier will become bound with two sureties as hereinafter provided, to be approved of by the said justices, in such sum as to them shall seem reasonable, regard being had to the value of the premises and to the probable costs of an action, to sue the person to whom such warrant was granted with effect and without delay, and to pay all the costs of the proceeding in such action, in case a verdict shall pass for the defendant, or the plaintiff shall discontinue or not prosecute his action, or become nonsuit therein, execution of the warrant shall be delayed until judgment shall have been given in such action of trespass; and if upon the trial of such action of trespass a verdict shall pass for the plaintiff, such verdict and judgment thereupon shall supersede the warrant so granted, and the plaintiff shall be entitled to double costs in the said action of trespass."

Where a warrant is improperly obtained, and put in execution, under this statute, trespass, not case, is the proper remedy (*n*).

(*n*) *Darlington* v. *Pritchard*, 5 Scott, N. R. 610; 4 Man. & Gr. 783; 2 Dowl. N. S. 664.

Sect. 3.—*In Cases where Persons refuse to quit Parish Property.*

Enactments of 59 Geo. III. c. 12, s. 24.

The statute 59 Geo. III. c. 12, s. 24, recites, that difficulties have frequently arisen, and considerable expenses have sometimes been incurred, by reason of the refusal of persons who had been permitted to occupy, or who have intruded themselves into, parish or town houses, or other tenements or dwellings built or provided for the habitation of the poor, or otherwise belonging to such parishes, to deliver up the possession of such houses, tenements or dwellings, when thereto required, and that it is expedient to provide a remedy for the same; and then enacts, "that if any person, who shall have been permitted to occupy any parish or town house, or any other tenement or dwelling belonging to or provided by or at the charge of any parish for the habitation of the poor thereof, or who shall have unlawfully intruded himself or herself into any such house, tenement or dwelling, or into any house, tenement or hereditament belonging to such parish, shall refuse or neglect to quit the same, and deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish, within one month after notice and demand in writing for that purpose, signed by such churchwardens and overseers, or the major part of them, shall have been delivered to the person in possession, or in his or her absence affixed on some notorious part of the premises, it shall be lawful for any two of his Majesty's justices of the peace, upon complaint to them made, by one or more of the churchwardens and overseers of the poor of the parish in which any such house, tenement or dwelling, shall be situated, to issue their summons to the person against whom such complaint shall be made to appear before such justices, at a time and place to be appointed by them, and to cause such summons to be delivered to the party against whom the complaint shall be made, or in his or her absence to be affixed on the premises, seven days at the least before the time appointed for hearing such complaint; and such justices are hereby empowered and required, upon the appearance of the defendant, or upon proof on oath that such summons hath been delivered or affixed as is hereby directed, to proceed to hear and determine the matter of such complaint, and if they shall find and adjudge the same to be true, then by warrant under their hands and seals to cause possession of the premises in question to be delivered to the churchwardens and overseers of the poor of the parish, or to some of them."

Sect. 25.

Sect. 25 enacts, "that if any person, to whom any land appropriated, purchased, or taken under the authority of this act, for the employment of the poor of any parish, or to whom any other lands belonging to such parish, or to the churchwardens and overseers thereof, or to either of them, shall have been let for his or her own

occupation, shall refuse to quit and to deliver up the possession thereof to the churchwardens and overseers of the poor of such parishes, at the expiration of the term for which the same shall have been demised or let to him or her, or if any person or persons shall unlawfully enter upon, or take or hold possession of any such land, or any other land or hereditaments belonging to such parish, or to the churchwardens or overseers, or to either of them, it shall be lawful for such churchwardens and overseers of the poor, or any of them, after such notice and demand of possession as is by this act directed in the case of parish houses, to exhibit a complaint against the person or persons in possession of such land, before two of his Majesty's justices of the peace, who are hereby authorized and required to proceed thereon, and to hear and determine the matter thereof; and if they shall find and adjudge the same to be true, to cause possession of such land to be delivered to the churchwardens and overseers of the poor, or some of them, in such and the like course and manner as are by this act directed with regard to parish houses."

Where a person has been let into possession of a house belonging to the parish, by the parish officers, as an ordinary tenant, they cannot proceed against him to recover possession under the 24th section of this statute (*o*).

SECT. 4.—*In Cases of Cottage Allotments.*

Enactments of 2 & 3 Will. IV. c. 42.

By the statute 2 & 3 Will. IV. c. 42, power is given in parishes inclosed under acts of parliaments, in which allotments have been made for the benefit of the poor, to let them in small portions to industrious cottagers. By section 5, if the rent is in arrear for four weeks, or if, at the end of any year of occupation, it is the opinion of the vestry that the land has not been duly cultivated, any churchwarden or overseer, with the consent of the vestry, may serve a notice to quit upon the occupier, who shall deliver up possession within one week after notice. By section 6 it is enacted, "that if any person to whom such portion of land as aforesaid shall have been let, for his or her own occupation, shall refuse to quit and deliver up possession thereof when thereto required, according to the terms of this act, or if any other person or persons shall unlawfully enter upon, or take or hold possession of any such land, it shall be lawful for the churchwardens and overseers of the poor, or any or either of them, to exhibit a complaint against the person so in possession of such land before two of his Majesty's justices of the peace, who are hereby authorized and required to issue a summons, under their hands and seals, to the person against whom such complaint shall be made, to appear before

(*o*) *Reg.* v. *Middlesex* (*Justices*), 7 Dowl. 767; see also *S. C. Reg.* v. *Bolton*, 1 Queen's B. Rep. 66; 4 Per. & Dav. 679; Arn. & Hod. 261.

them at a time and place appointed therein; and such justices are hereby required and empowered, upon the appearance of the defendant before them, or upon proof on oath that such summons has been duly served upon him, or left at his usual place of residence, or if there should have been any difficulty in finding such usual place of residence, then upon proof on oath of such difficulty, and that such summons has been affixed on the door of the parish church of the said parish in which such land is situated, and in any extra parochial place on some public building or other conspicuous place therein, to proceed to hear and determine the matter of such complaint, and if they shall find and adjudge the same to be true, then, by warrant under their hands and seals, to cause possession of the land in question to be delivered to the churchwardens and overseers of the poor, or to some of them." By section 11, the powers and provisions of the act, so far as they are applicable, may be applied in cases where inclosures are made under the statutes 1 & 2 Will. IV. c. 42, and c. 59, by which the powers of the statute 59 Geo. III. c. 12, for taking land for the benefit of the poor are extended, or where land shall in any other manner be found appropriated for the general benefit of the poor of any parish.

Enactments of 8 & 9 Vict. c. 118.

By the General Inclosure Act, 8 & 9 Vict. c. 118, power is given to the inclosure commissioners to appropriate a portion of lands inclosed for the purpose of letting it in gardens, not exceeding one quarter of an acre each, to the poor; and by section 110 it is enacted, "that if the rent reserved upon the letting of any garden by the allotment wardens shall at any time be in arrear for forty days, or if at any time during the tenancy, being not less than three calendar months after the commencement thereof, it shall appear to the allotment wardens that the occupier of such garden shall not have duly observed the terms and conditions of his tenancy, or shall have gone to reside more than one mile out of the parish, then and in every such case the allotment wardens shall serve a notice upon such occupier, or, in case he shall have gone to reside out of the parish, shall affix the same to the door of the church of the parish, determining the tenancy at the expiration of one month after such notice shall have been so served or affixed, and thereupon such tenancy shall be determined accordingly: provided always, that in every such case the allotment wardens or their incoming tenant shall pay to the occupier, whose tenancy shall have been so determined, a fair recompense in money for any crops (not being crops prohibited by the terms of such tenancy) which may be growing on such garden at the time of such determination, and for any manure left on such garden, or any benefit accruing from the manuring of such garden to the wardens or their incoming tenant; and the justices, to whom application may be made for a warrant to give possession of such garden, shall settle the amount

of such recompense, in case the parties differ about the same, and stay the execution of such warrant, until the same shall have been paid or tendered, or (in case such occupier be absent) until the payment thereof shall have been secured to the satisfaction of such justices."

Section 111 enacts, "that in case, upon the determination of any such tenancy as aforesaid, the occupier of any such garden shall refuse to quit and deliver up possession thereof, or if any other person shall unlawfully enter upon, take or hold possession of any such garden, or of any part of such allotment, the allotment wardens may recover possession, according to the mode prescribed by the statute 1 & 2 Vict. c. 74 (*p*), in such and the same manner as if the said wardens were landlords or a landlord, and as if such overholding occupier or other person were a tenant neglecting or refusing to quit and deliver up possession within the meaning of the last-mentioned act."

(*p*) See ante, 829, 830.

CHAPTER VIII.

PROCEEDINGS IN INFERIOR COURTS.

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BOOK III. CHAP. VIII. SECT. 1.

SECT. 1.—*The Ancient County Courts.*

The ancient County Courts.

BESIDES the course of proceedings in the Superior Courts of Law, parties may resort to the County Courts, which are Courts of ancient jurisdiction, having cognizance of all pleas of personal actions where the sum sought to be recovered does not amount to 40*s.*; and if it does, by a writ of justicies, which gives jurisdiction. These County Courts, not being Courts of Record, cannot proceed where the title to land comes in question (*a*).

SECT. 2.—*Courts of Requests, &c.*

Courts of Request, &c.

Parties may also resort to other Courts of local jurisdiction, many of which are called Courts of Request or of Conscience, the jurisdiction of which varies as to the amount that can be recovered, as to the nature of the actions to be prosecuted, and as to the persons who are subject to them. A London act excepted from its jurisdiction all debts where the title of freeholds or leases for years of lands or tenements came in question, and specially excepted distresses and actions for rent; and it was held, that an action for use and occupation was within the exception (*b*): and also an action for money had and received, brought against the receiver of an estate to recover money received by him for rent, in order to try the title (*c*). An action for use and occupation might, however, be brought in the County Court of Middlesex (*d*). An action for not using a farm in a tenant-like manner is not within the Isle of Wight Court of Requests Act (*e*). The London Act, 10 & 11 Vict. c. lxxi., gives a concurrent jurisdiction to the superior Courts "where the plaintiff dwells more than twenty miles from the defendant;" and it was held to mean twenty miles

(*a*) As if a title to freehold is set up, even though issue be taken on some collateral matter; *Tinniswood* v. *Pattison*, 3 Com. B. R. 243.

(*b*) *Double* v. *Gibbs*, 1 Cromp. & Mees. 246; *Kidd* v. *Mason*, 3 Dowl. 96.

(*c*) *Drew* v. *Fletcher*, 1 Barn. & Cres. 233.

(*d*) *Parker* v. *Vaughan*, 2 Bos. & Pul. 29.

(*e*) 46 Geo. III. c. lxvi.; *Wittam* v. *Urry*, 2 Dowl. 543.

from the place where the defendant dwells (*f*). The consequence of suing in a superior Court for a sum which comes within the jurisdiction of a Court of Requests, is generally the forfeiture of costs, if the plaintiff succeeds. In the pleadings in inferior Courts every transaction must be alleged to have occurred within the jurisdiction of the Court. Their proceedings are usually subject to review by writ of false judgment (*g*).

Power has, however, been given by the 5th sect. of the stat. 9 & 10 Vict. c. 95 (*h*) to the Queen in council to order, that many of these Courts should be held as County Courts under that act, to alter their districts, or to abolish them.

9 & 10 Vict. c. 95, s. 5.

SECT. 3.—*The New County Courts.*

By the statute 8 & 9 Vict. c. 127, s. 9, amended by 12 & 13 Vict. c. 101, power was given to the Queen in council to enlarge the jurisdiction of Courts of Request and of Conscience, and inferior Courts of Record for the recovery of debts, and other Courts for the recovery of small debts, to all debts and demands not exceeding 20*l.*, whether on balance of account or otherwise, or damage arising out of any express or implied agreement.

8 & 9 Vict. c. 127.

By the statute 9 & 10 Vict. c. 95 (*i*), these provisions are further extended; and the Queen in council is empowered to divide all the counties into districts, and to order that a County Court should be held in each district, which is to have "all the jurisdiction and powers of the (ancient) County Court, for the recovery of debts and demands as altered by the act (*j*)." These new Courts are to be Courts of Record (*k*). And it is enacted (*l*), "that all pleas of personal actions, where the debt or damage claimed is not more than 20*l.*, whether on balance of account or otherwise, may be holden in the County Court without writ; and all such actions brought in the said Court shall be heard and determined in a summary way, in a Court constituted under this act, and according to the provisions of this act; provided always, that the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market or franchise shall be in question, or in which the validity of any devise, bequest or limitation under any will or settlement may be disputed, or for any malicious prosecution, or

County Courts under 9 & 10 Vict. c. 95.

Jurisdiction.

(*f*) *Peterson* v. *Davis*, 17 Law J. (N. S.) C. P. 290.

(*g*) *Scott* v. *Bye*, 9 Moore, 649; *Bates* v. *Turner*, 10 Moore, 32.

(*h*) See below.

(*i*) This act is amended by 12 & 13 Vict. c. 101. The 13 & 14 Vict. c. 61, extends the provisions of the 9 & 10 Vict. c. 95, and also of 12 & 13 Vict. c. 101, to debts, &c., not exceeding 50*l.*, and also alters and amends the 9 & 10 Vict. c. 95.

(*j*) Sect. 3. Sect. 4 enacts, "That for all purposes, except those which shall be within the jurisdiction of the Courts holden under this act, the County Court shall be holden as if this act had not been passed."

(*k*) Sect. 3.

(*l*) Sect. 58.

Replevin. Recovery of small Tenements.

for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage."

Actions of replevin, not brought in the superior Courts, must now be brought in these Courts (*m*), and possession of small tenements may be recovered in some cases (*n*). Plaints are not to be removed

(*m*) Sect. 119 enacts, "that all actions of replevin in cases of distress for rent in arrear or damage feasant, which shall be brought in the County Court, shall be brought without writ, in a Court held under this act;" *Edmonds* v. *Challis*, 7 C. B. Rep. 413. See as to Replevin, ante, Chap. VI., 664, 671, 672, 673.

(*n*) See some useful practical forms and directions in these cases in Arch. Pract. of the New County Courts, p. 127, &c., 3rd ed. The following are the enactments of the statute on the subject:—

Sect. 122 enacts, "that when and so soon as the term and interest of the tenant of any house, land or other corporeal hereditament, where the value of the premises, or the rent payable in respect of such tenancy, did not exceed the sum of 50*l.* by the year, and upon which no fine shall have been paid, shall have ended or shall have been duly determined by a legal notice to quit, and such tenant, or (if such tenant do not actually occupy the premises, or occupy only a part thereof) any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord or his agent to enter a plaint in the County Court to be holden under this act, and thereupon a summons shall issue to the person so neglecting or refusing; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and show cause to the contrary, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to the Court proof of the holding, and of the end or other determination of the tenancy, with the time or manner thereof, and where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and upon proof of service of the summons, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the judge to issue a warrant under the seal of the Court to any bailiff of the Court, requiring and authorizing him, within a period to be therein named (not less than seven, or more than ten clear days from the date of such warrant), to give possession of the premises to such landlord or agent; and such warrant shall be a sufficient warrant to the said bailiff to enter upon the premises, with such assistance as he shall deem necessary, and to give possession accordingly: provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday or Christmas-day, or at any time except between the hours of nine in the morning and four in the afternoon: provided also, that nothing herein contained shall be deemed to protect any person by whom any such warrant shall be sued out of the County Court from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession, where such person had not, at the time of suing out the same as aforesaid, lawful right to the possession of the same premises."

Sect. 123 enacts, "that such summons as last aforesaid may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the person or persons so holding over as aforesaid: provided, that if the person or persons so holding over, or any or either of them, cannot be found, and the place of abode of such person or persons shall either not be known, or admission thereto cannot be obtained for serving such summons, the posting of the said summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person or persons respectively."

Sect. 124 enacts, "that it shall not be lawful to bring any action or prosecution against the judge, or against the clerk of the Court by whom such warrant as aforesaid shall have been issued, or against any bailiff or other person by whom such warrant may be executed or summons affixed, for issuing such warrant or executing the same respectively, or affixing such summons, by reason that the person by whom the same shall be sued out had not lawful right to the possession of the premises."

Sect. 125 enacts, "that where the landlord, at the time of applying for such warrant as aforesaid, had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this act; but the party aggrieved may, if he think fit, bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage, with costs of suit:

unless the debt or damage claimed exceeds *5l.*, and then only by leave of a judge of the superior Courts, upon such terms as he thinks fit (*o*). Judgments and executions cannot be stayed or reversed by writ of error (*p*). The superior Courts have a concurrent jurisdiction in some cases; and if parties sue in them when they might sue in the County Courts, they are liable to lose their costs (*q*). The judge of the Court is to be sole judge in all actions brought, and is to determine all matters of law and fact (*r*); except that in some cases the parties have a right to have a jury of five persons impanelled; and in all cases the judge

provided, that if the special damage so laid be not proved, the defendant shall be entitled to a verdict; and that if proved, but assessed by the jury at any sum not exceeding *5s.*, the plaintiff shall recover no more costs than damages, unless the judge before whom the trial shall have been holden shall certify that in his opinion full costs ought to be allowed."

Sect. 126 enacts, "that in every case in which the person by whom any such warrant shall be sued out of the County Court had not, at the time of suing out the same, lawful right to the possession of the premises, the suing out of any such warrant as last aforesaid shall be deemed a trespass by him against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant; and in case any such tenant or occupier will become bound with two sufficient sureties, to be approved by the clerk of the Court, in such sum as to the judge shall seem reasonable (regard being had to the value of the premises and to the probable cost of such action), to sue the person by whom such warrant was sued out with effect and without delay, and to pay all the costs of the proceeding in such action, in case a verdict shall pass for the defendant, or the plaintiff shall discontinue or not prosecute his action, or become nonsuit therein, execution upon the warrant shall be stayed until judgment shall have been given in such action of trespass; and if upon the trial of such action of trespass a verdict shall pass for the plaintiff, such verdict and judgment thereupon shall supersede the said warrant."

Sect. 127 enacts, "that every bond given on the removal of any action out of the County Court, or upon staying the execution of any such warrant of possession as aforesaid, or on moving for a new trial, or to set aside a verdict, judgment or nonsuit, shall be made to the other party to the action, at the costs of such other party, and shall be approved by the judge, and attested under the seal of the Court; and if the bond so taken be forfeited, or if, upon the proceeding for securing which such bond was given, the judge before whom such proceedings shall be had shall not certify upon the record in Court that the condition of the bond hath been fulfilled, the party to whom the bond shall have so been made may bring an action of debt, and recover thereon: provided always, that the Court in which such action as last aforesaid shall be brought may by a rule of Court give such relief to the parties liable upon such bond as may be agreeable to justice and reason, and such rule shall have the nature and effect of a defeasance to such bond."

(*o*) Sect. 90. The removal of plaints in replevin is regulated by sect. 121. See ante, 672, 673.

(*p*) Sect. 108.

(*q*) Sect. 128 enacts, "that all actions and proceedings which before the passing of this act might have been brought in any of her Majesty's superior Courts of Record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the County Court shall be a party (except in respect of any claim to any goods or chattels taken in execution of the process of the Court, or the proceeds or value thereof), may be brought and determined in any such superior Court at the election of the party suing or proceeding, as if this act had not been passed."

Sect. 129 enacts, "that if any action shall be commenced after the passing of this act in any of her Majesty's superior Courts of Record, for any cause other than those lately hereinbefore specified, for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l.*, if the said action is founded on contract, or less than *5l.*, if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior Court." The Courts held under the two Universities of Oxford and Cambridge, and the Courts of the Wardens of the Stannaries of Cornwall, are not affected by this act; sects. 140, 141. See also the County Courts Extension Acts, 13 & 14 Vict. c. 61, and 15 & 16 Vict. c. 54.

(*r*) Sect. 69.

may order the action to be tried by such a jury (s). The judge may also, with the consent of both parties, refer suits to arbitration, together with other matters in difference which are within the jurisdiction of the Court (t). Claims by landlords under a distress, or by others, to goods taken in execution under the process of the Court, are to be adjudicated upon by the judge (u); and landlords are restrained from demanding above a certain amount of rent (x). Five judges of the superior Courts are authorized to make general rules for regulating the practice of the County Courts, and to frame forms for proceedings. These rules and forms have from time to time been made (y).

Decisions on 9 & 10 Vict. c. 95.

An action for double value under the statute 4 Geo. II. c. 28, s. 1 (z), may be brought in the County Courts established under the statute 9 & 10 Vict c. 95, being within the 58th section; and such an action and an action for arrears of rent may be made the subject of two suits, not being within section 63 (a). The defendant in such an action cannot avail himself of the 58th section of the act to oust the County Court of jurisdiction by alleging title to the premises in himself if it be proved that he has admitted himself to have been tenant to the plaintiff at the time of the accruing of the rent and the commencement of the holding over (b). A custom for all the inhabitants of a town to fish in a person's river is bad; and it is, moreover, a claim for that which is not a "hereditament," and therefore not within section 58; and consequently, for both reasons, where such a custom is set up, the County Court is not ousted of its jurisdiction (c). It is for the judge of the County Court to decide whether the cause shown by the tenant or occupier on his appearance under section 122 is a sufficient cause, and also, whether the notice to quit be a legal notice, and his decision is conclusive (d). Title to a corporeal hereditament may be in question under the 58th section in a dispute relating to the occupation; as, for instance, where the plaintiff's case was that he had let the defendant a portion only of a cottage, and the defendant's case was that the plaintiff had let him the whole (e). It was held by the Court of Exchequer, dubitante Alderson, B., that under the 122nd section (ante, 838), the County Court has jurisdiction if either the rent, no fine having been paid, or the annual value of the premises does not exceed 50*l.* (f). A judgment under that section for the delivery of possession of premises at a future day is a nullity; it ought to order delivery of possession forth-

(s) Sect. 70.
(t) Sect. 77.
(u) Sect. 118.
(x) See ante, 402.
(y) For these rules and forms, see Arch. Pract. of the New County Courts, 3rd ed.; Pollock on County Courts, and other works on the same subject.
(z) Ante, 524.
(a) *Wickham* v. *Lee*, 12 Q. B. 521. Section 63 prohibits the dividing of causes of action into several suits.
(b) Ibid.
(c) *Lloyd* v. *Jones*, 6 C. B. 81.
(d) *Fearon* v. *Norvall*, 5 Dowl. & L. 439, Q. B. 161; and see *Lilley* v. *Harvey*, 5 ibid. 648; *Lowen* v. *Pearse*, ibid. n., 654.
(e) *Chew* v. *Holroyd*, 8 Exch. Rep. 249.
(f) *Harrington (Earl of)* v. *Ramsay*, 8 Exch. Rep. 879.

with (*g*). If a plaintiff has given a bond under the 9 & 10 Vict. c. 95, s. 121, but loses the verdict at the trial, he has not prosecuted his suit with effect, and therefore is not entitled to the certificate of the judge (*h*), though the title to land was in dispute (*i*). A County Court judge has no jurisdiction to give possession of premises not situated within his district (*k*). The 122nd section contemplates those cases only in which the ordinary relation of landlord and tenant exists. A mortgagee therefore, cannot, under this act, obtain possession of premises from the mortgagor's tenant, who had never consented to hold under the mortgagee (*l*).

(*g*) *Fearon* v. *Norvall*, 5 Dowl & L. 439.
(*h*) See section 127 of the act, ante, 839, n.
(*i*) *Tunnicliffe* v. *Wilmot*, 2 Car. & Kir. 626.
(*k*) *Ellis* v. *Peachey*, 5 Dowl. & L. 675.
(*l*) *Jones* v. *Owen*, ibid. 669.

CHAPTER IX.

PROCEDURE IN EQUITY.

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SECT. 1.—*Mode of Procedure.*

Nature of the Bill, and for what it may be filed.

A BILL in equity being the mode of obtaining relief in extraordinary cases, not touched by the common law, it is almost impossible to specify every purpose for which a bill may be filed. The following, however, are those which are peculiarly within the scope of this work:—bills for specific performance of contracts; for relief against fraudulent or other deeds; for injunction against acts prejudicial to the complainant's interest; for discovery; for partition; and for relief in cases of ejectment. In addition to those which are called original bills, there are others which are of a secondary nature,—as amended bills, for the alteration of the originals by omission or insertion of new matter,—supplemental bills, to supply defects in former proceedings, on change of interests, or discovery of new matter since the original bill and answer,—and bills of revivor, in case of abatement of the suit by death or change of circumstances in material parties. All persons materially interested should be made parties either as complainants or defendants, so that a complete decree may be made, embracing every right and interest in the subject (*a*). A material change in the practice and procedure in the Court of Chancery has been made by the 15 & 16 Vict. c. 86. Bills of complaint are now to be printed and filed, and are to contain a concise narrative of the facts on which the plaintiff relies. They are to be divided into numbered paragraphs, and are not to contain any interrogatories for the examination of the defendant.

Practice as to compelling Appearance.

The defendant, instead of being served with a writ of subpœna to appear and answer the bill, is now served with a printed copy of the bill, which has the same effect as regards remedies for default of appearance as the old writ of subpœna possessed. He is liable, for instance, to process of attachment for the contempt.

Course of Proceedings to Hearing.

Under the former practice the bill contained certain interrogatories to which the defendant was bound to give distinct answers. This is no longer the case; but if the plaintiff requires from the defendant

(*a*) Mitf. on Plead. 144.

an answer to the bill, he files interrogatories for the examination of the defendant, and furnishes the latter or his solicitor with a copy thereof, to which the defendant is bound to put in an answer. Whether the plaintiff does or does not require an answer from the defendant the latter is at liberty, with or without the leave of the Court, according to circumstances, to put in a plea, answer or demurrer to the bill. The defendant's answer may contain not only his answer to the interrogatories so filed, as above mentioned, but also such statements material to the case as he thinks it necessary or advisable to set forth therein. The plaintiff in any suit commenced by bill may, after the expiration of the time allowed to the defendant for answering, move the Court for such decree or decretal order as he may think himself entitled to; and the Court, on hearing such motion, may grant or refuse the application, or give such directions as to the further prosecution of the suit as the circumstances of the case may require. In certain cases the defendant is at liberty to file interrogatories for the examination of the plaintiff, to which the latter is bound to answer; or the defendant if he thinks fit may, instead of filing such interrogatories, exhibit a cross bill of discovery against the plaintiff. Either party to the suit may be compelled to produce on oath all documents in his possession or power relating to the matters in questions in the suit. The practice of issuing commissions to take pleas, answers, disclaimers and examinations, having been attended with great expense and delay has been abolished, and the pleas, &c. may now be sworn and taken before certain prescribed judicial and other public authorities. The practice of excepting to bills, answers and other proceedings for impertinence is abolished. In suits commenced by bill, where notice of motion for a decree or decretal order has not been given, or such decree or order has not been made, issue is to be joined by filing the replication in the usual form. Evidence may be taken either orally or upon affidavit; and when taken orally, the witnesses are to be examined either before an examiner of the Court, or an examiner specially appointed. The Court has power to order the production and oral examination before itself of any witness or party. The cause being ripe for hearing the suit is brought before the Court, counsel are heard, and a decree pronounced by the judge in open Court, which is afterwards drawn up in form by the proper officer.

Proceedings after Hearing.

The decree either directly adjudicates upon the rights of the litigant parties,—in which case it is usually final, without any subsequent proceedings beyond enforcement being necessary to effectuate it:—or it is merely a general declaration of interests, and requires further inquiries to be made into detail, before its object can be fully accomplished; of the latter description are cases arising out of the due administration of testator's assets; accounts under mortgages, and the like. In these cases, under the former practice, the decree was merely declaratory of the general rights of the parties, and referred the consi-

deration of the particulars to the Master; the final adjudication to be made upon further directions on his report. Now, however, by the 36th section of the Master in Chancery Abolition Act, 15 & 16 Vict. c. 80, all or any of the powers, authorities and jurisdiction given to the Masters in ordinary of the said Court, by any act or acts then in force, may in future be exercised by the Master of the Rolls or Vice-Chancellors respectively. It sometimes happens that the judge in equity directs an issue in law where he does not choose to take upon himself the responsibility of deciding difficult points of fact or law. When this course is not adopted, and the Court is in possession of all the facts of the case, it makes its final decree upon the merits, and the suit is at an end. The costs are usually the subject of a specific direction in the first decree upon the hearing.

Sect. 2.—*For Specific Performance.*

Nature of Equitable Relief by Specific Performance.

If either of the parties to an agreement or contract fail to complete his part of the contract, the other party has two remedies for the non-performance; an action at law,—in which damages, commensurate with the injury arising from the non-completion of the contract, may be recovered from the party who makes default; and a suit in equity,—in which the Court of Equity will enforce the agreement by a decree for a specific performance of its stipulations. The latter of these remedies will form the subject of inquiry in this place. We will first see in what cases the Courts of Equity will decree specific performance, and then, as it is a principle pervading all Courts of equitable jurisdiction, that the party who applies for relief should have an equitable title to the interference of the Court,—or, as it is technically expressed, shall have equity on his side;—it becomes material, briefly to inquire what circumstances in the conduct of the party applying to equity, will preclude his right to call for a specific performance by the other party of a contract made between them in the character of landlord and tenant.

In what Cases generally Specific Performance is decreed.

The constant doctrine of the Courts of Equity is, that it is in their discretion whether they will decree a specific performance, or leave the plaintiff to his remedy at law (*b*). They exercise a discretion, and will not exert their authority for that purpose, if, by so doing, injustice will be done (*c*); therefore, if an agreement be otherwise than certain, fair, and just in all its parts, they will not decree a specific performance (*d*). Accordingly, where the party seeking relief was, on entering into the contract, guilty of gross misrepresentations and deceit (*e*), specific performance was refused; and the bill, which was for specific performance of an agreement to grant a lease to the plaintiff, was dismissed with costs. Upon the same principle, specific

(*b*) See *Joynes* v. *Statham*, 3 Atk. 389.
(*c*) *Powell* v. *Lloyd*, 2 You. & Jerv. 372.
(*d*) See *Buxton* v. *Lister*, 3 Atk. 386.
(*e*) *Willingham* v. *Joyce*, 3 Ves. 168.

performance was not decreed where there was concealment (*f*) or misrepresentation (*g*). If in a bill for the specific performance of an agreement for a lease, the intended lessee have done any acts, which (had the lease been granted) would have amounted to a forfeiture, the Court will not decree performance (*h*); unless the intended lessor has by some competent act—such as the acceptance of rent subsequently due—waived his right to insist on the forfeiture (*i*); but the breach of condition must be clearly made out, to induce the Court to withhold specific performance. Specific performance of incomplete gifts will not be decreed (*k*). Inadequacy of value is no objection to specific performance, unless it be so great as to prove fraud (*l*). In bills for specific performance, the Court never gives relief where the act is impossible to be done, but leaves the party to his remedy at law (*m*). However, a bill lies for a specific performance, though there be a remedy at law; for the remedy by specific performance is superior in many cases to that of damages; thus, where there was a proviso in articles for the purchase of an estate, that if either party should break the agreement, he should pay 100*l.* to the other; and the defendant, on being offered two years' purchase more, accepted it, notwithstanding that agreement; Lord Hardwicke decreed a specific performance (*n*). In one case, however, it was held, that if a bond be given with a penalty, a specific performance shall not be decreed; for the party has relied upon the penalty (*o*).

Of what Contracts Specific Performance will be decreed.

A party cannot seek for a specific performance of a covenant to repair (*p*); but on a covenant to build, the lessors are entitled to come into a Court of Equity for a specific performance (*q*); although a general covenant to lay out a certain sum in a building of a certain value cannot be so executed (*r*). The reason of this is, that the covenant to build is one entire thing, and if not done prevents that security for his rent to which the lessor is entitled by virtue of a building lease. In one case a specific performance of articles to grant a lease to the plaintiff was decreed, though he had contracted to underlet, contrary to those articles (*s*); but in another case, specific performance of an agreement to renew a lease, in consideration of money previously or subsequently laid out by the tenant, was refused because such promise was nudum pactum; but it was said, that if previously to such promise the tenant had signified his intention to lay out money, and on that consideration the promise had been made, a specific performance

(*f*) *Shirley* v. *Stratton*, 1 Bro. Cha. Cas. 440.
(*g*) *Clermont* v. *Tasburgh*, 1 Jac. & Walk. 112; *Cadman* v. *Homer*, 18 Ves. jun. 10.
(*h*) *Wetherall* v. *Gearing*, 12 Ves. jun. 504.
(*i*) *Gourlay* v. *Somerset* (*Duke*), 1 Ves. & Bea. 68.
(*k*) *Callaghan* v. *Callaghan*, 8 Cl. & Fin. 374.
(*l*) Ibid.
(*m*) See *Green* v. *Smith*, 1 Atk. 573.
(*n*) *Howard* v. *Hopkins*, 2 Atk. 371.
(*o*) Cha. Cas. 188; see also *Howard* v. *Hopkins*, 2 Atk. 371.
(*p*) *London* (*City*) v. *Nash*, 3 Atk. 515.
(*q*) *Franklyn* v. *Tuton*, 5 Mad. 469; *London* (*City*) v. *Nash*, 1 Ves. 12; 3 Atk. 515.
(*r*) *Moseley* v. *Virgin*, 3 Ves. jun. 184.
(*s*) *Williams* v. *Chevey*, 3 Ves. jun. 59.

should be decreed (*t*). A specific performance of a covenant for perpetual renewal was refused under circumstances of laches and alteration of the property, so that it could not be enjoyed according to the stipulations (*u*). Where a testator has covenanted for perpetual renewal of a lease, the trustees of his will are not bound to enter into a covenant to renew; but the original covenant, together with the decision of the Court of the lessee's right to a perpetual renewal, ought to be recited in the lease granted by the trustees, and the trustees ought to purport to demise in obedience thereto (*x*). Injuries accruing to the landlord by the acts of the tenant, but which do not amount to a breach of covenant, form no ground for refusing a decree for the specific performance of the contract; and therefore, where the tenant, under an agreement for a building lease, had built a brewhouse, which injured the value of the landlord's other property in the neighbourhood, but there was no covenant not to build a brewhouse, the Court decreed performance of an agreement to grant a building lease, saying, that if the erection became a nuisance, the defendant had a remedy at law (*y*). But the Court refused specific performance of an agreement for an under-lease, the intended lessee having, with notice, committed acts which would have been a forfeiture of the original lease (*z*). Common covenants in husbandry are not the subject of equitable jurisdiction, of which a specific performance will be granted (*a*).

Against whom Specific Performance will be decreed.

Specific performance may be decreed against one become a lunatic since the agreement, if the legal estate is in trustees (*b*); but the Court will not execute an agreement to grant a lease to a man who has committed felony (*c*). The insolvency of the intended tenant is a valid ground for resisting the specific performance of an agreement for a lease (*d*). Although the bankruptcy of a person who has agreed to purchase does not discharge the contract, it must be a very strong case, however, that will induce the Court to carry into execution an agreement between landlord and tenant, the estate not being executed at law, where the person who is to become the tenant has become a bankrupt (*e*). On a bill by the assignees for the specific performance of an agreement for a lease, the Court decreed that the assignees were entitled to a lease according to the agreement, on personally entering into those covenants which the bankrupt, if solvent, would have been bound to enter into (*f*). Where a person agreed to grant a lease to *A.*, his executors, administrators and assigns, upon certain conditions,

(*t*) *Robertson* v. *St. John*, 2 Bro. Cha. Cas. 140; 1 Eq. Cas. Abr. 18.

(*u*) *London (City)* v. *Mitford*, 14 Ves. jun. 42; see also *Redshaw* v. *Bedford Level (Governors)*, 1 Eden, 346; and ante, 306.

(*x*) *Hodges* v. *Blagrave*, 18 Beav. 404; and see *Copper Mining Company* v. *Beach*, 13 Beav. 478.

(*y*) *Gordon* v. *Smart*, 1 Sim. & Stu. 66.

(*z*) *Lewis* v. *Bond*, 18 Beav. 85.

(*a*) *Rayner* v. *Stone*, 2 Eden, 128.

(*b*) 1 Ves. jun. 82.

(*c*) *Willingham* v. *Joyce*, 3 Ves. jun. 169.

(*d*) *Buckland* v. *Hall*, 8 Ves. jun. 92: *Neale* v. *Mackenzie*, 1 Keen, 474.

(*e*) *Brook* v. *Hewett*, 3 Ves. jun. 255; *Wetherall* v. *Gearing*, 12 Ves. jun. 504.

(*f*) *Powell* v. *Lloyd*, 2 You. & Jerv. 372.

and *A.* assigned his interest in the contract to *B*, and then became bankrupt; it was held that *B.*, on performing the conditions, had a right to enforce the agreement specifically (*g*).

What acts of the Complainant prevent Specific Performance.

Where one party to an agreement trifles, or shows backwardness in performing his part of it, equity will not decree a specific performance in his favour; especially if the circumstances and situation of the other party are materially altered in the meantime (*h*). So, if the party to whom the lease is contracted to be granted has been guilty of laches or delay, it will be a good reason for the Court refusing to decree a specific performance of the contract (*i*). Where, however, the time at which the contract was to be executed is not material, and there is no unreasonable delay, it is otherwise; therefore, a vendor, though not having a good title at the time the contract was to be executed, nor when the bill was filed, but being able to make a title at the hearing, is entitled to a specific performance (*k*). Where a tenant has committed breaches of covenant by waste, treating the land in an unhusbandlike manner, &c., he is not entitled to a specific performance of an agreement for a lease (*l*).

Effect of Statute of Frauds as to Agreements.

The meaning of the Statute of Frauds (*m*) is to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other; and therefore, both in Courts of equity and common law, where an agreement has been reduced to such a certainty, and the substance of the statute can be complied with in the material part, the forms have never been insisted upon (*n*). Accordingly, where there is a complete agreement in writing, and a person who is a party, and knows the contents, subscribes it as a witness only, he is bound by it; for it is a signing within the Statute of Frauds. On the same principle, a letter takes a parol agreement out of the statute, if it furnish the terms of the agreement, or at least refer to some written agreement in which the terms are set forth (*o*). There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute, and agreeable to the provision of it (*p*). However, the bare entry of a steward in his lord's contract book with his tenants, is not evidence of itself that there is an agreement for a lease between the lord and one of the tenants, but must be supported by other proof (*q*). Where a lessor made a verbal promise to his lessee to secure him in the possession of the premises during the lessee's life; in con-

(*g*) *Morgan* v. *Rhodes*, 1 Myl. & Keen, 435.

(*h*) *Hayes* v. *Caryll*, 1 Bro. Parl. Cas. 126.

(*i*) *Heapley* v. *Hill*, 2 Sim. & Stu. 29.

(*k*) *Wynn* v. *Morgan*, 7 Ves. jun. 202; *Hearne* v. *Tenant*, 13 Ves. jun. 287.

(*l*) *Hill* v. *Barclay*, 18 Ves. jun. 63; *Nesbitt* v. *Meyer*, 1 Swan. 223.

(*m*) 29 Car. II. c. 3. See ante, Book I., Chap. IV., Sect. 1, pp. 58, 59, and Book I., Chap. VI., Sect. 11 (a), p. 240, &c.

(*n*) *Welford* v. *Beazley*, 3 Atk. 503.

(*o*) 2 Bro. Cha. Cas. 32; 1 Stra. 426; 1 Atk. 12. The letter must in some cases be stamped before it can be used as evidence of an agreement.

(*p*) See *Welford* v. *Beazley*, 3 Atk. 503.

(*q*) *Charlewood* v. *Bedford* (*Duke*), 1 Atk. 497.

sequence of which promise the lessee made considerable alterations and improvements, and after the lessor's death a memorandum of this promise was found amongst his papers, wherein he expressed a hope that the same would be observed; Lord Thurlow held, that the memorandum took the case out of the Statute of Frauds; and directed a lease to be made for ninety-nine years, determinable on his life (r).

Effect of Part Performance of Parol Contracts.

With respect to *parol* agreements, it is an established rule, that a parol agreement, *part performed*, is not within the provisions of the Statute of Frauds, but will be decreed to be executed by a Court of Equity; for where a part of the agreement is performed on one side, it is but common justice that it be carried into execution; a plea, therefore, of the Statute of Frauds will not be allowed (s). As to what acts amount to a part performance, the general rule is, that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory or ancillary to it (t): a tender of conveyances, therefore, is not a part performance of an agreement; it must be something in *actual* execution of the contract, not merely *towards* the execution (u): nor will the circumstance of a vendee ordering the conveyances to be drawn in pursuance of a parol agreement, and going several times to see the premises, and a letter from the vendee mentioning the agreement, but not the price, induce the Court to decree a performance; nor will sending an appraiser to value the thing agreed for (x). Delivery of possession, however, or payment of money, is a part performance of an agreement not reduced into writing; for delivery of possession to the person claiming under the agreement is a strong and marked circumstance (y); accordingly, upon an agreement for the surrender of a term, where the lessor accepts the key, he shall be bound to accept of the surrender (z). In one case, it is said, that where a man, on a promise of a lease to be made to him, lays out money in improvements, he may oblige the lessor afterwards to execute a lease, because it was executed on the part of the lessee (a). Where, however, a bill was filed by a tenant of a farm for a specific performance of a parol agreement for a new lease, stating improvements made at a considerable expense, and continuance of possession after the expiration of the old lease, and payment of an increased rent under the agreement; a plea of the Statute of Frauds was ordered to stand for an answer, with liberty to except (b). In another case an issue was sent to a jury by way of inquiry of damages, where it appeared that the parties, who applied to the Court for a specific performance of an agreement, had, by their committee and surveyors, viewed, without complaint, the pro-

(r) 3 Bro. Cha. Cas. 149.
(s) 2 Bro. Cha. Cas. 566; 2 Atk. 100; 2 Stra. 733; Prac. Chan. 519.
(t) Ambl. 586.
(u) *Popham* v. *Eyre*, Lofft, 786.
(x) 1 Eq. Ca. Abr. 20.
(y) *Willis* v. *Stradling*, 3 Ves. jun. 381.
(z) 2 Vern. 113; 1 Atk. 12.
(a) Prec. Cha. 561.
(b) *Willis* v. *Stradling*, 3 Ves. jun. 378.

gress of the party in repairing premises which they at last insisted on being rebuilt (c).

SECT. 3.—*For Relief against Fraud or Mistake.*

When Courts of Equity will relieve from Fraud.

If the consideration of a deed be fraudulent, or contra bonos mores, or any other circumstance affect the transaction with fraud, the Courts of Equity will interfere to set the deed aside, although in many instances the Courts of Law have rendered such an interference unnecessary: thus, the Court of Equity will interfere, when an agent procures his principal to grant a lease on disadvantageous terms, if it appear that the agent took any interest in the lease (d).

When Courts of Equity will relieve from Mistake.

Courts of Equity will also interfere, to set right mistakes which occur in deeds, or contracts of agreement, if the interests of parties are prejudiced by such mistakes: thus, articles of agreement may be rectified by the minutes; but though a formal mistake in the deed may be rectified by articles of which it purports to be an execution, essential additions cannot be made to a conveyance, from articles of which it does not purport to be an execution: nor can the transaction be rescinded by the Court (e): nor will the Court relieve against a contract in writing, on the ground of mistake, unless there is express proof of the mistake in the intention of the parties.

SECT. 4.—*For Injunction.*

(a) *Against Waste.*

Nature of Relief in Equity against Waste.

The relief afforded by the Courts of Equity is in many cases absolutely necessary to be sought, in order to prevent the commission of threatened or impending waste; and the Court will stay waste upon application, by bill brought for that purpose, praying an injunction (f). Respecting the remedy of the remainderman or reversioner—or in the case of copyholds, of the lord—against a tenant about to commit or committing waste, although a Court of Equity will not assist a forfeiture, yet the tenant in possession shall be restrained in equity from waste in all cases in which waste is punishable by law (g); and

(c) *London* (*City*) v. *Nash*, 2 Atk. 517. The Court has gone too far in permitting part performance and other circumstances to take cases out of the statute, and then, unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement; the relief ought to have been confined to compensation.

(d) *Ormond* (*Lady*) v. *Hutchinson*, 16 Ves. jun. 94.

(e) *Mosely* v. *Virgin*, 3 Ves. jun. 184.

(f) At the common law, prohibition went out of Chancery, against the tenant by the curtesy, in dower or as guardian, at the prayer of him who had the inheritance, to inhibit waste, and that before waste committed. Com. Dig. tit. *Chancery* (D 11). A writ of estrepement was a writ which also was formerly issued to prohibit waste being done by the tenant, while a real action was depending in the Common Law Courts; and if the tenant, notwithstanding, committed waste, an action might be brought on the writ, in which damages and costs might be recovered, or the defendant might be punished for the contempt. *Playstow* v. *Bacheller*, Moore, 100; Benl. 216.

(g) By the statute 3 & 4 Will. IV. c. 27, s. 36, the action of waste is abolished. See ante, Book II., Chap. IV., Sect. 7 (c), p. 465; and Book III., Chap. IV., Sect. 4, p. 644.

for this purpose an injunction will be granted before the bill is filed. Equity will, likewise, in some particular cases, restrain the tenant from committing waste, where he is dispunishable by law, either by the nature of the estate, or by express grant "without impeachment of waste (*h*):" but where, by agreement of the parties, the lease is made without impeachment of waste, equity will not restrain the lessee from cutting timber, ploughing, opening mines, &c., though such lessee shall be restrained from pulling down houses, defacing seats, &c. (*i*). But a Court of Equity will not interfere in a doubtful case (*k*).

Proceeding to obtain an Injunction.

Special injunctions, against waste or injury, are obtained on special applications only, by motion or petition with a notice;—sometimes on affidavit before answer,—sometimes on the merits disclosed in it; the former, however, only in cases of great importance, injury or urgency. When a bill is filed to restrain waste, or any other injury very detrimental, so that it is necessary to lose no time, an injunction may be applied for immediately after the bill is filed, by special motion, supported by affidavit of the grievance (*l*). On a motion, however, to stay waste, a particular title must be shown: and the motion should be made upon affidavit of the title,—of the waste committed,—and a certificate of the bill filed; for it will not be granted without positive evidence of title (*m*). The Court will not grant an injunction to stay waste in digging mines, where the defendant sets up a right to the inheritance of the estate, till the answer is come in, or the defendant has made default in not putting in his answer; for such injunctions are never granted before the hearing unless the defendant had only a term in the estate, for years, or for life, and the reversion was in the plaintiff (*n*).

Who may be injoined from Waste.

The Court of Chancery will not, in any case whatever, restrain a tenant in tail from committing waste (*o*). It is said also, that if he grant all his estate, the grantee is dispunishable for waste: so if the grantee grant it over, his grantee is likewise dispunishable (*p*): so, a tenant after possibility of issue extinct, or one who is in possession in respect of a trust, is not liable to waste: so, no injunction can be obtained against tenant for life, at the suit of the remainderman in fee, though there is an intermediate remainder; but if a tenant for life "without impeachment of waste," or any other lessee, cut timber, so as not to leave sufficient for repairs, the Court will restrain him from cutting any more without leave of the Court. An injunction to re-

(*h*) Where a clause "without impeachment of waste" is inserted in a lease or demise for years, it will have the same effect as when it is inserted in a conveyance of an estate for life; and the Court of Chancery will restrain the import of it, in the same manner as in the case of an estate for life. 1 Cruise, Dig. tit. 8, s. 12, n.

(*i*) 2 Eq. Cas. Abr. 399.

(*k*) *Savage* v. *O'Connor*, 7 Irish Jur. 161.

(*l*) Park. An. 47.

(*m*) *Davis* v. *Leo*, 6 Ves. jun. 784.

(*n*) *Lowther* v. *Stamper*, 3 Atk. 496.

(*o*) See 1 Mad. Ch. Prac. 138, &c.

(*p*) 3 Leon. 121.

strain waste cannot be granted against one in possession under a claim by an adverse title (*q*); or, where the title is disputed, as between devisee and heir at law (*r*). But where the defendant insists on his own title, but admits he received possession from the plaintiff's tenant without the plaintiff's knowledge, in breach of the tenant's duty, such an injunction may be granted (*s*).

In whose Favour Injunction may be granted.

The Court will grant an injunction, at the suit of a ground landlord, to stay waste in an under lessee, who holds by lease from the original landlord, upon a certificate being produced of the waste (*t*). So, a mortgagor may have an injunction to stay waste against the mortgagee, if he cut down timber, and do not apply the money arising from the sale in sinking the interest and principal. So, where the mortgagor commits waste, the Court will grant the mortgagee an injunction; for they will not suffer the mortgagor to prejudice the inheritance. So, though a rector may cut down timber for the repairs of the parsonage, or chancel (but not for any common purpose), and is entitled to botes for repairing barns and outhouses belonging to the parsonage, an injunction to stay waste, in cutting down timber in the churchyard will be granted, till the cause be heard; an injunction may also be granted to stay waste against a rector, at the suit of the patron (*u*). An injunction to stay waste may be granted in favour of a child in ventre sa mère (*x*). An injunction may be granted between tenants in common, against destruction; but not against pure equitable waste (*y*). In one case, where the plaintiff and defendant in possession were tenants in common, an injunction to stay waste was refused; but on affidavit of the defendant's insolvency, it was granted (*z*).

What Acts of Waste are sufficient to obtain an Injunction.

Every common trespass is not a foundation for an injunction, where it is only contingent and temporary; but if it continue so long as to become a nuisance, in such case the Court will interfere, and grant an injunction to restrain the person from committing it (*a*). A tenant for life may be restrained from pulling down the ancient and capital house; and not only so, but the Court will compel him to put it in the same plight in which he found it; the Court, it is said, will not decree a tenant for life to repair, or appoint a receiver with directions to repair (*b*). So, a tenant will be restrained from pulling down a house and building another to which the landlord objects (*c*). At the present day, an injunction shall be granted upon an affidavit of waste committed, to inhibit any waste from being committed by tenant for life or years,—as to inhibit meadow, or other pasture, not ploughed within

(*q*) *Pittsworth* v. *Hopton*, 6 Ves. jun. 31.
(*r*) *Smith* v. *Collyer*, 8 Ves. jun. 89.
(*s*) *Norway* v. *Rowe*, 19 Ves. jun. 154.
(*t*) *Farrant* v. *Lovel*, 3 Atk. 723; Ambl. 105.
(*u*) *Strachy* v. *Francis*, 2 Atk. 217.
(*x*) 3 Atk. 211.
(*y*) *Hole* v. *Thomas*, 7 Ves. jun. 589.
(*z*) 3 Bro. Cha. Cas. 621.
(*a*) *Coulson* v. *White*, 3 Atk. 21; and see 1 Mad. Chan. Prac. 138, &c.
(*b*) *Wood* v. *Gaynon*, Ambl. 395.
(*c*) *Smyth* v. *Carter*, 18 Beav. 78.

twenty years, being ploughed: but not against a lessee who had agreed to pay 20*s*. per acre per annum, increase of rent, if he ploughed a meadow: so it will be granted to inhibit ancient inclosures being thrown down, or houses being pulled down (*d*). So it will be granted to restrain a tenant from doing damage and removing crops, manure, &c., except according to the custom of the country (*e*). The Court will award a perpetual injunction to restrain waste by ploughing, burning, breaking or sowing down lands (*f*). In one case, where there was an express covenant, an injunction was granted to restrain a tenant from breaking up meadow for the purpose of building; although the Lord Chancellor doubted if it could be done without an express covenant (*g*). An injunction was granted against ploughing up pasture when there was only a covenant to manage the farm in a husbandlike manner (*h*). An injunction has also been granted to prevent land being sown with pernicious crops (*i*). A tenant holding under the Court by lease with the usual covenant to cultivate in a husbandlike manner and not to commit waste, in a motion by the receiver a conditional order had been granted for an injunction to restrain him from sowing a large quantity of flax, and from breaking up grass land. On a motion to show cause, there being contradictory affidavits as to the advantage or disadvantage of the mode of tillage, the motion was directed to stand over, with liberty to the receiver to bring an action at law on the covenant, serving notice on the parties interested in the estate, the tenant in the meantime to have liberty to go on with his tillage on his own peril (*k*). An injunction shall go to restrain the defendant from injuring fishponds (*l*). A tenant for life, even without impeachment of waste, will be restrained also from cutting down trees in lines or avenues, or ridings in a park, whether planted or growing naturally; or trees not of a proper growth to be cut: and though he be tenant for life, with liberty to cut timber "at seasonable times," he is not to cut trees planted for ornament or shelter to the mansion-house, or sapling trees not fit to be cut or felled for timber (*m*). This extends to a clump of trees planted on a common, two miles from the house, for ornament (*n*). An injunction against cutting ornamental timber must, however, be confined to timber standing for ornament or shelter; in one case, the Court refused to extend it, by inserting the words "contribute to ornament (*o*)." With respect to threatened or impending waste, the act of sending a surveyor to mark out trees, is a sufficient ground for an injunction (*p*). So, a threat to open mines,

(*d*) Com. Dig. tit. *Chancery* (D 11); and see *London* (*Mayor*) v. *Hedger*, 18 Ves. jun. 355.

(*e*) *Onslow* v. ——, 16 Ves. jun. 173.

(*f*) 4 Bro. Parl. Cas. 377.

(*g*) *Grey de Wilton* (*Lord*) v. *Saxon*, 6 Ves. jun. 106; and see *Kimpton* v. *Eve*, 3 Ves. & Bea. 349.

(*h*) *Drury* v. *Molins*, 6 Ves. jun. 328.

(*i*) *Pratt* v. *Brett*, 2 Mad. 62.

(*k*) *Savage* v. *O'Connor*, 7 Irish Jur. 161.

(*l*) 2 Bro. Cha. Cas. 64.

(*m*) 3 Atk. 95, 215, 755.

(*n*) *Downshire* (*Marquis*) v. *Sandys* (*Lady*), 6 Ves. jun. 107.

(*o*) *Williams* v. *M'Namara*, 8 Ves. jun. 72.

(*p*) *Jackson* v. *Cator*, 5 Ves. jun. 688.

entitles a party to come into Court to restrain the party. Even if a tenant for life insist on a right to do waste, and have none, the reversioner may have an injunction, though no proof of waste appear (*q*).

(b) *Injunction against Proceedings at Law.*

When and how Injunction against Proceedings at Law is granted.

The injunction to restrain proceedings at law is either common or special. The former merely stays execution in the action, unless it be specially extended to the trial of the cause; the latter can be had in those cases only where there has been no opportunity of obtaining the former, as in case of judgment, warrant of attorney, or the like. By the terms of the special injunction, granted before answer, it is to continue until answer or further order; and therefore it may be dissolved, either upon the coming in of the answer, or upon affidavit before answer. In some oppressive cases a perpetual injunction will be granted, particularly where the Court has directed a trial, or where the subject of a verdict is odious in its nature (*r*).

SECT. 5.—*For Discovery.*

Nature and Object of a Bill for Discovery.

Every bill in equity is in effect a bill of discovery; but the bill specifically so called is one for the discovery of facts peculiarly within the knowledge of the defendant, or of deeds or other things in his custody. It is generally used in aid of some Court or jurisdiction not having power to compel a discovery on oath; it is never allowed in ecclesiastical jurisdiction, and cannot be amended by adding parties (*s*). Sometimes relief is prayed as well as discovery.

SECT. 6.—*To compel Partition.*

Nature of Partition.

A partition is when two or more coparceners, joint-tenants or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part. By the common law, coparceners, being compellable to make partition, might have made it by parol, but joint-tenants and tenants in common must have done it by deed: and in both cases, the conveyance must have been perfected by livery of seisin; but the Statute of Frauds, 29 Car. II. c. 3, has abolished this distinction, and made a deed in all cases necessary (*t*).

Nature of Partition by Suit in Equity.

The course of proceeding to compel a partition between persons

(*q*) *Gibson* v. *Smith*, 2 Atk. 182; Barnard. 91.
(*r*) See also ante, 823.
(*s*) 1 Mad. Chan. Prac. 196, &c.
(*t*) 2 Black. Com. 324. There are some things, indeed, in their nature impartable; the mansion-house, common of estovers, piscary uncertain, or any other common without stint, which shall not be divided; but the eldest sister, if she please, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance; or if that cannot be, they shall have the profits of the thing by turns, in the same manner as they take an advowson.

jointly interested is by a suit in equity (*u*). On a bill for a partition between two joint-tenants, the plaintiff must show a title for himself, and not allege generally that he is in possession of a moiety (*x*). On such a bill neither side pays costs; because it is for the benefit of both parties to have their shares in severalty: but where a bill was to settle the boundaries of a manor, and it was decreed that each party should give to the other a note of their boundaries, and that it should be tried in a feigned issue; and the issue being found for the defendant, on the first, second and third trial, he was not only allowed the costs of all the trials at law, but also the costs in equity; in regard that the defendant had no bill, and the plaintiff might have tried it at law, without coming into a Court of Equity (*y*). On a partition in Chancery, every part of the estate need not be divided; for it is sufficient if each tenant, jointly interested, have an equal share; thus, for example, if there are three houses of different value, to be divided among three, it would not be right to divide every house; but some recompense is to be made, either by a sum of money, or rent for owelty of partition to those who have houses of less value (*z*). Where partition was made between the daughters of one, in whom the way to a mill had been extinguished by unity of possession, and the mill and way were assigned to one, and the land to the other; it was held, that the way was revived, as though it was a new way (*a*). If rent be assigned for owelty of partition, there being three parceners, and rent assigned to two, if it were a grant they would be joint-tenants, and the rent would survive; whereas, it being but an appointment, if either of them die, the rent shall go to the heir of the deceased, and not survive.

(*u*) Previous to the statute 3 & 4 Will. IV. c. 27, s. 36, this might also have been effected by an action in the common law courts, called a writ of partition, but the method by suit in equity had latterly been more usually adopted.

(*x*) *Cartwright* v. *Pultney*, 2 Atk. 380.

(*y*) 2 P. Wms. 376.

(*z*) 1 P. Wms. 447. If a joint-tenant upon owelty [equality] of partition, think proper to accept of a contingent uncertain advantage, where one moiety of the land is of superior value to the other, it will not vacate the agreement. Where *M.* and *S. J.*, daughters and coheirs of *J. J.*, being seised in fee of certain lands, the former married *T. J.* and the latter *W. R.*, and by mutual agreement between their husbands, a partition was made of the said premises between them and the heirs of *M.* and *S.*, by which each of them agreed to take one part thereof, which they did, and entered into possession; and *S.* held such of her said premises by virtue of the partition, and *M.* enjoyed her part till her death, and being at the time of the partition somewhat larger than *S.*'s, *M.* in consideration thereof paid the taxes and levies charged upon both. The husbands being both dead, the bill was brought against *S.* to confirm the division of the said estates. The Lord Chancellor held, that the agreement of the husbands could not bind the inheritance of the wives; nor was a long enjoyment under it of any force, unless it had been originally the agreement of the wives; but *S.* consenting to the enjoyment of the several years of the said premises that had been held in severalty, it was decreed, that the plaintiff and defendant should take in severalty accordingly. *Ireland* v. *Rittle*, 1 Atk. 541.

(*a*) Bro. Abr. *Extinguishment*, pl. 15; 1 Bos. & Pul. 376, n. (*a*).

SECT. 7.—*In Cases of Ejectment.*

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Courts of Equity will relieve tenants in cases where ejectments have been brought against them, for breaches of covenant caused by unavoidable ignorance or accident, and where the amount of damage done can be clearly computed; but where the breaches are caused by the tenant's wilful neglect or default, Courts of Equity will not relieve, except in cases where it has been by nonpayment of a fixed sum of money (*b*). The consequence is, that such relief can seldom be obtained, except where ejectments are brought for nonpayment of rent.

Effec
Stat.
c. 28.

Formerly this relief might be obtained in all cases at almost any time (*c*), but now the stat. 4 Geo. II. c. 28, enacts, sect. 2, that in case lessees suffer judgment to be recovered in ejectment without paying the rent, and arrears and costs, and without filing a bill for relief in equity within six months after execution, then they shall be barred and foreclosed from all relief in law and equity, other than by writ of error. Sect. 3 enacts, that in case the lessee or other person, claiming any interest in the lease, shall, within six months, file a bill for relief in equity, such person shall not have any injunction against the proceedings at law on the ejectment unless he shall, within forty days after answer filed by the lessor of the plaintiff in the ejectment, bring into Court such sum of money as the lessor of the plaintiff shall swear to be due and in arrear, over and above all just allowances; and also the costs taxed in the suit; there to remain till the hearing, or to be paid out to the lessor or landlord, on good security; and in case of a bill so filed, the lessor of the plaintiff shall be accountable only for so much, and no more, as he shall really and bonâ fide, without fraud, deceit, or wilful neglect, make of the demised premises; and if what shall be so made by the lessor of the plaintiff happen to be less than the rent reserved on the lease, then the lessee, before he shall be restored to possession, shall pay the lessor what the money so made fell short of the reserved rent. Sect. 4 provides, that if the tenant shall before trial tender to the landlord, or pay into Court, all the rent in arrear, together with costs, all further proceedings shall be discontinued in the ejectment (*d*), and that if the lessee, &c., or their executors, &c., shall, upon the bill so filed, be relieved in equity, he shall have, hold and enjoy the demised lands according to the lease thereof made, without any new lease to be thereof made. The true end and professed intention of the Act of Parliament is, to take off from the landlord the inconvenience of his continuing always liable to an uncertainty of possession, from its remaining in the power of the tenant to offer him a compensation at any time, in order to

(*b*) Adams, Eject. 156, 4th ed.
(*c*) Ibid. 122, 4th ed.
(*d*) See ante, 786.

found an application for relief in equity; and to limit and confine the tenant to six calendar months after execution executed for his doing this; or else, that the landlord should from thenceforth hold the demised premises discharged from the lease (*e*). It may be questioned whether these enactments apply to any cases except those named in the previous part of the second section (*f*), namely, where there is no sufficient distress on the premises, so as to limit the time within which relief can be obtained in equity in such cases only; it has, however, been decided, that these enactments apply to all cases where there is half-a-year's rent in arrear, and a right of re-entry in the landlord (*g*), although those decisions do not appear satisfactory (*h*).

In other Ejectments.

The Courts of Equity will, it seems, sometimes interfere and grant a perpetual injunction against a person proceeding at law to try an ejectment, where previous ejectments have been tried, and the right has been settled to the satisfaction of the Court (*i*).

(*e*) Per Lord Mansfield, in *Doe* d. *Hitchins* v. *Lewis*, 1 Burr. 619.
(*f*) Ante, 718.
(*g*) Adams, Eject. 124, &c., 4th ed.
(*h*) See ante, 786.
(*i*) See ante, 823; and Adams, Eject. 309, 4th ed.

CHAPTER X.

CRIMINAL PROCEDURE.

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SECT. 1.—*Larceny in Lodgings.*

Stealing in Lodgings.

BY section 45 of stat. 7 & 8 Geo. IV. c. 29, it is enacted, "that if any person shall steal any chattel or fixture, let to be used by him or her, in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, every such offender shall be deemed guilty of felony," and if the value of the property stolen exceeds 5*l.* (*a*) he shall be punished as in the case of simple larceny. This enactment is much more extensive than the 3 W. & M. c. 9, s. 5, which was the first that made the stealing by lodgers felonious; and many of the difficulties that arose as to drawing the indictment under the last-mentioned statute seem to have been removed by this (*b*).

Property of the value of 40*s.* (under 12 Anne, stat. 1, c. 7), left at a house by mistake, and delivered to the occupier, under the supposition that it was for one of the persons in the house, was held entitled to the protection, so as to make the stealing of it by a lodger, under the pretence that it was his, a capital offence under that act (*c*).

SECT. 2.—*Arson.*

Nature and Punishment of Arson.

The statute 7 Will. IV. & 1 Vict. c. 89, s. 2, enacts, that "whosoever shall unlawfully and maliciously set fire to any house, stable, coachhouse, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn or granary, or to any building or erection, used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony," and being convicted thereof shall be transported for life, or for not less than fifteen years, or be imprisoned for not more than three years. This act seems to define clearly what sort of buildings it is arson to burn; and the omission of the common law, and of the statute 9 Geo. I. c. 22,

(*a*) 12 Vict. c. 11, s. 2.
(*b*) Car. C. L. 141, 318.
(*c*) *R.* v. *Carroll*, Ryan & Moo. C. C. 89.

—the Black Act,—to make the burning of the house by the owner, or by the tenant in possession, felony, is also supplied.

Sect. 3.—*Forcible Entry and Detainer.*

Nature and Punishment of the Offence by Indictment.

The offence of forcible entry and detainer is defined to be the violent taking or keeping possession of lands and tenements, with menaces, force, and arms, and without the authority of law (*d*). This was formerly allowable, under certain circumstances, to every person disseised or put out of possession (*e*); but being found very prejudicial to the public peace, it was thought necessary, by various statutes (the latest of which was the 21 Jac. I. c. 15), to restrain all persons whatever from the use of such violent methods to do themselves justice (*f*). Where there has been a forcible entry made into a freehold, it is punishable by statute 5 Rich. II. st. 1, c. 8, with imprisonment and ransom at the Queen's will. Though the statute mentions entry only, if expulsion be laid in the indictment and proved, the prosecutor may obtain restitution (*g*); though no restitution can be awarded by 31 Eliz. c. 11, if the defendant have been permitted to remain quietly in possession for three years previously to the finding of the indictment (*h*). An indictment lies also at common law for a forcible entry, although it is generally brought on the acts of parliament (*i*). No expulsion or detainer in this case need be proved, because no restitution can be awarded (*k*). The tenement in which the force was made must be described with convenient certainty; and the indictment must set forth, that the defendant actually entered, and ousted the party grieved, and continued his possession at the time of finding the indictment, otherwise he cannot have restitution, because it does not appear that he needs it (*l*). If, however, a man's wife, children or servants continue in the house, or upon the land, he is not ousted of his possession; but his cattle being upon the ground do not preserve his possession (*m*). A repugnancy in setting forth the offence in an indictment upon any of the statutes is an incurable fault (*n*): an indictment for forcible entry was quashed, therefore, for not setting forth that the party was seised or disseised, or what estate he had in the tenement; for if he had only a term for years, then the entry must be laid into the freehold of *A.* in the possession of *B.* (*o*). Upon

(*d*) 4 Black Com. 148.

(*e*) 1 Hawk. P. C. c. 64, s. 1.

(*f*) Although a man may arm himself and his friends for the defence of the possession of his house, against such as threaten to make an unlawful entry, he cannot lawfully do the same in defence of his close. *Rex* v. *Bangor* (*Bishop*), 1 Russ. C. & M. 255.

(*g*) 1 Hawk. P. C. c. 64, s. 41.

(*h*) Archb. Crim. Law.

(*i*) Per Wilmot, J., in *Rex* v. *Baker*, 3 Burr. 1731.

(*k*) *Rex* v. *Wilson*, 8 Term Rep. 357. The indictment for forcible entry into leasehold premises is founded on statute 21 Jac. I. c. 15; for a forcible detainer, on 8 Hen. VI. c. 9, or 21 Jac. I. c. 15.

(*l*) Hawk. P. C. c. 64, ss. 37, 41.

(*m*) Dalt. c. 132.

(*n*) 1 Hawk. P. C. c. 64, s. 38.

(*o*) 3 Salk. 169; 3 Burr. 1732; and see *Reg.* v. *Bowser*, 8 Dowl. 128; 1 Will. Wal. & Hod. 345.

has a discretion to refuse to award restitution (*p*). The tenant whose land has been entered upon or withholden by force, was formerly held not to be a competent witness upon an indictment founded on 21 Jac. I. c. 15, or 8 Hen. VI. c. 9 (*q*).

Punishment of the Offence by Action.

By statute 8 Hen. VI. c. 9, s. 6, if any person be put out, or disseised of any lands or tenements in a forcible manner, or put out peaceably, and after holding out with strong hand; the party grieved shall have a writ of trespass against the disseisor; and if he recovers, he shall have treble damages, and the defendant moreover shall make fine and ransom to the king. This statute applies only to a person having the freehold (*r*): and he shall recover as well for the mesne occupation, as for the first entry: and although he shall recover treble damages, yet he shall recover costs, for the word "damages" includes costs of suit (*s*).

Punishment of the Offence by Justices.

By statute 8 Hen. VI. c. 9, for a more speedy remedy, the party grieved may complain to any one justice, or to a mayor, sheriff or bailiff within their liberties (*t*). Concerning which power of the justice, it is enacted as follows:—After complaint made to such justice, by the party grieved, of a forcible entry made into lands, tenements or other possessions, or forcibly holding thereof, he shall, within a convenient time, at the costs of the party grieved (without any examining or standing upon the right or title of either party), take sufficient power of the county, and go to the place where the force is made (*u*). All people of the county, as well the sheriff as others, shall be attendant on the justices, to arrest the offenders, on pain of imprisonment and fine to the Queen: and if the doors be shut, and they within the house shall deny the justice to enter, it seems he may break open the house to remove the force (*x*): if, after the entry made, the justice "shall find such force, he shall cause the offenders to be arrested;" and the offenders being arrested, they shall be put in the

(*p*) *Reg.* v. *Harland*, 8 Ad. & El. 826; 1 Per. & Dav. 93; 1 Will. Wol. & Hod. 604; 2 Mood. & Rob. 141.

(*q*) *Rex* v. *Williams*, 9 Barn. & Cres. 549; 4 Man. & Ryl. 471. See also *Rex* v. *Bevan*, Ry. & Mood. N. P. Ca. 242.

(*r*) *Cole* v. *Eagle*, 8 Barn. & Cres. 409.

(*s*) Dalt. c. 129. This action being at the suit of the party, and only for the right, is only maintainable where the entry of the defendant was not lawful: for if a man enter with force, where his entry is lawful, he shall not be punished by way of action; but yet he may be indicted upon the statute, for the indictment is for the force and for the Queen, and he shall make fine to the Queen although his right is never so good.

(*t*) Although one justice alone may proceed in such cases, yet it may be advisable for him, if the time for viewing the force will suffer it, to take for his assistance one or two more justices.

(*u*) Dalt. c. 44; 1 Hawk. P. C. c. 66, s. 8. The justice ought to "make a record of such force by him viewed;" which record shall be a sufficient conviction of the offenders, and the parties shall not be allowed to traverse it. This record, being made out of the sessions, by a particular justice, may be kept by him; or he may make it indented, and certify the one part into the Queen's Bench, or leave it with the clerk of the peace; and the other part he may keep himself. For this view of the force by the justice, being a judge of record, makes his record thereof, in the judgment of the law, as strong and effectual as if the offenders had confessed the force before him; and as far as regards the restraining of traverse, more effectual, than if the force had been found by a jury, upon the evidence of others.

(*x*) Dalt. c. 44.

next gaol, there to abide convict by the record of the same justice, until they have made fine and ransom to the Queen; 15 Rich. II. c. 2. A conviction for a forcible detainer must show on the face of it an unlawful entry, as well as a forcible detainer: a conviction on the view merely of the justices, without any evidence of an unlawful entry, is bad, even though information and complaint of an unlawful expulsion be stated (*y*). An inquisition taken under the 8 Hen. VI. c. 9, should set forth the estate possessed by the party in the property (*z*). It is doubtful whether the holding over by a termor after the expiration of his term is constructively an unlawful entry (*a*). The Court will not compel magistrates to hear a complaint and act summarily under the statutes (*b*).

Punishment after Certiorari.

Although regularly the justices only who were present at the inquiry, and when the indictment was found, ought to award restitution; yet if the record of the presentment or indictment be certified by the justice or justices into the Queen's Bench, or the same presentment or indictment be removed or certified thither by certiorari, the justices of that Court may award a writ of restitution to the sheriff, to restore possession to the party expelled; for the justices of the Queen's Bench have a supreme authority in all cases of the crown (*c*). Also where, upon removal of the proceedings into the Queen's Bench, the conviction shall be quashed, the Court will order restitution to the party injured. Where a conviction of forcible entry was quashed for the uncertainty of messuage *or* tenement, but the restitution was opposed, on an affidavit that the party's title (which was by lease) was expired since the conviction; the Court said, they had no discretionary power in this case, but were bound to award restitution on quashing the conviction (*d*).

Punishment when amounting to Riot.

If a forcible entry or detainer shall be made by three persons or more, it is also a riot, and may be proceeded against as such, if no inquiry has before been made of the force (*e*).

What is a forcible Entry.

In general, it seems clear, that to denominate the entry forcible, it ought to be accompanied with some circumstances of actual *violence or terror;* and therefore that an entry, which has no other force than such as is implied by the law in every trespass whatsoever, is not within these statutes (*f*). With respect to *violence,* it seems to be agreed that an entry may be forcible, not only in respect of a violence actually done to the person of a man,—as by beating him if he refuse to relinquish his possession;—but also in respect of any other kind of violence in the manner of the entry,—as by breaking open the doors

(*y*) *Rex* v. *Wilson*, 3 Ad. & El. 817; 1 Ad. & El. 627; 5 Nev. & Man. 164; 6 Nev. & Man. 625, 852; 3 Nev. & Man. 753; 1 Har. & Wol. 387; 2 Har. & Wol. 225.

(*z*) *Reg.* v. *Bowser*, 8 Dowl. 128; 1 Will. Wol. & Hod. 345.

(*a*) *Rex* v. *Oakley*, 4 Barn. & Adol. 307; 1 Nev. & Man. 58.

(*b*) *Ex parte Davy*, 2 Dowl. N. S. 24.

(*c*) Dalt. c. 44.

(*d*) *Rex* v. *Jones*, 1 Stra. 474.

(*e*) Dalt. c. 44.

(*f*) *Rex* v. *Smyth*, 5 Car. & Pay. 201; 1 Mood. & Rob. 155.

of a house, whether any person be in it or not, especially if it be a dwelling-house; and perhaps, also, by an act of outrage after the entry,—as by carrying away the party's goods. It seems, however, that an entry is not forcible, by the bare drawing up a latch, or pulling back the bolt of a door, there being no appearance therein of being done by a strong hand or multitude of people: and it has been held, that an entry into a house through a window, or by opening a door with a key, is not forcible (*g*). With respect to the circumstances of *terror*, it is to be observed, that wherever a man, either by his behaviour or speech at the time of his entry, gives those who are in possession just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible. This is the case whether he cause such a terror, by carrying with him an unusual number of attendants; or by arming himself in such a manner as plainly intimates a design; or by actually threatening to kill, maim or beat those who shall continue in possession; or by giving out such speeches as plainly imply a purpose of using force (*h*). It seems that if a person enter into another man's house or ground with apparent violence, though it be but to cut or take away his corn, grass or other goods, or to fell or chop wood, or do any other like trespass, and though he do not put the party out of his possession, it is a forcible entry. If the entry were peaceable, and after such entry made, parties cut or take away any other man's corn, grass, wood or other goods, without apparent violence or force, though such acts are accounted a disseisin with force, yet they are not punishable as forcible entries (*i*): but if he enter peaceably, and then by force or violence cut or take away any corn, grass or wood, or forcibly or wrongfully carry away any other goods there being, it seems to be a forcible entry punishable by the statutes. It seems, however, that no entry is forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any other such like damage, which is not personal (*k*). It is also a forcible entry, if a man, having an estate in land, by a defeasible title, continue with force in the possession thereof, after a claim made by one who had a right of entry thereto (*l*).

What is a ble Detai

The same circumstances of violence and terror, which will make an entry forcible, will make a detainer forcible also: and a detainer may be forcible, whether the entry were forcible or not (*m*).

By whom forcible E may be m

It is clear that a forcible entry may be committed by a single person, as well as by twenty (*n*); but those who accompany a man, when he makes a forcible entry, shall be judged to enter with him, whether they actually come upon the lands or not (*o*). He, however, who barely

(*g*) 1 Hawk. P. C. c. 64, s. 26.
(*h*) Ibid. s. 27.
(*i*) Dalt. c. 126.
(*k*) Ibid.
(*l*) 1 Hawk. P. C. c. 64, s. 23.
(*m*) Ibid. s. 30.
(*n*) Ibid. s. 29.
(*o*) Ibid. s. 22.

agrees to a forcible entry made to his own use, without his knowledge or privity, shall not be adjudged to make an entry within these statutes, because he no way concurred in or promoted the force (p).

SECT. 4.—*Malicious Injuries.*

Malicious Trespass Act, 7 & 8 Geo. IV. c. 30.

A person who causes the apprehension of another for a malicious trespass to property, of which the former is the reversioner only, is entitled to notice of action under the Malicious Trespass Act, 7 & 8 Geo. IV. c. 30, if he causes such apprehension under the bonâ fide belief that he is acting in pursuance of the statute (q).

(p) 1 Hawk. P. C. c. 64, s. 24.
(q) *Horn* v. *Thornborough*, 3 Exch. Rep. 846.

BOOK IV.

STATUTES, PRECEDENTS AND FORMS.

CHAPTER I.

STATUTES.

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SECT. 1.—13 & 14 VICT. c. 97 (*a*).

An Act to repeal certain Stamp Duties, and to grant others in lieu thereof; and to amend the Laws relating to the Stamp Duties. [14*th August*, 1850.]

WHEREAS by an act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act for repealing the Stamp Duties on Deeds, Law Proceedings, and other written or printed Instruments, and the Duties on Fire Insurances, and on Legacies, and Successions to Personal Estate upon Intestacies, now payable in Great Britain, and for granting other Duties in lieu thereof," certain stamp duties specified and contained in a Schedule to the said act annexed were granted and made payable in and throughout Great Britain, for and in respect of the several instruments, matters and things described or mentioned in the said Schedule: And whereas by an act passed in the third year of the reign of King George the Fourth, intituled "An Act to reduce the Stamp Duties on Reconveyances of Mortgages and in certain other Cases, and to amend an Act of the last Session of Parliament for removing Doubts as to the Amount of certain Stamp Duties in Great Britain and Ireland respectively," certain stamp duties therein mentioned or referred to were repealed, and in lieu thereof certain other stamp duties in the said last-recited act specified were granted and made payable in and throughout Great Britain and Ireland respectively: And whereas by an act passed in the sixth year of the reign of her present Majesty, intituled "An Act to assimilate the Stamp Duties in Great Britain and Ireland, and to make Regulations for collecting and managing the same until the tenth day of October, one thousand eight hundred and forty-five," certain of the said stamp duties granted by the said first-recited act were extended to and made payable in Ireland; and under and by virtue of the said three several acts, and also of two other acts passed respectively in the eighth and eleventh years of her Majesty's reign, for continuing the said last-recited act, the said stamp duties are now payable in Great Britain and Ireland respectively: And whereas it is expedient to repeal certain of the said stamp duties, so far as the same relate to the several instruments, matters and things mentioned and described in the Schedule to this act annexed, and to substitute in lieu thereof other rates of duties for and in respect of the same instruments, matters and things: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords

55 Geo. III. c. 184.
3 Geo. IV. c. 117.
5 & 6 Vict. c. 82.
8 & 9 Vict. c. 2
11 & 12 Vict. c. 9.

(*a*) A portion of the schedule of this act was inadvertently omitted in the text.

Stamp Duties on Instruments specified in the annexed Schedule repealed, and other Duties granted in lieu thereof.

spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the tenth day of October, one thousand eight hundred and fifty, the several stamp duties now payable in Great Britain and Ireland respectively, under or by virtue of the said several acts hereinbefore recited or referred to, or any of the said acts respectively, or any other act or acts, for or in respect of the several instruments, matters and things described or mentioned in the said Schedule to this act annexed, and whereon other duties are by this act granted and imposed, shall respectively cease and determine, and shall be and the same are hereby repealed, and in lieu and instead thereof there shall be granted, raised, levied, collected and paid in and throughout the United Kingdom of Great Britain and Ireland, unto and for the use of her Majesty, her heirs and successors, for and in respect of the said several instruments, matters and things, or for or in respect of the vellum, parchment, or paper upon which the same respectively shall be written, the several duties or sums of money set down in figures against the same respectively, or otherwise specified and set forth in the said last-mentioned Schedule, and that the said last-mentioned Schedule, and the several provisions, regulations and directions therein contained with respect to the said duties, and the instruments, matters and things charged therewith, shall be deemed and taken to be part of this act, and shall be applied, observed and put in execution accordingly: Provided always, that nothing herein contained shall extend to repeal or alter any of the said duties now payable in relation to any deed or instrument which shall have been signed or executed by any party thereto, or which shall bear date before or upon the said tenth day of October, one thousand eight hundred and fifty.

Duties not to be charged on Deeds or Instruments expressly exempted from Stamp Duty by existing Acts.

III. Provided always, and be it enacted, that nothing in this act or in the Schedule hereto annexed contained shall extend or be deemed or construed to extend to charge with Stamp Duty any deed or instrument which by any act or acts now in force is expressly exempted from all stamp duty, or to subject or charge any transfer or assignment of any share in the stock and funds of the governor and company of the Bank of England, or of the South Sea Company, or of the East India Company respectively, to or with any higher or other stamp duty than such transfers and assignments are respectively subject and liable to under any act or acts now in force.

Preamble.

VI. And whereas, under or by virtue of the said several acts hereinbefore recited, or some of them, certain stamp duties are now payable for or in respect of any bargain and sale or lease for a year, for vesting the possession of lands or other hereditaments, and enabling the bargainee to take a release of the freehold or inheritance: And whereas by an act passed in the fourth year of the reign of her present Majesty, intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties," it is provided, that every deed or instrument taking effect under the said last-mentioned act in the manner therein mentioned shall be chargeable with the same amount of stamp duty as any bargain and sale or lease for a year would have been chargeable with (except progressive duty) if executed to give effect to such deed or instrument, in addition to the stamp duties which such deed or instrument shall be chargeable with as a release or otherwise under any act or acts relating to stamp duties: And whereas by an act passed in the ninth year of the reign of her present Majesty, intituled "An Act to amend the Law of Real Property," it is enacted, that every deed which by force only of the said last-mentioned act shall be effectual as a grant shall be chargeable with the stamp duty with which the same deed would have been chargeable in case the same had been a release founded on a lease or bargain and sale for a year, and also with the same stamp duty (exclusive of progressive duty) with which such lease or bargain and sale for a year would have been chargeable: And whereas it is expedient to repeal the said stamp duties now payable for or in respect of any such bargain and sale or lease for a year as aforesaid, and also to repeal

4 & 5 Vict. c. 21.

8 & 9 Vict. c. 106.

deed or instrument the said additional stamp duty as for a bargain and sale or lease for a year: Be it therefore enacted, that the said duties now payable for or in respect of any such bargain and sale or lease for a year as aforesaid, and also so much of the said two several last-mentioned acts as is hereinbefore recited, shall, so far as the same respectively relate to any deed or instrument which shall bear date after the said tenth day of October, one thousand eight hundred and fifty, be and the same are hereby repealed.

Stamp Duties on a Bargain and Sale, and so much of said Two Acts as is recited, repealed.

VII. And whereas by the said recited act of the fifty-fifth year of the reign of King George the Third, and the Schedule thereto annexed, it is provided, that where any freehold lands or hereditaments shall be conveyed by a deed of feoffment or by a deed of bargain and sale enrolled, such deed of feoffment or bargain and sale, unless accompanied with a lease and release, shall be charged with such further duty as in the said last-mentioned Schedule is specified and contained in that behalf: Be it enacted, that so much of the said last-mentioned act and of the said Schedule as charges such deed of feoffment or bargain and sale with any such further duty shall, as to any such deed as aforesaid which shall bear date at any time after the tenth day of October, one thousand eight hundred and fifty, be and the same is hereby repealed.

Preamble.

Additional Duty on a Conveyance by Feoffment or Bargain and Sale enrolled, repealed.

X. And whereas numerous leases have been from time to time granted upon or after sales made in consideration of money paid to some other person or persons than the lessor, without stamping such leases with any *ad valorem* stamp in respect of such pecuniary consideration, the party to such leases conceiving that the provisions of the several acts now in force requiring the consideration to be set out, and imposing an *ad valorem* duty thereon, did not apply to any other consideration than that passing between the lessor and lessee; but inasmuch as doubts have arisen on the subject, it is reasonable that such relief as is hereinafter mentioned should be afforded in such cases: But it therefore enacted and declared, that no lease made and executed before the twentieth day of March, one thousand eight hundred and fifty shall be adjudged, deemed or taken to be improperly stamped by reason of there not being an *ad valorem* stamp impressed thereon for or in respect of any pecuniary consideration which may have been paid or may be therein expressed to be paid by the lessee to any other person or persons than the lessor, and that the seller and the lessee respectively in any such lease, and any attorney, solicitor, writer to the signet, or other person employed in or about the preparation or completion of the same, shall be exempted from all penalties and other liabilities for or by reason of any default in setting forth any such pecuniary consideration as aforesaid.

For affording Relief in certain Cases of Leases.

XI. And whereas, by the several acts now in force relating to the stamp duties as well as by this act, certain stamp duties called progressive duties, are imposed upon deeds and instruments in respect of certain quantities of words contained therein, together with any schedule, receipt, or other matter put or indorsed thereon or annexed thereto: and whereas doubts are entertained whether such progressive duties are chargeable on any deed or instrument in respect of the words contained in any other deed or instrument liable to stamp duty and duly stamped which may be put or indorsed upon, or annexed to, or referred to in or by such first-mentioned deed or instrument, and it is expedient to remove such doubts: Be it therefore declared and enacted, that the said progressive duties shall not be deemed or held to be or to have been imposed or chargeable upon any deed or instrument in respect of the words or any quantity of the words contained in any other deed or instrument liable to stamp duty and duly stamped which may be or may have been put or indorsed upon or annexed to such first-mentioned deed or instrument, or which may be or may have been in any manner incorporated with or referred to in or by the same.

For removing Doubts regarding Progressive Duties.

Progressive Duties not to be charged on Deeds or Instruments in respect of other Deeds or Instruments duly stamped and referred to therein.

XX. And in order to avoid the frequent use of divers terms and expressions, and to prevent any misconstruction of the terms and expressions used

Construction of certain

Terms used in Stamp Acts.

in this or any other act relating to stamp duties, be it enacted, that wherever in this act or in any other such act as aforesaid, with reference to any person, offence, matter or thing, any word or words is, or are, or have been, or shall be used importing the singular number or the masculine gender only, yet such words shall be understood to include several persons as well as one person, females as well as males, bodies politic or corporate as well as individuals, and several matters or things as well as one matter or thing, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and that wherever the several words, terms or expressions following are or shall be used in this act or in any other such act as aforesaid, with reference to any deed or instrument, they shall be construed respectively in the manner hereinafter directed, (that is to say,) the word "write" or the word "written" shall be respectively deemed to mean and include the several words "print" or "printed," or "partly write and partly print" or "partly written and partly printed," as well as "write" or "written."

Act may be amended, &c.

XXI. And be it enacted, that this act may be amended or repealed by any act to be passed in this present session of parliament.

The SCHEDULE referred to, containing the DUTIES granted by this Act.

	£	s.	d.
AGREEMENT, or any minute or memorandum of Agreement, made in England or Ireland under hand only, or made in Scotland without any clause of registration (*not charged otherwise than under the head* AGREEMENT *in the schedule to the act 55 Geo. III. c.* 184, *nor expressly exempted from all stamp duty*), where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument, together with every schedule, receipt, or other matter put or endorsed thereon or annexed thereto.....	0	2	6
And where the same shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, a further *progressive* duty of	0	2	6
BOND in England or Ireland, and personal or heritable bond in Scotland, given as a security for the payment of any *annuity* (*except as aforesaid*), or of any sum or sums of money at stated periods (*not being interest for any principal sum, nor rent reserved or payable upon any lease or tack*), for the term of life or any other *indefinite period*, so that the whole money to be paid cannot be previously ascertained :—			
Where the annuity or sum secured shall not exceed 50*l.* per annum	1	0	0
And where the same shall exceed 50*l.* and not exceed 100*l.* per annum	2	0	0
And where the same shall exceed 100*l.* per annum, then for every 100*l.* per annum and also for any fractional part of 100*l.* per annum	2	0	0
But where there shall be both a personal and heritable bond in Scotland in separate deeds of the same date for securing any such annuity or sums payable at stated periods, and the *ad valorem* duty above charged thereon shall amount to 2*l.* or upwards, the heritable bond only shall be charged with the *ad valorem* duty, and the personal bond shall be charged only with a duty of.....	1	0	0

	£	s.	d
BOND of any kind or description *given for any other purpose than as aforesaid* ..... { The duty chargeable thereon by any act or acts now in force.			
Provided always, and it is hereby declared, that no such bond as last mentioned shall be charged or chargeable under this or any other act or acts with any greater amount of stamp duty than the *ad valorem* duty hereinbefore charged upon a bond given for the payment of a *definite and certain* sum of money *of the same amount as the penalty* of such bond.			
And in all the said several cases of BOND see PROGRESSIVE DUTY.			
CONVEYANCE, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, *upon the sale* of any lands, tenements, rents, annuities, *or other property*, real or personal, heritable or moveable, or of any right, title, interest or claim in, to, out of or upon any lands, tenements, rents, annuities or other property, that is to say, for and in respect of *the principal or only deed, instrument or writing* whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons by his, her or their direction;			
Where the purchase or consideration money therein or thereupon expressed shall not exceed 25*l.*	0	2	6
And where the same shall exceed 25*l.* and not exceed 50*l.*	0	5	0
And where the same shall exceed 50*l.* and not exceed 75*l.*	0	7	6
And where the same shall exceed 75*l.* and not exceed 100*l.*	0	10	0
And where the same shall exceed 100*l.* and not exceed 125*l.*	0	12	6
And where the same shall exceed 125*l.* and not exceed 150*l.*	0	15	0
And where the same shall exceed 150*l.* and not exceed 175*l.*	0	17	6
And where the same shall exceed 175*l.* and not exceed 200*l.*	1	0	0
And where the same shall exceed 200*l.* and not exceed 225*l.*	1	2	6
And where the same shall exceed 225*l.* and not exceed 250*l.*	1	5	0
And where the same shall exceed 250*l.* and not exceed 275*l.*	1	7	6
And where the same shall exceed 275*l.* and not exceed 300*l.*	1	10	0
And where the same shall exceed 300*l.* and not exceed 350*l.*	1	15	0
And where the same shall exceed 350*l.* and not exceed 400*l.*	2	0	0
And where the same shall exceed 400*l.* and not exceed 450*l.*	2	5	0
And where the same shall exceed 450*l.* and not exceed 500*l.*	2	10	0
And where the same shall exceed 500*l.* and not exceed 550*l.*	2	15	0
And where the same shall exceed 550*l.* and not exceed 600*l.*	3	0	0
And where the purchase or consideration money shall exceed 600*l.*, then for every 100*l.* and also for any fractional part of 100*l.*	0	10	0
And it is hereby directed, that the purchase money or consideration *shall be truly expressed and set forth in words at length* in or upon every such principal or only deed or instrument of conveyance; and where such consideration shall consist either wholly or in part of any stock or security, the value thereof respectively, to be ascertained as hereinafter mentioned, shall also be truly expressed and set forth in manner aforesaid in or upon every such deed or instrument; and such value shall be deemed and taken to be the purchase or consideration money, or part of the purchase or consideration money, as the case may be, in respect whereof the *ad valorem* duty shall be charged as aforesaid.			

CONVEYANCE—*continued.* £ s. d.

And where the consideration or any part of the consideration shall be any stock in any of the public funds, or any government debenture or stock of the Bank of England or Bank of Ireland, or any debenture or stock of any corporation, company, society, or persons or person, payable only at the will of the debtor, the said duty shall be calculated (taking the same respectively, whether constituting the whole or a part only of such consideration), according to the average selling price thereof respectively on the day or on either of the ten days preceding the day of the date of the deed or instrument of conveyance; or if no sale shall have taken place within such ten days, then according to the average selling price thereof on the day of the last preceding sale; and if such consideration or part of such consideration shall be a mortgage, judgment or bond, or a debenture, the amount whereof shall be recoverable by the holder, or any other security whatsoever, whether payable in money or otherwise, then such calculation shall be made according to the sum due thereon for both principal and interest.

And see PROGRESSIVE DUTY.

COPYHOLD ESTATES and CUSTOMARY Estates passing by surrender and admittance, or by admittance only, and not by deed: INSTRUMENTS relating thereto *upon the sale or mortgage* of any such estates; (that is to say,)

Any ADMITTANCE out of court, or the memorandum thereof, or the copy of court roll of any admittance in court..... 0 2 6

And where the same shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein over and above the first 1,080 words, a further *progressive* duty of 0 2 6

COUNTERPART. See DUPLICATE.

COVENANT.—Any *separate* deed of covenant made on the sale or mortgage of any freehold, leasehold, copyhold or customary estate, or of any right or interest therein (*the same not being a deed chargeable with* ad valorem *duty under the head of* CONVEYANCE *in this Schedule*) for the conveyance, assignment, surrender, or release of such estate, right or interest, or for the title to or quiet enjoyment, freedom from incumbrances, or further assurance of, the same estate, right or interest, or otherwise by way of indemnity in respect of the same, or for the production of the title deeds or muniments of title relating thereto, or for all or any of those purposes;

Where the *ad valorem* duty on the purchase money or consideration or on the mortgage money shall not exceed the sum of 10*s*..... } A duty equal to the amount of such *ad valorem* duty.

And where the same shall exceed that amount..... 0 10 0

And see PROGRESSIVE DUTY.

COVENANT.—Any deed containing a covenant for the payment or repayment of any sum or sums of money, or for the transfer or re-transfer of any share or shares in the government or parliamentary stocks or funds, or in the stock and funds of the governor and company of the Bank of England, or of the Bank of Ireland, or of the East India Company, or of the South Sea Company, or of any other company or corporation, in any case where a mortgage, } The same *ad valorem* duty as on a mortgage or bond respectively for the like purpose.

COVENANT—*continued.* £ s. d

if made for the like purpose, would be chargeable under this Schedule with any *ad valorem* duty exceeding in amount the sum of 1*l.* 15*s.*; or for the payment of any annuity, or any sums in stated periods in any case where a bond for the like purpose would be chargeable with any such duty.....

For the duty thereon, see BOND or MORTGAGE.

And see PROGRESSIVE DUTY.

Provided always, that where any covenant shall be made as an additional or further security for the payment or repayment, transfer or re-transfer of any sum or sums of money, or any share or shares in any of the said stocks or funds, or for the payment of any annuity or sums at stated periods, at the same time, or already or previously secured by any bond or other instrument mentioned and referred to by the deed containing such covenant, and chargeable with and which shall have paid the proper *ad valorem* duty under the head of BOND or MORTGAGE, or (as respects any annuity) under the head of CONVEYANCE, respectively in this Schedule, or under any act or acts in force at the date thereof, in respect of the same sum or sums, share or shares, the said *ad valorem* duty hereby charged shall not be payable upon or in respect of such covenant; and if required for the sake of evidence the deed containing such covenant shall, on the same and such bond or other instrument being produced duly stamped in other respects, be stamped with a particular stamp for denoting or testifying the payment of the *ad valorem* duty hereby charged.

Exemption from the preceding ad valorem *duty, but not from any other duty to which the same may be liable.*

Any covenant contained in any deed chargeable with any duty under the head of MORTGAGE in this Schedule, or in any deed exempted from the *ad valorem* duty on mortgages by the act 3 Geo. IV. c. 117, such deeds hereby exempted operating as a security by way of mortgage, or as a transfer, assignment, disposition or assignation hereinafter charged for the same sum or sums of money, or share or shares in any of the said stocks or funds, which is or are the subject of such covenant.

Also any covenant contained in any deed chargeable with any duty under the head of SETTLEMENT in this Schedule, in respect of the same sum or sums of money, or share or shares in any of the said stocks or funds, which is or are the subject of such covenant.

DUPLICATE or COUNTERPART of any deed or instrument, of any description whatever, chargeable with any stamp duty or duties, either under this Schedule or any other act or acts now in force;

Where such stamp duty or duties chargeable as aforesaid (*exclusive of progressive duty*) shall not amount to the sum of five shillings ..... { The same duty or duties as shall be chargeable on the original deed or instrument, including the *progressive duty* thereon (if any).

And where the same (*exclusive as aforesaid*) shall amount to the sum of five shillings or upwards 0 5 0

And where in the latter case any such deed or instrument, together with any Schedule, receipt or other matter put or indorsed thereon or annexed thereto, shall contain 2,160

DUPLICATE or COUNTERPART—*continued.* £ s. d.

words or upwards, then for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, such duplicate or counterpart shall be charged with the further *progressive* duty of 0 2 6

Provided always, that in such latter case the duplicate or counterpart shall not be available unless stamped with a particular stamp for denoting or testifying the payment of the full and proper stamp duty on the original deed or instrument, which said particular stamp shall be impressed upon such duplicate or counterpart, on the same being produced, together with the original deed or instrument, and on the whole being duly executed and duly stamped in all other respects.

LEASE or TACK of any lands, tenements, hereditaments or heritable subjects, granted in consideration of a sum of money by way of *fine*, premium or grassum paid for the same, *without any yearly rent, or with any yearly rent under* 20*l.* ..... } The same duty as for a conveyance on the Sale of lands for a sum of money of the same amount.

For the duty thereon see CONVEYANCE.

(Save and except leases and tacks for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, by whomsoever granted, and leases for a term absolute not exceeding twenty-one years, granted by ecclesiastical corporations, aggregate or sole, where the duties on such leases and tacks respectively would, under the provisions of this act, amount to 1*l.* 15*s.* or upwards).

LEASE or TACK of any lands, tenements, hereditaments or heritable subjects *at a yearly rent, without any* sum of money by way of *fine*, premium or grassum paid for the same;

Where the yearly rent shall not exceed 5*l.*	0	0	6
And where the same shall exceed 5*l.* and not exceed 10*l.* ..	0	1	0
And where the same shall exceed 10*l.* and not exceed 15*l.*	0	1	6
And where the same shall exceed 15*l.* and not exceed 20*l.*	0	2	0
And where the same shall exceed 20*l.* and not exceed 25*l.*	0	2	6
And where the same shall exceed 25*l.* and not exceed 50*l.*	0	5	0
And where the same shall exceed 50*l.* and not exceed 75*l.*	0	7	6
And where the same shall exceed 75*l.* and not exceed 100*l.*	0	10	0
And where the same shall exceed 100*l.*, then for every 50*l.* and also for any fractional part of 50*l.*	0	5	0

LEASE or TACK of any lands, tenements, hereditaments or heritable subjects granted in consideration of a sum of money by way of *fine*, premium or grassum, *and also of a yearly rent* amounting to 20*l.* or upwards ..... } Both the *ad valorem* duties payable for a lease in consideration of a fine only and for a lease in consideration of a rent only of the same amount.

(*Save and except the leases and tacks hereinbefore excepted.*)

LEASE or TACK of any *mine* or *minerals* or other property of a like nature, either with or without any other lands, tenements, hereditaments or heritable subjects, *where any portion of the produce* of such mines or minerals *shall be reserved to be paid in money or kind;*

If it shall be stipulated that the value of such portion of the produce *shall amount at least* to a given sum per annum, or if such value *shall be limited not to exceed* a given sum per annum, to be specified in such lease or tack, then the said *ad valorem* duty on leases shall be charged in respect

LEASE or TACK—*continued.* £ s. d. BOOK IV. CHAPTER I. SECT. 1.

of the *highest* of such sums so given or limited for any year during the term of such lease or tack.

And where any *yearly sum* shall be reserved in addition to or together with such produce, relative to the yearly amount or value of which produce there shall be no such stipulation or limitation as aforesaid, the said *ad valorem* duty shall be charged in respect of such *yearly sum.*

And where *both a certain yearly sum and also such produce* relative to the yearly amount or value of which there shall be such stipulation or limitation as aforesaid shall be reserved, the said *ad valorem* duty shall be charged on the *aggregate* of such yearly sum and also of the highest yearly amount or value of such produce.

GENERAL REGULATIONS as to Leases and Tacks:

Where, in any of the aforesaid several cases of lease or tack, any fine, premium or grassum, or any rent payable under any lease or tack, shall consist wholly or in part of *corn, grain or victual,* the value of such corn, grain or victual shall be ascertained or estimated at and after any permanent rate of conversion which the lessee may be specially charged with, or have it in his option to pay; and if no such permanent rate of conversion shall have been stipulated, then in England and Ireland respectively at and after the prices, upon an average of twelve calendar months preceding the first day of *January* next before the date of such lease or tack, of the average prices of British corn published in the *London Gazette* in the manner directed by any act in force for the commutation of tithes in England and Wales; and in Scotland at and after the fiars prices of the county in which the lands or any part thereof lie, upon an average of seven years preceding the date of such lease or tack; and such respective values shall be deemed and taken to be the fine, premium or grassum, or yearly rent, or part thereof respectively, as the case may be, in respect whereof the *ad valorem* duty shall be charged as aforesaid.

And where *separate* and *distinct* fines, premiums or grassums shall be paid to several lessors, being joint tenants, tenants in common or coparceners, in England or Ireland, or proprietors, *pro indiviso* in Scotland, who shall by one and the same deed or instrument jointly or severally demise or lease the lands, tenements, hereditaments or heritable subjects of which they are such joint tenants, tenants in common or coparceners in England or Ireland, or proprietors *pro indiviso* in Scotland, or where *separate* and *distinct* rents shall be by one and the same deed or instrument reserved or made payable, or agreed to be reserved or made payable, to the lessor or to several lessors, being such joint tenants, tenants in common or coparceners in England or Ireland, or proprietors *pro indiviso* in Scotland, the *ad valorem* duties shall be charged in respect of the *aggregate* amount of such fines, premiums or grassums, and of such rents respectively.

And where any person, having contracted for, but not having obtained a lease of any lands or other property, shall contract to sell such lands or other property, or any part thereof, or his right or interest therein or thereto, to any

LEASE or TACK—*continued.* £ s. d.

other person, and a lease shall accordingly be granted to such other person, the purchase money or consideration which shall be paid or given or agreed to be paid or given to the person immediately selling to such lessee shall be set forth in such lease, and such lease shall be charged as well with the said *ad valorem* duty on such purchase money or consideration as with the duty on the purchase money or consideration or rent paid or reserved to the lessor.

LEASE or TACK of any kind, *not otherwise charged*..... 1 15 0

Provided always, that no *ad valorem* duty shall be chargeable in respect of any *penal rent*, or increased rent in the nature of a penal rent, reserved in any such lease or tack as aforesaid.

LEASE.—Any ASSIGNMENT or SURRENDER of a lease or tack upon any other occasion than a sale or mortgage ..... { A duty equal to the *ad valorem* duty with which a similar lease or tack would be chargeable under this act.

Provided always, that where a similar lease or tack would be chargeable under this act with any stamp duty amounting to 1*l.* 15*s.* or upwards, then such assignment or surrender shall be chargeable only with a duty of 1 15 0

Provided also, that no stamp duty, except the said *ad valorem* duty, shall be chargeable for or in respect of any LEASE, whether in possession, reversion or remainder, expressed to be granted in consideration of the surrender of an existing lease and also of a sum of money.

And in all the said several cases of LEASE or TACK see PROGRESSIVE DUTY.

MEMORIAL to be registered pursuant to any act of parliament made or to be made for the public registering of deeds and conveyances in England or Ireland (that is to say):

For every piece of vellum, parchment or paper upon which any such memorial shall be written 0 2 6

PROGRESSIVE DUTY; that is to say:—Where any deed or instrument of any description whatever chargeable with any stamp duty either under this Schedule or under any other act or acts now in force, together with any Schedule, receipt or other matter put or indorsed thereon or annexed thereto, shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, there shall be charged the further *progressive* duty following (that is to say):

Where such deed or instrument shall be chargeable with any *ad valorem* stamp duty or duties not exceeding in the whole the sum of ten shillings, a further *progressive* duty equal to the amount of such *ad valorem* duty or duties.

And in every other case (*except where any other progressive duty is by this Schedule expressly charged thereon*), a further *progressive* duty of 0 10 0

Provided always, that nothing herein contained shall extend to charge the said *progressive* duty in any case in which express provision is made by any such act or acts as aforesaid for charging a certain duty on every skin, sheet or piece of vellum, parchment or paper in or upon which any deed or instrument shall be contained or written, or to charge with *progressive* duty any description of deed or

instrument not chargeable with *progressive* duty under any act or acts now in force, or to charge any deed or instrument with any higher rate or amount of *progressive* duty than is now chargeable on a deed or instrument of the like description under any such act or acts as aforesaid.

SCHEDULE, inventory or catalogue of any lands, hereditaments, or heritable subjects, or of any furniture, fixtures or other goods or effects, or containing the terms and conditions of any proposed sale, lease or tack, or the conditions and regulations for the cultivation or management of any farm lands or other property leased or agreed to be leased, or containing any other matter or matters of contract or stipulation whatsoever, *which shall be referred to* in or by and be intended to be used or given in evidence as part of or as material to any agreement, lease, tack, bond, deed or other instrument charged with any duty, *but which shall be separate and distinct from* and not indorsed on or annexed to such agreement, lease, tack, bond, deed or other instrument;

Where any such Schedule, inventory or catalogue shall be so referred to in or by any such agreement, lease, tack, bond, deed or other instrument chargeable with any stamp duty not exceeding 10*s.* *exclusive of progressive duty* ..... } The same duty (*exclusive of progressive duty*) as shall be so chargeable on such agreement, lease, tack, bond, deed or other instrument.

And where any such Schedule, inventory or catalogue shall be referred to in or by any lease, tack, bond, deed or such other instrument as aforesaid, chargeable with any stamp duty exceeding ten shillings, *exclusive of progressive duty* 0 10 0

And if in any of the said cases such Schedule, inventory or catalogue shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein over and above the first 1,080 words ..... } A further *progressive* duty of the same amount as the duty hereinbefore charged thereon respectively.

SECT. 2.—8 & 9 VICT. c. 124.

An Act to facilitate the Granting of certain Leases.

[*8th August*, 1845.]

Whereas it is expedient to facilitate the leasing of lands and tenements: Be it enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present parliament assembled, and by the authority of the same, that whenever any party to any deed, made according to the forms set forth in the first schedule to this act, or to any other deed which shall be expressed to be made in pursuance of this act, shall employ in such deed respectively any of the forms of words contained in column 1 of the second schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed, as if such party had inserted in such deed the form of words contained in column 2 of the same schedule, and distinguished by the same number as is annexed to the form of words employed by such party, but it shall not be necessary in any such deed to insert any such number.

II. That every such deed, unless any exception be specially made therein, shall be held and construed to include all outhouses, buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passages, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emolu-

ments, hereditaments and appurtenances whatsoever, to the lands and tenements therein comprised, belonging or in anywise appertaining.

III. That in taxing any bill for preparing and executing any deed under this act, it shall be lawful for the taxing officer, and he is hereby required, in estimating the proper sum to be charged for such transaction, to consider not the length of such deed, but only the skill and labour employed, and responsibility incurred in the preparation thereof.

IV. That any deed or part of a deed, which shall fail to take effect by virtue of this act, shall nevertheless be as valid and effectual, and shall bind the parties thereto, so far as the rules of law and equity will permit, as if this act had not been made.

V. That in the construction, and for the purposes of this act, and the schedules hereto annexed, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all tenements and hereditaments of freehold tenure, and to such customary lands as will pass by deed, or deed and surrender, and not by surrender alone, or any undivided part or share therein respectively; and every word importing the singular number only, shall extend and be applied to several persons or things, as well as one person or thing, and the converse; and every word importing the masculine gender only, shall extend and be applied to a female as well as a male; and the word "party" shall mean and include any body politic or corporate, or collegiate, as well as an individual.

VI. That the schedules and the directions and forms therein contained, shall be deemed and taken to be parts of this act.

VII. That this act shall commence and take effect from and after the first day of October (1st October, 1835).

VIII. That this act shall not extend to Scotland.

THE FIRST SCHEDULE.

This indenture, made the day of , one thousand eight hundred and forty [*or other year*], in pursuance of an act to facilitate the granting of certain leases, between [*here insert the names of the parties, and recitals, if any*]: Witnesseth, that the said [*lessor*] *or* [*lessors*] doth, *or* do demise unto the said [*lessee*] *or* [*lessees*], his [*or* their] executors, administrators and assigns, all, &c. [*parcels*], from the day of , for the term of , thence ensuing: Yielding therefore during the said term the rent of, [*state the rent and mode of payment.*]

In witness whereof the said parties hereto have hereunto set their hands and seals.

THE SECOND SCHEDULE.

Directions as to the Forms in this Schedule.

1. Parties who use any of the forms in the first column of this schedule, may substitute for the words "lessee" or "lessor," any name or names: and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in the forms in the first column of this schedule; and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may fill up the blank spaces left in the forms 4 and 5 in the first column of this schedule so employed by them, with any words or figures, and the words or figures so introduced shall be taken to be inserted in the corresponding blank spaces left in the forms embodied.

4. Such parties may introduce into or annex to any of the forms in the

first column any express exceptions from, or express qualifications thereof respectively; and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

5. Where the premises demised shall be of freehold tenure, the covenants 1 to 10 shall be taken to be made with, and the proviso 11 to apply to, the heirs and assigns of the lessor. And where the premises demised shall be of leasehold tenure, the covenants and proviso shall be taken to be made with and apply to the lessor, his executors, administrators and assigns.

Column 1.	*Column* 2.
1. That the said [*lessee*] covenants with the said [*lessor*] to pay rent:	1. And the said [*lessee*] doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the said [*lessor*], that he, the said [*lessee*], his executors, administrators and assigns, will, during the said term, pay unto the said [*lessor*] the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever.
2. And to pay taxes:	2. And also will pay all taxes, rates, duties and assessments whatsoever, whether parochial, parliamentary or otherwise, now charged or hereafter to be charged upon the said demised premises, or upon the said [*lessor*] on account thereof (excepting land tax, and excepting, in Ireland, tithe rent-charge, and such portion of the poor rate, as the [*lessor*] is or may be liable to pay; and excepting also all taxes, rates, duties and assessments whatsoever, or any portion thereof, which the [*lessee*] is or may be by law exempted from).
3. And to repair:	3. And also will, during the said term, well and sufficiently repair, maintain, pave, empty, cleanse, amend and keep the said demised premises, with the appurtenances, in good and substantial repair, together with all chimney-pieces, windows, doors, fastenings, water-closets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks and keys, and all other fixtures and things, which at any time during the said term shall be erected and made, when, where and so often as need shall be.
4. And to paint outside every year:	4. And also that the said [*lessee*], his executors, administrators and assigns, will, in every year in the said term, paint all the outside wood work and iron work belonging to the said premises, with two coats of proper oil colours, in a workmanlike manner.
5. And to paint and paper inside every year:	5. And also that the said [*lessee*], his executors, administrators and assigns, will, in every year, paint the inside wood, iron and other works, now or usually painted with two coats of proper oil colours, in a workmanlike manner; and also re-paper with paper of a quality as at present, such parts of the premises as are now papered; and also wash, stop, whiten or colour such parts of the said premises as are now plastered.

Column 1.	*Column* 2.
6. And to insure from fire in the joint names of the said [*lessor*] and the said [*lessee*]:	6. And also, that the said [*lessee*], his executors, administrators and assigns, will forthwith insure the said premises hereby demised to the full value thereof, in some respectable insurance office, in the joint names of the said [*lessor*], his executors, administrators and assigns, and the said [*lessee*], his executors, administrators or assigns, and keep the same so insured during the said term:
To show receipts:	And will, upon the request of the said [*lessor*] or his agent, show the receipt for the last premium paid for such insurance for every current year:
And to rebuild in case of fire:	And as often as the said premises hereby demised shall be burnt down or damaged by fire, all and every the sums or sum of money which shall be recovered or received by the said [*lessee*], his executors, administrators or assigns, for or in respect of such insurance, shall be laid out and expended by him in building or repairing the said demised premises, or such parts thereof as shall be burnt down or damaged by fire as aforesaid.
7. And that the said [*lessor*] may enter and view state of repair; and that the said [*lessee*] will repair according to notice:	7. And it is hereby agreed that it shall be lawful for the said [*lessor*] and his agents, at all seasonable times during the said term, to enter the said demised premises, to take a schedule of the fixtures and things made and erected thereupon, and to examine the condition of the said premises; and further, that all wants of reparation, which upon such views shall be found, and for the amendment of which notice in writing shall be left at the premises, the said [*lessee*], his executors, administrators and assigns, will, within three calendar months next after every such notice, well and sufficiently repair and make good accordingly.
8. That the said [*lessee*] will not use premises as a shop:	8. And also, that the said [*lessee*], his executors, administrators and assigns, will not convert, use or occupy the said premises or any part thereof, into or as a shop, warehouse or other place, for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose or otherwise than as a private dwelling-house, without the consent in writing of the said [*lessor*].
9. And will not assign without leave:	9. And also, that the said [*lessee*] shall not nor will during the said term, assign, transfer or set over, or otherwise by any act or deed procure the said premises, or any of them, to be assigned, transferred or set over unto any person or persons whomsoever, without the consent in writing of the said [*lessor*], his executors, administrators or assigns, first had and obtained.
10. And that he will leave premises in good repair:	10. And further, that the said [*lessee*] will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said [*lessor*] the said premises hereby

demised, with the appurtenances, together with all buildings, erections and fixtures, now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects, reasonable wear and tear, and damage by fire, only excepted.

11. Proviso for re-entry by the said lessor, on non-payment of rent, or non-performance of covenants:

11. Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or non-performance of any of the covenants and agreements herein contained on the part of the said [*lessee*], his executors, administrators and assigns, then and in either of such cases it shall be lawful for the said [*lessor*] at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, repossess and enjoy as of his or their former estate, anything hereinafter contained to the contrary notwithstanding.

12. The said [*lessor*] covenants with the said [*lessee*] for quiet enjoyment:

12. And the [*lessor*] doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the said [*lessee*], his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said [*lessor*], his executors, administrators or assigns, or any other person or persons lawfully claiming by, from or under him, them or any of them.

SECT. 3.—15 & 16 VICT. c. 76.

An Act to amend the Process, Practice and Mode of Pleading in the Superior Courts of Common Law at Westminster, and in the Superior Courts of the Counties Palatine of Lancaster and Durham. [*30th June*, 1852.]

ABSTRACT OF THE ENACTMENTS RELATING TO EJECTMENT.

168. Ejectment to be brought by writ.
169. Form and duration of writ of ejectment.
170. Service of writ of ejectment.
171. Appearance of persons named in the writ.
172. Appearance of persons not named.
173. Appearance and defence by landlord.
174 Notice to defend for part only.
175. Want of certainty cured by particulars.
176. Defence by persons not in possession.
177. Judgment for default of appearance or defence.
178. Issue how made up.
179. Special case may be stated.
180. Trial of issue.
181. Verdict when title appears to have expired before trial.
182. Trial may be ordered to take place in any county.
183. Non appearance at trial.
184. Special verdict, and bill of exceptions.
185. Judgment upon finding for claimant.
186. Judgment upon finding for defendant.
187. Execution for recovery of possession and costs may be joint or separate.
188. Defence by joint tenants, tenants in common, or coparceners.
189. Trial and judgment in ejectment against joint tenants, tenants in common and coparceners.

ABSTRACT OF THE ENACTMENTS, &c.—*continued.*

190. Action not to abate by death.
191. Proceedings upon death before trial, where right survives.
192. Proceedings upon death before trial, where right does not survive.
193. Upon death of one of several claimants having obtained a verdict.
194. Proceedings in case of death of claimant, where right does not survive.
195. Proceedings upon death of one of several joint defendants.
196. Upon death of all the defendants in ejectment before trial.
197. Upon death of all defendants in ejectment after verdict.
198. Upon death before trial of defendant in ejectment, who defends separately for part.
199. Upon death of defendant defending separately for property in respect of which others also defend.
200. Claimant may discontinue by notice.
201. Discontinuance of action by one of several claimants.
202. Judgment for not proceeding to trial after notice.
203. Defendant may confess the action.
204. Confession by one of several defendants defending separately for part.
205. Confession by one of several defendants who defend for same property.
206. Formal entry of judgment on the roll unnecessary for purposes of execution.
207. Effect of judgment.
208. Error and bail in error in ejectment.
209. Tenants to give notice of ejectment to landlord.
210. Proceedings in ejectment by landlord for non-payment of rent.
211. Lessee proceeding in equity not to have injunction or relief without payment of rent and costs.
212. Tenant paying all rent with costs, proceedings to cease.
213. Ejectment by landlord against tenant holding over after expiration of term or determination of tenancy by notice to quit—Rule or summons for the tenant to give bail—On rule or summons absolute, if tenant shall not conform, judgment to be for the landlord.
214. On trial of any ejectment between landlord and tenant, juries to give damages for mesne profits down to the verdict, or to a day specified therein.
215. On trials after bail found, judge shall not stay the execution except by consent, or on tenant's finding security—Bail in error to discharge such security.
216. Recognizances to be taken as other recognizances of bail; actions on them limited.
217. Landlord to recover possession of lands, &c. after service of writ in ejectment.
218. Saving of former remedies.
219. In ejectment by mortgagee, the mortgagor's rendering the principal, interest and costs in Court shall be deemed a full satisfaction, and the Court may compel the mortgagee to re-convey.
220. Not to extend to cases where the right of redemption is controverted, or the money due not adjusted; or to prejudice any subsequent mortgage.
221. Jurisdiction of Courts and judges.
222. Amendment.

And with respect to the action of ejectment, be it enacted as follows:

Ejectment to be brought by Writ.

CLXVIII. Instead of the present proceeding by ejectment, a writ shall be issued, directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed, which property shall be described in the writ with reasonable certainty.

Form and duration of Writ of Ejectment.

CLXIX. The writ shall state the names of all the persons in whom the title is alleged to be, and command the persons, to whom it is directed, to appear, within sixteen days after service thereof, in the Court from which it is issued, to defend the possession of the property sued for, or such part thereof as they may think fit, and it shall contain a notice that in default of appearance they will be turned out of possession; and the writ shall bear teste of the day on which it is issued, and shall be in force for three months, and shall be in the form contained in the Schedule (A.) to this act annexed, marked No. 13, or to the like effect; and the name and abode of the attorney issuing the same, or, if no attorney, the name and residence of the party shall be indorsed thereon, in like manner as hereinbefore enacted with reference to the indorsements on a writ of summons in a personal action; and the same proceedings may be had to ascertain whether the writ was issued by the authority of the attorney whose name was indorsed thereon, and who and what the claimants are, and their abode, and as to staying the proceedings upon writs issued without authority, as in the case of writs in personal actions.

Service of Writ of Ejectment.

CLXX. The writ shall be served in the same manner as an ejectment has heretofore been served, or in such manner as the Court or a judge shall

order, and in case of vacant possession, by posting a copy thereof upon th door of the dwelling-house or other conspicuous part of the property.

CLXXI. The persons named as defendants in such writ, or either of them shall be allowed to appear within the time appointed.

CLXXII. Any other person not named in such writ shall, by leave of the Court or a judge, be allowed to appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant.

CLXXIII. Any person appearing to defend as landlord in respect of property, whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord; and such person shall be at liberty to set up any defence which a landlord appearing in an action of ejectment has heretofore been allowed to set up, and no other.

CLXXIV. Any person appearing to such writ shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in a notice intituled in the Court and cause, and signed by the party appearing or his attorney; such notice to be served within four days after appearance upon the attorney whose name is indorsed on the writ, if any, and if none, then to be filed in the master's office; and an appearance without such notice confining the defence to part, shall be deemed an appearance to defend for the whole.

CLXXV. Want of "reasonable certainty" in the description of the property, or part of it, in the writ or notice, shall not nullify them, but shall only be ground for an application to a judge for better particulars of the land claimed or defended, which a judge shall have power to give in all cases.

CLXXVI. The Court or a judge shall have power to strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants.

CLXXVII. In case no appearance shall be entered into within the time appointed, or if an appearance be entered, but the defence be limited to part only, the plaintiffs shall be at liberty to sign a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply; which judgment, if for all, may be in the form contained in the Schedule (A.) to this act annexed, marked No. 14, or to the like effect; and if for part, may be in the form contained in the Schedule (A.) to this act annexed, marked No. 15, or to the like effect.

CLXXVIII. In case an appearance shall be entered, an issue may at once be made up, without any pleadings, by the claimants or their attorney, setting forth the writ, and stating the fact of the appearance, with its date, and the notice limiting the defence, if any, of each of the persons appearing, so that it may appear for what defence is made, and directing the sheriff to summon a jury; and such issue, in case defence is made for the whole, may be in the form contained in Schedule (A.) to this act annexed, marked No. 16, or to the like effect; and in case defence is made for part, may be in the form contained in the Schedule (A.) to this act annexed, marked No. 15, or to the like effect.

CLXXIX. By consent of the parties, and by leave of a judge, a special case may be stated according to the practice heretofore used.

CLXXX. The claimants may, if no special case be agreed to, proceed to trial upon the issue, in the same manner as in other actions; and the particulars of the claim and defence, if any, or copies thereof, shall be annexed to the record by the claimants; and the question at the trial shall, except in the cases hereafter mentioned, be, whether the statement in the writ of the title of the claimants is true or false, and, if true, then which of the claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question; and the entry of the verdict may be made in the form contained in the Schedule (A.) to this act annexed, marked

No. 17, or to the like effect, with such modifications as may be necessary to meet the facts.

Verdict when Title appears to have expired before Trial.

CLXXXI. In case the title of the claimant shall appear to have existed as alleged in the writ, and at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant shall, notwithstanding, be entitled to a verdict according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his cost of suit.

Trial may be ordered to take place in any County.

CLXXXII. The Court or a judge may, on the application of either party, order that the trial shall take place in any county or place other than that in which the venue is laid; and such order being suggested on the record, the trial may be had accordingly.

Non-appearance at Trial.

CLXXXIII. If the defendant appears, and the claimant does not appear at the trial, the claimant shall be nonsuited; and if the claimant appears, and the defendant does not appear, the claimant shall be entitled to recover as heretofore, without any proof of his title.

Special Verdict and Bill of Exceptions.

CLXXXIV. The jury may find a special verdict, or either party may tender a bill of exceptions.

Judgment upon finding for Claimant.

CLXXXV. Upon a finding for the claimant, judgment may be signed, and execution issue for the recovery of possession of the property, or such part thereof as the jury shall find the claimant entitled to, and for costs, within such time, not exceeding the fifth day in term after the verdict, as the Court or judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen.

Judgment upon finding for Defendant.

CLXXXVI. Upon a finding for the defendants, or any of them, judgment may be signed, and execution issue for costs against the claimants named in the writ, within such time, not exceeding the fifth day in term after the verdict, as the Court or judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen.

Execution for recovery of Possession and Costs may be joint or separate.

CLXXXVII. Upon any judgment in ejectment for recovery of possession and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs, at the election of the claimant.

Defence by Joint Tenants, Tenants in Common or Coparcener.

CLXXXVIII. In case of such an action being brought by some or one of several persons entitled as joint tenants, tenants in common or coparceners, any joint tenant, tenant in common or coparcener in possession, may, at the time of appearance, or within four days after, give notice in the same form as in the notice of a limited defence, that he or she defends as such, and admits the right of the claimant to an undivided share of the property (stating what share), but denies any actual ouster of him from the property, and may, within the same time, file an affidavit stating with reasonable certainty that he or she is such joint tenant, tenant in common or coparcener, and the share of such property to which he or she is entitled, and that he or she has not ousted the claimant; and such notice shall be entered in the issue in the same manner as the notice limiting the defence, and upon the trial of such an issue the additional question of whether an actual ouster has taken place shall be tried.

Trial and Judgment in Ejectment against Joint Tenants, Tenants in Common and Coparceners.

CLXXXIX. Upon the trial of such issue as last aforesaid, if it shall be found that the defendant is joint tenant, tenant in common or coparcener with the claimant, then the question whether an actual ouster has taken place shall be tried, and unless such actual ouster shall be proved the defendant shall be entitled to judgment and costs; but if it shall be found either that the defendant is not such joint tenant, tenant in common or coparcener, or that an actual ouster has taken place, then the claimant shall be entitled to such judgment for the recovery of possession and costs.

Action not to abate by Death.

CXC. The death of a claimant or defendant shall not cause the action to abate, but it may be continued as hereinafter mentioned.

CXCI. In case the right of the deceased claimant shall survive to another claimant, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant; and if such a suggestion shall be made before the trial, then the claimant shall have a verdict and recover such judgment as aforesaid, upon its appearing that he was entitled to bring the action either separately or jointly with the deceased claimant.

CXCII. In case of the death before trial of one of several claimants, whose right does not survive to another or others of the claimants, where the legal representative of the deceased claimant shall not become a party to the suit in the manner hereinafter mentioned, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant for such share of the property as he is entitled to, and costs.

CXCIII. In case of a verdict for two or more claimants, if one of such claimants die before execution executed, the other claimant may, whether the legal right to the property shall survive or not, suggest the death in manner aforesaid, and proceed to judgment and execution for recovery of possession of the entirety of the property and the costs; but nothing herein contained shall affect the right of the legal representative of the deceased claimant, or the liability of the surviving claimant to such legal representative; and the entry and possession of such surviving claimant under such execution shall be considered as an entry and possession on behalf of such legal representative in respect of the share of the property to which he shall be entitled as such representative, and the Court may direct possession to be delivered accordingly.

CXCIV. In case of the death of a sole claimant, or, before trial, of one of several claimants, whose right does not survive to another or others of the claimants, the legal representative of such claimant may, by leave of the Court or a judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed; and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of the deceased claimant, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion, as hereinbefore provided with reference to a judgment for or against such claimant; and in case such suggestion in the case of a sole claimant be made after trial and before execution executed by delivery of possession thereupon, and such suggestion be denied by the defendant within eight days after notice thereof, or such further time as the Court or a judge may allow, then such suggestion shall be tried; and if, upon the trial thereof, a verdict shall pass for the person making such suggestion, he shall be entitled to such judgment as aforesaid for the recovery of possession, and for the costs of and occasioned by such suggestion; and in case of a verdict for the defendant such defendant shall be entitled to such judgment as aforesaid for costs.

CXCV. In case of the death, before or after judgment, of one of several defendants in ejectment, who defend jointly, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the action may proceed against the surviving defendant to judgment and execution.

CXCVI. In case of the death of a sole defendant, or of all the defendants in ejectment, before trial, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the claimants shall be entitled to judgment for recovery of possession of the property, unless some other person shall appear and defend within the time to be appointed for that purpose by the order of the Court or a judge, to be made upon the application of the claimants; and it shall

be lawful for the Court or a judge, upon such suggestion being made and upon such application as aforesaid, to order that the claimant shall be at liberty to sign judgment within such time as the Court or judge may think fit, unless the person then in possession, by himself or his tenant, or the legal representative of the deceased defendant, shall within such time appear and defend the action; and such order may be served in the same manner as the writ; and in case such person shall appear and defend the same, proceedings may be taken against such new defendant as if he had originally appeared and defended the action; and if no appearance be entered and defence made, then the claimant shall be at liberty to sign judgment pursuant to the order.

Upon Death of all Defendants in Ejectment after Verdict.

CXCVII. In case of the death of a sole defendant or of all the defendants in ejectment after verdict, the claimants shall nevertheless be entitled to judgment as if no such death had taken place, and to proceed by execution for recovery of possession without suggestion or revivor, and to proceed for the recovery of the costs, in like manner as upon any other judgment for money, against the legal representatives of the deceased defendant or defendants.

Upon Death before Trial of Defendant in Ejectment, who defends separately for Part.

CXCVIII. In case of the death before trial of one of several defendants in ejectment, who defends separately for a portion of the property for which the other defendant or defendants do not defend, the same proceedings may be taken as to such portion as in the case of the death of a sole defendant, or the claimants may proceed against the surviving defendants in respect of the portion of the property for which they defend.

Upon Death of Defendant defending separately for Property in respect of which others also defend.

CXCIX. In case of the death before trial of one of several defendants in ejectment, who defends separately in respect of property for which surviving defendants also defend, it shall be lawful for the Court or a judge at any time before the trial to allow the person at the time of the death in possession of the property, or the legal representative of the deceased defendant, to appear and defend on such terms as may appear reasonable and just, upon the application of such person or representative; and if no such application be made or leave granted, the claimant, suggesting the death in manner aforesaid, may proceed against the surviving defendant or defendants to judgment and execution.

Claimant may discontinue by Notice.

CC. The claimant in ejectment shall be at liberty at any time to discontinue the action as to one or more of the defendants, by giving to the defendant or his attorney a notice headed in the Court and cause, and signed by the claimant or his attorney, stating that he discontinues such action; and thereupon the defendant to whom such notice is given, shall be entitled to and may forthwith sign judgment for costs in the form contained in the Schedule (A.) to this act annexed, marked No. 18, or to the like effect.

Discontinuance of Action by one of several Claimants.

CCI. In case one of several claimants shall be desirous to discontinue, he may apply to the Court or a judge to have his name struck out of the proceedings, and an order may be made thereupon upon such terms as to the Court or judge may seem fit, and the action shall thereupon proceed at the suit of the other claimants.

Judgment for not proceeding to Trial after Notice.

CCII. If after appearance entered the claimant, without going to trial, allow the time allowed for going to trial by the practice of the Court in ordinary cases after issue joined to elapse, the defendant in ejectment may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and if the claimant afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, and the time for going to trial shall not be extended by the Court or a judge, the defendant may sign judgment in the form contained in the Schedule (A.) to this act annexed, marked No. 19, and recover the costs of defence.

Defendant may confess the Action.

CCIII. A sole defendant or all the defendants in ejectment shall be at liberty to confess the action as to the whole or part of the property, by giving to such claimant a notice headed in the Court and cause, and signed by the defendant or defendants, such signature to be attested by his or their attorney; and thereupon the claimant shall be entitled to and may forthwith

sign judgment and issue execution for the recovery of possession and costs in the form contained in the Schedule (A.) to this act annexed, marked No. 20, or to the like effect.

CCIV. In case one of several defendants in ejectment, who defends separately for a portion of the property for which the other defendant or defendants do not defend, shall be desirous of confessing the claimant's title to such portion, he may give a like notice to the claimant; and thereupon the claimant shall be entitled to and may forthwith sign judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same, and the action may proceed as to the residue.

CCV. In case one of several defendants in ejectment, who defends separately in respect of property for which other defendants also defend, shall be desirous of confessing the claimant's title, he may give a like notice thereof; and thereupon the claimant shall be entitled to and may sign judgment against such defendant for the costs occasioned by his defence, and may proceed in the action against the other defendants to judgment and execution.

CCVI. It shall not be necessary before issuing execution upon any judgment under the authority of this act to enter the proceedings upon any roll, but an incipitur thereof may be made upon paper, shortly describing the nature of the judgment according to the practice heretofore used, and judgment may thereupon be signed, and costs taxed, and execution issued, according to the practice heretofore used: provided nevertheless, that the proceedings may be entered upon the roll whenever the same may become necessary for the purpose of evidence, or of bringing error, or the like.

CCVII. The effect of a judgment in an action of ejectment under this act shall be the same as that of a judgment in the action of ejectment heretofore used.

CCVIII. Error may be brought in like manner as in other actions upon any judgment in ejectment, after a special verdict found by the jury, or a bill of exceptions, or by consent after a special case stated, but, except in the case of such consent as aforesaid, execution shall not be thereby stayed, unless the plaintiff in error shall, within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed, be bound unto the claimant, who shall have recovered judgment in such action of ejectment, in double the yearly value of the property, and double the costs recovered by the judgment, with condition, that if the judgment shall be affirmed by the Court of error, or the proceedings in error be discontinued by the plaintiff therein, then the plaintiff in error shall pay such costs, damages and sum or sums of money as shall be awarded upon or after such judgment affirmed or discontinuance: and it shall be lawful for the Court wherein execution ought to be granted upon such affirmation, or discontinuance, upon the application of the claimant, to issue a writ to inquire as well of the mesne profits as of the damage by any waste committed after the first judgment in ejectment, which writ may be tested on the day on which it shall issue, and be returnable immediately after the execution thereof; and upon the return thereof judgment shall be given, and execution awarded for such mesne profits and damages, and also for costs of suit.

CCIX. Every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years improved or rack rent of the premises, demised or holden in the possession of such tenant, to the person of whom he holds, to be recovered by action in any Court of common law having jurisdiction for the amount.

CCX. In all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the nonpayment

Nonpayment of Rent.

thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made appear to the Court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half-a-year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be nonsuited therein, then in every such case such defendant shall have and recover his costs; provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed.

Lessee proceeding in Equity not to have Injunction or Relief without Payment of Rent and Costs.

CCXI. In case the said lessee, his assignee, or other person claiming any right, title or interest, in law or equity, of, in or to the said lease, shall, within the time aforesaid, proceed for relief in any Court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant in such ejectment, bring into Court, and lodge with the proper officer, such sum and sums of money as the lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the Court; and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he shall really and bonâ fide, without fraud, deceit or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands.

CCXII. If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold and enjoy the demised lands, according to the lease thereof made, without any new lease.

Tenant p ing all R with Cost Proceedin cease.

CCXIII. Where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing any lands, tenements or hereditaments for any term or number of years certain, or from year to year, shall have expired or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the writ in ejectment, to address a notice to such tenant or person requiring him to find such bail, if ordered by the Court or a judge, and for such purposes as are hereinafter next specified; and upon the appearance of the party on an affidavit of service of the writ and notice, it shall be lawful for the landlord producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the Court or apply by summons to a judge at chambers for a rule or summons for such tenant or person to show cause, within a time to be fixed by the Court or judge on a consideration of the situation of the premises, why such tenant or person should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum conditioned to pay the costs and damages which shall be recovered by the claimants in the action; and it shall be lawful for the Court or judge upon cause shown, or upon affidavit of the service of the rule or summons in case no cause shall be shown, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to find such bail, with such conditions and in such manner as shall be specified in the said rule or summons, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court or judge to enlarge the time for obeying the same, then the lessor or landlord filing an affidavit that such rule or order has been made and served and not complied with, shall be at liberty to sign judgment for recovery of possession and costs of suit in the form contained in the Schedule (A.) to this act annexed, marked No. 21, or to the like effect.

Ejectment Landlord against Te holding ov after expir tion of Ter determinati of Tenancy Notice to Q

Rule or Sun mons for the Tenant to gi Bail.

On Rule or Summons absolute, if Tenant shall not conform, Judgment to be for the Landlord.

CCXIV. Wherever it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the claimant on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the writ in ejectment, to go into evidence of the mesne profits thereof which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the claimant shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of

On Trial of any Ejectment between Landlord and Tenant, Juries to give Damages for Mesne Profits down to the Verdict, or to a Day specified therein.

the premises, and also as to the amount of the damages to be paid for such mesne profits; and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession and costs, but also for the mesne profits found by the jury: provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment.

On Trials after Bail found, Judge shall not stay the Execution except by consent, or on Tenant's finding Security.

CCXV. In all cases in which such security shall have been given as aforesaid, if upon the trial a verdict shall pass for the claimant, unless it shall appear to the judge before whom the same shall have been had that the finding of the jury was contrary to the evidence, or that the damages given were excessive, such judge shall not, except by consent, make any order to stay judgment or execution, except on condition that within four days from the day of the trial the defendant shall actually find security, by the recognizance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste or other wilful damage, and not to sell or carry off any standing crops, hay, straw or manure produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be: provided always, that the recognizance last above mentioned shall immediately stand discharged and be of no effect, in case proceedings in error shall be brought upon such judgment, and the plaintiff in error shall become bound in the manner hereinbefore provided.

Bail in Error to discharge such Securtiy.

Recognizances to be taken as other Recognizances of Bail; Actions on them limited.

CCXVI. All recognizances and securities entered into as last aforesaid may and shall be taken respectively in such manner and by and before such persons as are provided and authorized in respect of recognizances of bail upon actions and suits depending in the Court in which any such action of ejectment shall have been commenced; and the officer of the same Court with whom recognizances of bail are filed shall file such recognizances and securities, for which respectively the sum of two shillings and sixpence, and no more, shall be paid; but no action or other proceeding shall be commenced upon any such recognizance or security after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord.

Landlord to recover Possession of Lands, &c. after Service of Writ in Ejectment.

CCXVII. In all actions of ejectment hereafter to be brought in any of her Majesty's Courts at Westminster by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments in any county, except London or Middlesex, where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord, in or after Hilary or Trinity Terms respectively, it shall be lawful for the claimant in any such action, at any time within ten days after such tenancy shall expire, or right of entry accrue as aforesaid, to serve a writ in ejectment in the form contained in the Schedule (A.) to this act annexed, marked No. 13, except that it shall command the persons to whom it is directed to appear within ten days after service thereof in the Court in which such action may be brought; and the like proceedings shall be thereupon had as hereinbefore provided, save that it shall be sufficient to give at least six clear days' notice of trial to the defendant before the commission day of the assizes at which such ejectment is intended to be tried; and any defendant in such action may, at any time before the trial thereof, apply to a judge by summons to stay or set aside the proceedings, or to postpone the trial until the next assizes; and it shall be lawful for the judge, in his discretion, to make such order in the said cause as to him shall seem expedient.

Saving of former Remedies.

CCXVIII. Nothing herein contained shall be construed to prejudice or affect any other right of action or remedy which landlords may possess in

made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.

SCHEDULE (A.) referred to in the foregoing act.

No. 13.

EJECTMENT.

Form of Writ.

Victoria, *&c.*, to *X.*, *Y.*, *Z.*, and all persons entitled to defend the possession of [*describe the property with reasonable certainty*], in the parish of , in the county of , to the possession whereof *A.*, *B.* and *C.*, some or one of them claim to be [*or* "to have been on and since the day of , A.D. "] entitled, and to eject all other persons therefrom; these are to will and command you, or such of you as deny the alleged title, within sixteen days after service hereof, to appear in our Court of to defend the said property, or such part thereof as you may be advised; in default whereof judgment may be signed, and you turned out of possession.

Witness, *&c.*

No. 14.

Judgment in Ejectment in case of Nonappearance.

In the Queen's Bench.

The day of , 18 .

[*Date of Writ.*]

Lancashire to wit. } On the day and year above written, a writ of our lady the Queen issued forth of this Court in these words; that is to say,—

Victoria, by the grace of God [*here copy the writ*]; and no appearance has been entered or defence made to the said writ: therefore it is considered that the said [*here insert the names of the persons in whom title is alleged in the writ*] do recover possession of the land in the said writ mentioned, with the appurtenances.

No. 15.

In the Queen's Bench.

On the day of , A.D. 18 .

Cumberland to wit. } On the day and year above written, a writ of our lady the Queen issued forth of this Court, in these words; that is to say,—

Victoria, by the grace of God [*here copy the writ*]; and *C. D.* has, on the day of , appeared by his attorney [*or* "in person"] to the said writ, and has defended for a part of the land in the writ mentioned; that is to say [*here state the part*], and no appearance has been entered or defence made to the said writ, except as to the said part: Therefore it is considered that the said *A. B.* [*the claimant*] do recover possession of the land in the said writ mentioned, except the said part, with the appurtenances, and that he have execution thereof forthwith; and as to the rest, let a jury come, *&c.*

No. 16.

In the Queen's Bench.
On the day of , A.D. 18 .

Cumberland } On the day and year above written, a writ of our lady the
to wit. } Queen issued forth of this Court, in these words; that is to say,—

Victoria, by the grace of God [*here copy the writ*]; and *C. D.* has, on the day of , appeared by his attorney [*or* "in person"] to the said writ, and defended for the whole of the land therein mentioned: Therefore let a jury come, *&c.*

No. 17.

Afterwards on the day of , A.D. , before and , justices of our lady the Queen assigned to take the assizes in and for the within county, come the parties within mentioned; and a jury of the said county being sworn to try the matters in question between the said parties, upon their oath say, that *A. B.* [*the claimant*] within mentioned, on the day of , A.D. , was, and still is, entitled to the possession of the land within mentioned, as in the writ alleged: Therefore, *&c.*

No. 18.

In the Queen's Bench.
On the day of , 18 .
[*Date of Writ.*]

Lancashire } On the day and year above written, a writ of our lady the
to wit. } Queen issued forth of this Court, in these words; that is to say,—

Victoria, by the grace of God [*here copy the writ*]; and *C. D.* has, on the day of , appeared by his attorney [*or* "in person"] to the said writ, and *A. B.* has discontinued the action: Therefore it is considered that the said *C. D.* be acquitted, and that he recover against the said *A B.* £ for his costs of defence.

No. 19.

In the Queen's Bench.
The day of , 18 .
[*Date of Writ.*]

Lancashire } On the day and year above written, a writ of our lady the
to wit. } Queen issued forth of this Court, in these words; that is to say,—

Victoria, by the grace of God [*here copy the writ*]; and *C. D.* has, on the day of , appeared by his attorney [*or* "in person"] to the said writ, and *A. B.* has failed to proceed to trial, although duly required so to do: Therefore it is considered that the said *C. D.* be acquitted, and that he recover against the said *A. B.* £ for his costs of defence.

No. 20.

In the Queen's Bench.
The day of , 18 .
[*Date of Writ.*]

Lancashire } On the day and year above written, a writ of our lady the
to wit. } Queen issued forth of this Court, in these words; that is to say,—

Victoria, by the grace of God [*here copy the writ*]; and *C. D.* has, on the day of , appeared by his attorney [*or* "in person"] to the said writ, and the said *C. D.* has confessed the said action [*or*,

"has confessed the said action as to part of the said land, that is to say," *here state the part*]: Therefore it is considered that the said *A. B.* do recover possession of the land in the said writ mentioned [*or*, "of the said part of the said land"], with the appurtenances, and £ for costs.

No. 21.

In the Queen's Bench.
The day of , A.D. 18 .
[*Date of Writ.*]

Yorkshire } On the day and year above written, a writ of our lady the
to wit. } Queen issued forth of this Court, with a notice thereunder written, the tenor of which writ and notice follows in these words; that is to say,—

[*Here copy the writ and notice, which latter may be as follows:*]

["Take notice, that you will be required, if ordered by the Court or a judge, to give bail by yourself and two sufficient sureties, conditioned to pay the costs and damages which shall be recovered in this action."]

And *C. D.* has appeared by his attorney [*or* "in person"] to the said writ, and has been ordered to give bail, pursuant to the statute, and has failed so to do: Therefore it is considered that the said [*here insert name of landlord*] do recover possession of the land in the said writ mentioned, with the appurtenances, together with £ for costs of suit.

SCHEDULE (B.)

FORMS OF PLEADINGS.

STATEMENTS OF CAUSES OF ACTION.

On Contracts.

For an Estate sold.

VII. A messuage and lands sold and conveyed by the plaintiff to the defendant.

For Goodwill.

VIII. The goodwill of a business of the plaintiff, sold and given up by the plaintiff to the defendant.

For the Use of a House and Land.

IX. The defendant's use, by the plaintiff's permission, of messuages and lands of the plaintiff.

For the Use of a Fishery.

X. The defendant's use, by the plaintiff's permission, of a fishery of the plaintiff.

For Copyhold Fines.

XI. Fines payable by the defendant as tenant of customary tenements of the manor of to the plaintiff as lord of the said manor, for the admission of the defendant into the said customary tenements.

Upon a Lease for Rent.

XXIII. That the plaintiff let to the defendant a house, No. 401, Piccadilly, for seven years, to hold from the day of , A.D. , at £ a year, payable quarterly, of which rent quarters are due and unpaid.

Upon a Covenant to repair.

XXIV. That the plaintiff by deed let to the defendant a house, No. 401, Piccadilly, to hold for seven years from the day of , A.D. , and the defendant by the said deed covenanted with the plaintiff well and substantially to repair the said house during the said term [*according to the covenant*], yet the said house was during the said term out of good and substantial repair.

For Wrongs independent of Contract.

Trespass to Land.

XXV. That the defendant broke and entered certain land of the plaintiff, called the Big Field, and depastured the same with cattle.

XXIX. That the defendant detained from the plaintiff his title deeds land called Belmont, in the county of ; that is to say [*describe deeds*].

XXX. That the plaintiff was possessed of a mill, and by reason there was entitled to the flow of a stream for working the same, and the defenda by cutting the bank of the said stream, diverted the water thereof aw from the said mill.

XLVI. That the defendant, at the time of the alleged trespass, was po sessed of land the occupiers whereof for twenty years before this su enjoyed as of right and without interruption a way on foot and with catt from a public highway over the said land of the plaintiff to the said land the defendant, and from the said land of the defendant over the said land the plaintiff to the said public highway, at all times of the year, for th more convenient occupation of the said land of the defendant, and that th alleged trespass was a use by the defendant of the said way.

XLVII. That the defendant, at the time of the alleged trespass, was pos sessed of land the occupiers whereof for thirty years before this sui enjoyed as of right and without interruption common of pasture over the said land of the plaintiff for all their cattle, levant and couchant, upon the said land of the defendant, at all times of the year, as to the said land of the defendant appertaining, and that the alleged trespass was a use by the defendant of the said right of common.

REPLICATION.

LIV. That the occupiers of the said land did not for twenty years before this suit enjoy as of right and without interruption the alleged way.

NEW ASSIGNMENT.

LV. The plaintiff, as to the and pleas, says, that he sues not for the trespasses therein admitted, but for trespasses committed by the defendant in excess of the alleged rights, and also in other parts of the said land and on other occasions, and for other purposes than those referred to in the said pleas.

[*If the plaintiff replies and new assigns, the new assignment may be as follows:*]

LVI. And the plaintiff, as to the and pleas, further says, that he sues not only for the trespasses in those pleas admitted, but also for, *&c.*

[*If the plaintiff replies and new assigns to some of the pleas, and new assigns only to the other, the form may be as follows:*]

LVII. And the plaintiff, as to the and pleas, further says, that he sues not for the trespasses in the pleas [*the pleas not replied to*] admitted, but for the trespasses in the pleas [*the pleas replied to*] admitted, and also for, *&c.*

SECT. 4.—17 & 18 VICT. C. 125.

An Act for the further Amendment of the Process, Practice and Mode of Pleading in and Enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster, and of the Superior Courts of Common Law of the Counties Palatine of Lancaster and Durham.

Sect. 16.—"When any award made on any such submission, document or order of reference as aforesaid, directs that possession of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any party either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the Court, of which the document authorizing the reference is

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or is made a rule or order to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference to deliver possession of the same to the party entitled thereto pursuant to the award, and such rule or order to deliver possession shall have the effect of a judgment or ejectment against every such party or person named in it, and execution may issue and possession shall be delivered by the sheriff as in a judgment in ejectment."

Plaintiff in Second Ejectment for same Premises against same Defendant may be ordered to give Security for Costs.

Sect. 93.—"If any person shall bring an action of ejectment after a prior action of ejectment for the same premises has been or shall have been unsuccessfully brought by such person, or by any person through or under whom he claims, against the same defendant or against any person through or under whom he defends, the Court or a judge may, if they or he think fit on the application of the defendant at any time after such defendant has appeared to the writ, order that the plaintiff shall give to the defendant security for the payment of the defendant's costs, and that all further proceedings in the cause shall be stayed until such security be given whether the prior action has been or shall have been disposed of by discontinuance, or by nonsuit, or by judgment for the defendant."

SECT. 5.—18 VICT. C. 13.

An Act to Explain and Amend the Lunacy Regulation Act, 1853.

[*26th April*, 1855.]

ABSTRACT OF THE ENACTMENTS.

1. Lord Chancellor in matters of lunacy enabled to empower committees of estates to grant leases binding on issue or remaindermen.
2. Interpretation.

By this act, after reciting that by section 129 of the 16 & 17 Vict. c. 70, it was enacted, that when a lunatic is seised or possessed of, or entitled to land in fee or in tail, or to leasehold land for an absolute interest, and it appears to the Lord Chancellor, intrusted as in the said act mentioned, to be for his benefit, that a lease or underlease should be made thereof for term of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or otherwise improving the same, or for farming or other purposes, the committee of the estate may in the name and on behalf of the lunatic under order of the Lord Chancellor, intrusted as aforesaid, make such leases of the land or any part thereof according to the lunatic's estate and interest therein, and to the nature of the tenure thereof for such term or terms of years and subject to such rents and covenants as the Lord Chancellor, intrusted as aforesaid, shall order: And that it has been considered that the Lord Chancellor, intrusted as aforesaid, cannot by force of the said enactment empower the committee of a lunatic tenant in tail to grant leases as extensively as was intended by that enactment which will bind his issue in tail and the remaindermen: And it is expedient to explain and enlarge the power of the Lord Chancellor intrusted as aforesaid, in the matter aforesaid.

It enacted as follows:—

1. When a lunatic is seised of or entitled to in land tail, and it appears to the Lord Chancellor, intrusted as aforesaid, to be for his benefit, the committee of the estate may, in the name and on behalf of the lunatic, under order of the Lord Chancellor, intrusted as aforesaid, make any such leases of the land or any part thereof as in the said section of the said act are mentioned, and every such lease shall be good and effectual in law against the lunatic and his heirs, and all persons claiming the lands entailed by force of any estate tail which shall be vested in such lunatic, and also against all persons, including the Queen's most excellent Majesty, her heirs and suc-

cessors, whose estates are to take effect after the determination of or remainder or reversion expectant upon such estate tail, according to su estate as is comprised and specified in every such lease, in like mann as the same would have been good and effectual in law if the lunatic, at tl time of the making of such leases, had been lawfully seised of the san lands comprised in such lease of a pure estate in fee simple to his own u and had been of sound mind and not the subject of a commission of lunac and had himself granted such lease; and every person to whom from time t time this reversion expectant upon the lease shall belong after the death c the lunatic shall and may have such and the like remedies and advantage to all intents and purposes against the lessee, his executors, administrator and assigns, as the lunatic or his committee would or might have had agains him or them: And the powers given by sections numbered 130 and 131 o the said recited act shall and are to operate as extensively as the powe given by the said section 129 of the said act, as explained and enlarged b this act.

2. When any of the expressions in this act are used in the said recited act, they shall receive the same interpretation in this act as by the said recited act is enforced upon them.

CHAPTER II.

LEASES.

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SECT. 1.—*Town Lease.*

Date, Parties and Demise.

THIS INDENTURE, made the 2nd day of January, in the year of our Lord 1855, Between *A. B.*, of Hendon, in the county of Middlesex, Esquire, of the one part, and *C. D.*, of No. 10, Newgate Street, in the city of London, draper, of the other part, WITNESSETH, that as well in consideration of the sum of 100*l.* of lawful money of Great Britain, to the said *A. B.* in hand paid by the said *C. D.* at or before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged,) as also in consideration of the yearly rent, covenants, provisoes and agreements, hereinafter reserved and contained, on the part and behalf of the said *C. D.*, his executors, administrators and assigns, to be paid, observed and performed, He, the said *A. B.*, Hath demised and leased, And by these presents Doth demise and lease, unto the said *C. D.*, his executors, administrators and *assigns*(*a*), ALL that messuage or tenement and dwelling-house, situate and being at No. 10, on the south side or part of Bridge Street, in the parish of St. Sepulchre, in the town of Cambridge, together with [*here describe the particulars of the premises*]: And also all ways, paths, passages, lights, easements, rooms, vaults, cellars, areas, yards, watercourses, profits, commodities, privileges, conveniences, hereditaments and appurtenances whatsoever, to the said messuage or premises hereby demised belonging or in any ways appertaining, or therewith usually held, occupied and enjoyed; all and singular which said messuage and premises are now or lately were in the occupation of *G. G.* or his under tenants; TO HAVE AND TO HOLD the said messuage or tenement and premises, with the appurtenances hereinbefore mentioned, and intended to be hereby demised, unto the said *C. D.*, his executors, administrators and assigns, from the 25th day of December now last past, for and during and unto the full end and term of twenty-one years thence next ensuing and fully to be complete and ended (*b*): YIELDING AND PAYING

Premises and general Words.

Habendum for 21 Years.

Reddendum Quarterly.

(*a*) See ante, 496, note (*k*).

(*b*) If it be intended that the parties may determine the lease at the end of seven or fourteen years, the following words should be inserted here, "determinable nevertheless as hereinafter mentioned;" and a proviso should be added to that effect (post, sect. 9, (g)): or if determinable by notice.

therefor yearly and every year during the said term unto the said *A. B.* (*c*), his executors, administrators or assigns (*d*), the clear yearly rent or sum of 100*l.* of lawful money of Great Britain, payable quarterly on the four most usual days of payment of rent in the year; that is to say, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in each and every year, by equal portions, free and clear of and from the land tax, sewers' rates and charges, [rent-charges in lieu of tithes (*e*)], and all and all manner of parliamentary, parochial and other taxes, assessments, rates (*f*); charges, deductions and impositions whatsoever; the first quarterly payment thereof to be made on the 25th day of March now next ensuing the date of these presents, [subject nevertheless to the proviso and agreement hereinafter contained for the total (*or* partial) suspension of the said rent, in case of the destruction of the said demised premises or any part by fire or otherwise (*g*);] AND THE SAID *C. D.* doth hereby for himself, his executors, administrators and assigns, covenant, promise and agree to and with the said *A. B.*, his executors, administrators and assigns, in manner following; that is to say, that he the said *C. D.*, his executors, administrators or assigns, shall and will yearly and every year during the continuance of the said term hereby demised (subject as aforesaid) well and truly pay, or cause to be paid unto the said *A. B.*, his executors, administrators or assigns, the said yearly rent or sum of 100*l.* hereinbefore reserved, on the respective days, and in the manner the same is hereinbefore mentioned and made payable: AND ALSO shall and will well and truly pay, satisfy and discharge, or cause to be paid, satisfied and discharged, as they severally and respectively become due, the land tax (*h*) and all sewers' rates (*i*), [all tithe-rent charges (*j*),] and all and all manner of taxes, assessments, rates (*k*), charges and impositions whatever, parliamentary, parochial or otherwise, which now are, or hereafter shall, at any time during the continuance of the said term hereby

Covenant to pay Rent.

Covenant to pay Taxes & Rates.

say, "subject nevertheless to the proviso hereinafter contained, for determining the said term by notice at the end of the first or any succeeding year of the said term," and add a proviso accordingly.

(*c*) It is said that the rent cannot be reserved to a stranger, Co. Lit. 143 a; therefore if the rent is intended to be so reserved to a person who has not the legal estate, an express power of distress should be given to him; but see *Deering* v. *Farringdon*, 1 Mod. 113; and it is said in *Whitlock's case*, 8 Co. Rep. 70, 141, that where there is any doubt to whom the reservation is to be made, it is best to make the reservation in general terms.

(*d*) Where the lessor has the freehold, make the exception, reservation, &c., to him, his *heirs* and *assigns*, and not *executors*, *administrators* and *assigns*: so he may covenant for *himself*, his *heirs* and *assigns*, and it is sufficient; *executors* and *administrators* are superfluous, they are his *assigns* in law of course, but have nothing to do with the freehold as such; but where the lessor has not the freehold, then make the exception, reservation, &c., to him, his *executors*, *administrators* and *assigns*, and the covenants from him, his *executors*, *administrators* and *assigns*; though here it is usual to make him covenant for himself, his *heirs*, *administrators* and *assigns*, that he, his *executors*, *administrators* and *assigns*, shall and will, &c., in which case the *heir* will be bound.

(*e*) These words will be necessary since the Tithe Commutation Acts, if it is intended that the tenant should pay the rent-charge in lieu of tithes: see ante, Book II. Chap. VII. Sect. 5, p. 567.

(*f*) As to various rates on tenements not exceeding 10*l.* annual value, see ante, Book II. Chap. III. Sect. 7, p. 431.

(*g*) This should be omitted, in case it is intended that the rent shall not be suspended.

(*h*) Especially except the land tax, if not intended to be included. The exception is necessary when the lessor is to pay the land tax (*Hopwood* v. *Barefoot*, 11 Mod. 237; *Ormfield* v. *White*, Ryan & Mood. 254), as it is now clear, that an agreement to pay taxes generally extends to this tax; but when the land tax is excepted, the landlord is only bound to pay the land tax assessed in respect of the rent received by him; *Hyde* v. *Hill*, 3 Term R. 377; *Whitfield* v. *Brandwood*, 2 Stark. 440.

(*i*) It will be as well to add the words "and all charges and impositions in respect of sewers and drains, whether general, special, or by way of improvement, and whether for making, repairing, or cleansing any sewers or drains of what nature or kind soever the same may be," in leases of property in the Westminster district, on account of the stat. 10 & 11 Vict. c. lxx. ss. 12, 14, and in the metropolitan district on account of the stat. 11 & 12 Vict. c. 112, s. 88, amended by 12 & 13 Vict. c. 93.

(*j*) See note (*e*), ubi sup.

(*k*) See note (*f*), ubi sup.

Covenant to repair generally.

demised, be assessed, rated, charged or imposed upon or in respect of the said demised messuage or tenement and premises, or any part thereof, or on the said *A. B.*, his executors, administrators or assigns, on account thereof, or on the said rent of , or on the said *A. B.*, his executors, administrators and assigns in respect thereof. AND ALSO that the said *C. D.*, his executors, administrators and assigns, or some or one of them, shall and will, at his or their or some or one of their own proper costs and charges, from time to time, and at all times hereafter, during the said term hereby granted, when, where and as often as need and occasion shall be or require, well and substantially repair, uphold, support, maintain, tile, glaze, pave, paint, point, cleanse, empty, amend and keep in repair, the said messuage or tenement and premises hereby demised, and all the glass windows, window frames and window shutters, of and belonging thereto, and all the wainscots, rooms, floors, stairs, partitions, paper and ceilings, and all and every part of the inside of the said messuage or tenement and premises, and also all the walls (*k*), rails, pales, fences, pavements, privies, sinks, drains, wells and watercourses thereunto belonging, [casualties happening thereto by or by means of fire or tempest only excepted] (*l*). AND ALSO shall and will, once in the course of every three years of the said term hereby granted, paint, or cause to be painted, twice in oil in a good and workmanlike manner, all the wood and iron-work on the outside of the said messuage or tenement and premises; and all the wood-work and parts usually painted in the inside, once in every seven years of the said term hereby granted in the same manner. AND THE SAID messuage or tenement and premises, with the glass windows, window frames and window shutters, wainscots, rooms, floors, partitions and ceilings, and all the inside of the said messuage or tenement and premises, and also all the walls, rails, pales, fences, pavements, privies, sinks, drains, wells and watercourses thereunto belonging, being so well and substantially repaired, upheld, supported, maintained, tiled, glazed, paved, painted, pointed, cleansed, amended and kept as aforesaid, shall and will at the end, expiration or other sooner determination of the said term, which shall first happen, peaceably and quietly leave, surrender and yield up the same and every part thereof unto the said *A. B.*, his executors, administrators or assigns, together with all doors, locks, keys, bolts, bars, staples, hinges, hearthstones, marble and other chimney-pieces, slabs, shutters, fastenings, wainscots, partitions, pipes and gutters of lead, shelves, dressers and all other erections, buildings, improvements, fixtures and things then in, upon, about or affixed to the said messuage or tenement and premises, or any part thereof (except as aforesaid).

Covenant to paint outside and inside.

Covenant to yield up in repair.

Covenant to repair after Three Months' Notice.

AND MOREOVER, that it shall and may be lawful to and for the said *A. B.*, his executors, administrators and assigns, with or without surveyors and workmen in his or their company, twice or oftener in every year during the said term, at all seasonable times in the day, to enter and come into and upon the said messuage or tenement and premises hereby demised, or any part thereof, to view, search and see the state and condition of the same (*m*), and of all decays, defects and wants of reparation and amendment, which upon every such view or views shall be found, to give or leave notice or

(*k*) As to party walls within the operation of the Building Act, see a covenant, post, Sect. 8, (b), p. 930.

(*l*) If the lessee enters into the covenant to insure, and lay out the money received from the insurance office, the words within the brackets should be left out. And although the exceptions here introduced will exonerate the lessee from a liability to rebuild, he will be still liable to pay rent under his covenant, unless it be qualified to that effect by a proviso; *Monk* v. *Cooper*, 2 Stra. 763; and even though the premises be not rebuilt by the lessor after notice; *Belfour* v. *Weston*, 1 Term Rep. 310. See such a proviso, post, 943.

(*m*) Sometimes a clause requiring notice is here inserted; it may be in this form: "Notice of such intention to view being given unto the said *C. D.*, his executors, administrators or assigns, one day at least before the same shall take place." A covenant for a landlord to be allowed to come into a house to see the state of its repair at "convenient times," is not broken by his not being allowed to go into some of the rooms, if he has given no notice of his coming; *Doe d. Wetherell* v. *Bird*, 6 Car. & Pay. 195.

warning in writing, at or upon the said demised premises, or unto or for the said *C. D.*, his executors, administrators or assigns, to repair and amend the same within three calendar months then next following, within which said time or space of three calendar months next after every such notice or warning shall be so given or left as aforesaid, he the said *C. D.*, for himself, his executors, administrators and assigns, doth hereby covenant, promise and agree to and with the said *A. B.*, his executors, administrators and assigns, to repair and amend all such decays, defects and wants of reparation and amendment accordingly (except as aforesaid) (*n*). AND ALSO, that the said *C. D.*, his executors, administrators and assigns, shall and will, during the last year of the said term, empty and cleanse the privies, drains and cesspools of and belonging to the said premises. AND ALSO, that it shall and may be lawful for the said *A. B.*, his executors, administrators or assigns, or his or their agent, at all times during the last six calendar months of the term hereby granted, to place a notice in writing on the door, or on any window or other conspicuous place of the hereby demised premises, signifying that the same are to be let; and during the said six months to enter and come at seasonable times upon the said premises to show and treat for the same. AND FURTHER, that the said *C. D.*, his executors, administrators or assigns, or some or one of them, shall and will, immediately upon the execution of these presents, insure, or cause to be insured, in the names as well of the said *C. D.* as of the said *A. B.*, all the buildings hereby demised, from or against loss or damage by fire, in the (*o*) Imperial Fire Office in London, or in some other good or reputable office, to be approved of by the said *A. B.*, in a competent sum to cover the full value thereof (*p*); and within twenty-eight days then next shall and will show and produce upon request to the said *A. B.*, his executors, administrators or assigns, or his or their steward, receiver or agent, the policy of insurance which shall be so made, in order that the person or persons to whom the same shall be so shown and produced shall and may take an account of the particulars and conditions thereof: and also shall and will continually, during the said term, keep the said premises so insured in the same office, or in such other office or offices in London or Westminster, as shall from time to time be directed by the said *A. B.*, his executors, administrators and assigns, and produce and show the policies to be taken from time to time, in manner and for the purposes hereinbefore mentioned; and shall and will make due and regular payments of the premiums, duty and charges which shall become due and payable in respect of every such insurance; and shall and will show and produce upon request to the said *A. B.*, his executors, administrators, or assigns, or his or their steward, receiver or agent, the receipts for such payments of the said premiums, duty and charges (*q*); and in default thereof, it shall be lawful for the said *A. B.*, his executors, administrators or assigns, to make such payments, and to recover the same by distress on

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(*n*) When the lessee is to repair under the superintendence of the lessor, the following clause is here inserted: "Under the inspection of and in such manner as shall be approved by the said *A. B.*, his heirs or assigns, or such person as shall be appointed by him or them for that purpose, and in default thereof, then that it shall and may be lawful to and for the said *A. B.*, his heirs and assigns, or the persons appointed by him or them for that purpose, to repair and amend all such defaults and want of reparations, whereof such notice shall be so given or left as aforesaid, and to charge the said *C. D.*, his executors, administrators and assigns, with the costs and expenses of such repairs and amendments, as and by way of additional rent, with full and free power and liberty to enter and distrain upon the said demised premises, or any part thereof, for the recovery of such costs and expenses as in the way of rent in arrear, according to the usual custom of law."

(*o*) It is best to name some office, although if it be not named it seems that it would be intended to be in some office where insurances against fire are usually effected. *Doe* d. *Pitt* v. *Shewin*, 3 Camp. 134; it should also be stated to be against fire. Ibid.

(*p*) Or "In the sum of £——."

(*q*) If this clause is not inserted, the lessor may be put to great difficulty in proving a forfeiture for not insuring. See *Doe* d. *Bridger* v. *Whitehead*, 3 Nev. & Per. 557; 1 Will. Wol. & Hod. 521; 8 Ad. & El. 571; *Doe* d. *Ive* v. *Scott*, Arn. & Hod. 76.

Covenant to lay out Money received from the Insurance Office in reinstating the premises.

the premises so insured, in the same manner as for rent in arrear (*q*). AND it is hereby mutually agreed between the parties hereto, that all and every the sums and sum of money which shall be recovered from and paid by the proprietors or directors of any insurance office, by virtue of any policy or policies made of all or any part of the premises aforesaid, shall, with all convenient speed, be expended for or towards the rebuilding, repairing, reinstating, or making fit for habitation, the premises hereby demised, or such part thereof as shall be burned down or damaged by fire (*r*). And that if the sum or sums so paid be insufficient for the same, or if the said *C. D.*, his executors, administrators or assigns, shall not make and continue such insurance as aforesaid, then and in such case he or they shall and will, at his or their own proper costs and charges, rebuild, repair, reinstate and make fit for habitation, or cause to be substantially rebuilt, reinstated and made fit for habitation, the premises hereby demised, or such part thereof as shall be so burned down or damaged by fire as aforesaid (*s*). AND FURTHER, that the said *C. D.*, his executors, administrators and assigns, or any other person or persons, shall not nor will, during the continuance of this demise (*t*), use,

Covenant not to use offensive Trades, &c.

(*q*) If it is agreed that the landlord should insure, this and the next covenant must be altered accordingly, and inserted afterwards amongst the landlord's covenants. The latter clause of this covenant must be altered thus: "and to deduct the same from the next quarterly payment of rent." See also note (*u*), p. 899.

If the landlord is to insure, the next covenant should be that he will, in case of fire, without delay rebuild and reinstate the buildings and premises, or such parts as may be burnt down or injured.

(*r*) If the premises are within the bills of mortality, the clause that the money paid by the insurance office shall be expended in rebuilding, &c., may be omitted: as by the provisions of the old building act, 14 Geo. III. c. 78, s. 83 (which are not repealed by the new act 7 & 8 Vict. c. 84) the landlord may have the money laid out in rebuilding the premises without a covenant for that purpose; but it should be retained if the premises are not within the bills of mortality; for otherwise the covenant to insure is personal only, and will not run with the land. *Vernon* v. *Smith*, 5 Barn. & Ald. 1. See ante, 83, 473.

(*s*) If it is the intention of the parties that the rent shall not be suspended, a clause to the following effect should be added: "But it is hereby declared, that the said rent hereby reserved, or any part thereof, shall not be suspended during the period that the said demised premises or any part thereof shall be rendered uninhabitable or unfit for use by fire as aforesaid, and before the same shall be rebuilt or reinstated as hereinbefore provided."

Sometimes the covenant is much shorter, thus: "And further, that he, the said *C. D.*, his executors, administrators and assigns, or some or one of them, shall and will, at his or their or some or one of their own proper charges, from time to time, and at all times hereafter during the said term hereby granted, insure or cause to be insured the said messuage or tenement and premises from loss or damage by fire, in some or one of the public offices of insurance in the cities of London or Westminster; and shall and will from time to time during the said term, when thereunto requested, produce and show unto the said *A. B.*, his executors, administrators or assigns, the policy of such insurance, and also the receipt for the payment of the premium and duty thereon for the then current year: and that he, the said *C. D.*, his executors, administrators and assigns, shall and will immediately after any accident by fire to the said premises, lay out and expend the money to be received by virtue of such insurance in rebuilding or repairing the said premises, as the case may require."

Sometimes again the covenant is framed *with a view to correspond with the original lease.* "And further, that the said *C. D.*, his executors, administrators or assigns, shall and will [forthwith] insure from accident by fire all the buildings [*to be erected on the ground*] demised to the full value thereof in the —— Fire Office in ——, London [in the joint names of (*original landlord*) of, &c., the original landlord of the said premises, his heirs or assigns, and the said *C. D.*, his executors, administrators or assigns], and keep the same continually so insured during the said term: and will, upon the request of the said *A. B.*, his executors, administrators or assigns, or his or their steward or agent, produce and show the receipt for the premium paid for such insurance for the then current year; and also will, during the said term, as often as the buildings [*to be erected on the ground*] hereby demised, or any part thereof, shall be burnt down or damaged by fire, forthwith reinstate the same under the direction [of the surveyor] of the said *A. B.*, his executors, administrators or assigns, and shall and will pay the said hereby reserved rent in the same manner as if no such accident by fire had happened."

(*t*) Where the premises are to be used only as a private dwelling-house, say, "convert, use or occupy the said premises, or any part thereof, into or for any shop, warehouse or other place for carrying on the trade, &c.;" and after the word scavenger, say,

exercise or follow, in or upon the said premises, or any part thereof, th trade or business of a brazier, slaughterman, soap-maker, tobacco-pipe make sugar-baker, fellmonger, melter of tallow, tallow-chandler, oilman, butche baker, distiller, victualler or tavern keeper, cork burner, blacksmith, farrie nightman, scavenger or any or either of them, or any other noisy, noisome, o offensive trade or business whatsoever (*u*); AND SHALL NOT nor will, a any time during the said term, assign over this present lease or grant, assign demise, underlet (*x*), or part with the possession of the said messuage o tenement and premises, to any person or persons whomsoever, without the special license and consent of the said *A. B.*, his executors, administrators or assigns, first had and obtained in writing: PROVIDED ALWAYS, and these presents are upon this express condition, that if the said yearly rent of 100*l.* hereinbefore reserved, or any part thereof, shall be in arrear or unpaid by the space of twenty-one days next over or after any or either of the said days whereon the same ought to be paid as aforesaid (being lawfully demanded upon or at any time after the said twenty-one days, and not paid when demanded (*y*)), or in case of breach or nonperformance of any or either of the other covenants, clauses, conditions, agreements or provisions *herein* (*z*) contained, and by and on the part and behalf of the said *C. D.*,

"or for any other art, trade or business than as a private dwelling-house, without the consent in writing of the said *A. B.*, his executors, administrators or assigns."

(*u*) It is generally best to enumerate as many as possible, particularly those to which it is intended the clause to apply. See the case of *Jones* v. *Thorne*, 3 Dowl. & Ryl. 150. Where premises are insured by the lessor, here add a clause not to bring into the premises combustible materials, &c., by the lessee, so as to invalidate the insurance, in this form: "Nor shall nor will bring or permit to be brought to, or lodged in or upon the said demised premises, or any part thereof, hemp, flax, tallow, oil, pitch, tar, turpentine, gunpowder or any other goods of a sort or quality which may in any way affect or invalidate any insurance or insurances from fire, made by the said *A. B.*, his executors, &c., in, of or upon the said dwelling-house, or in, of or upon any goods and merchandizes in the part thereof by him occupied." Or it may be in this form: "Nor shall nor will do, or permit or suffer to be done, any act without the consent in writing of the said *A. B.*, his executors, &c., which may increase the rate of insurance against fire upon the said premises above common (*or* hazardous) insurance, or that may vacate the policy of insurance hereby covenanted to be effected thereon."

The covenant is sometimes much more strictly framed in the following manner:—"And also that the said *C. D.*, his executors, administrators or assigns, shall not nor will, at any time during the continuance of the said term hereby granted, use or carry on, or suffer or permit to be used or carried on, in the said demised messuage or tenement and premises, or assign or set over the present indenture of lease, or set over, let or assign any part of the said messuage or tenement and premises, to any person or persons using or carrying on the trade, business or calling of a maker of sedan or other chairs, baker, brewer, butcher, currier, distiller, dyer, founder, smith, soap-boiler, schoolmaster or schoolmistress, sugar-baker, auctioneer, pewterer, tallow-chandler or tallow-melter, working brazier, tinman, tripe-boiler, pipe-maker, pipe-borer, plumber or any other noxious or offensive trade, business or calling whatsoever which is noisy, offensive, or occasions offensive smells, without the consent in writing of the said *A. B.*, his executors, administrators and assigns, first had and obtained for that purpose; nor shall nor will, without such consent as aforesaid, make or cause to be made any addition or alteration whatsoever in, upon or about the said messuage or tenement and premises, or any part thereof."

(*x*) The words "underlet and assign over" should always be inserted, if it is intended that the lessee shall not underlet or assign, as a covenant not to assign only does not extend to an under-lease."

(*y*) The proviso may be that the demand must be made as in the text; but except cases which come under the statute 4 Geo. II. c. 28, s. 2 (which only applies where a half-year's rent is due, and there is no sufficient distress), the lessor will then not be entitled to enter under this proviso on nonpayment of rent, without the formal demand before adverted to, which must be made with precision. Very frequently the words "although no formal demand shall be made for payment" of the rent, are inserted instead, which seem to render the making of any demand unnecessary. *Doe* d. *Harris* v. *Masters*, 2 Barn. & Cres. 490. See ante, Book I., Chap. VII., Sect. 5 (e), p. 275. As to the words "lawfully demanded," see 3 Bligh, 338; and *Doe* d. *Scholefield* v. *Alexander*, 2 Maule & Selw. 525; ante, 276, 277.

(*z*) This word is most proper, and care should be taken not to use the words *hereinafter* or *hereinbefore*, as this proviso will be construed strictly against the lessor. See *Doe* d. *Spencer* v. *Godwin*, 4 Maule & Selw. 265.

his executors, administrators and assigns, to be kept, done and performed (*a*), then and in either of the said cases, from thenceforth, and at all times thereafter, it shall and may be lawful to and for the said *A. B.*, his executors, administrators and assigns, into and upon the said hereby demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, retain, repossess and enjoy, as in his or their first and former estate, as if these presents had not been made, and the said *C. D.*, his executors, administrators and assigns, and all other occupiers of the same premises, thereout and thence utterly to expel, put out and amove, this indenture or any thing herein contained to the contrary notwithstanding: PROVIDED ALSO, and it is further declared by and between the said parties, that in case the said messuage or tenement and premises, or any part thereof, shall be destroyed by fire or tempest during the said term hereby granted, then and in such case, and so often as the same shall happen, the rent hereinbefore reserved, or a fair and just proportion thereof, according to the nature of the injury sustained, shall cease and be suspended during so long as the said premises, or any part thereof, shall remain uninhabitable, or unfit for use, by reason of such destruction; and if any dispute shall arise between the said parties, in regard to the amount of the abatement to be so made in the said rent, or the period for which the said rent, or any part thereof, shall be suspended, the same shall be referred to the arbitrament of two indifferent persons, one to be named by each of the said parties, with power to choose an umpire; and if either of the said parties shall neglect to name an arbitrator on his part after fourteen days' notice in writing from the other of the said parties requiring him to do so, then the said dispute shall stand referred to the person who shall have been named by the party giving such notice; and in either of the said cases, the determination of the said arbitrators or arbitrator shall be final and conclusive on both the said parties, in regard to the matters aforesaid, and their respective executors and administrators, and the award of the said arbitrators or arbitrator shall or may be made a rule of her Majesty's Court of Queen's Bench at Westminster (*b*): AND

Prov[illegible] suspen[illegible] of Rent in case of Fire.

Covenant by Lessor for Quiet Enjoyment.

(*a*) Where the lease is to cease on bankruptcy, &c., add, "or if the said *C. D.*, his executors, administrators or assigns, or any of them, shall become bankrupt or bankrupts, or take the benefit of any act made or to be made for the relief of insolvent debtors, or compound with his or their creditors for the payment of his or their debts, or make any assignment of his or their personal estate, or any part thereof, for the benefit of his or their creditors, or if any writ of execution shall be levied upon their goods or chattels for any debt or sum of money." This provision for a forfeiture on bankruptcy is good. *Roe* d. *Hunter* v. *Gallieas*, 2 Term Rep. 133. And see *Doe* d. *Godbehere* v. *Bevan*, 3 Maule & Selw. 353. See ante, 226.

If it is intended that the lease is to be forfeited on the commission of waste, the following clause must be added: "Or if the said *C. D.*, his executors, administrators or assigns, shall commit, or permit or suffer any spoil, destruction, decay or waste, in or about the said demised premises, or any part thereof, to the value or amount of 100*l.* of such lawful money as aforesaid, in any one year, and shall not effectually amend, repair or make satisfaction for the same within two calendar months next after notice in writing given to him or them for that purpose, under the hand of the said *A. B.*, his executors, administrators or assigns."

Again, if the proviso be intended to extend to an assignment of the lease, where there is no covenant against such assignment without license, add the following clause: "Or if the said *C. D.*, his executors or administrators, shall assign over, let or underlet, or in any manner part with the possession of the said premises hereby demised, or any part thereof, to any person or persons whomsoever, for the whole or any part of the term for which they are mentioned or intended to be hereby demised, without the license or consent of the said *A. B.*, his executors, administrators or assigns in writing, under his or their hand or hands, obtained for that purpose." It must be observed, that in general it is advisable not to insert the above provision, and it is now the general practice to add covenants to pay taxes and not to assign, with a proviso for re-entry on breach of all the covenants instead, as is set forth in the text, which seems best. As to a covenant to "give up possession" on a certain event, without reserving to the lessor a right of re-entry, see *Doe* d. *Wilson* v. *Phillips*, 9 Moore, 46; 2 Bing. 13; *Doe* d. *Gardner* v. *Kennard*, 12 Queen's B. Rep. 244.

(*b*) This proviso should be omitted, if the parties do not intend that the rent shall be suspended in case of fire; but it is advisable to insert a proviso of this sort where the landlord is to insure and rebuild.

assigns, from the 25th day of December now next ensuing, for and during and unto the full end and term of twenty-one years thence next ensuing, and fully to be complete and ended, determinable nevertheless as hereinafter mentioned, YIELDING AND PAYING therefore yearly and every year, during the said term of twenty-one years hereby granted, to the said *A. B.*, his heirs or assigns, the yearly rent or sum of 100*l.* of lawful money of Great Britain, on the four following usual days of payment, that is to say, the twenty-fifth day of March, the twenty-fourth day of June, the twenty-ninth day of September, and the twenty-fifth day of December in each and every year, by equal portions, the first payment thereof to be made on the twenty-fifth day of March now next. AND THE SAID *C. D.*, for himself, his executors, administrators and assigns, doth hereby covenant, promise and agree with the said *A. B.*, his heirs and assigns, in manner following, that is to say [*covenants by lessee to pay rent, ante, p.* 895; *make repairs, ante, p.* 896; *not to carry on offensive trades, ante, p.* 898.] AND THE SAID *A. B.*, for himself, his heirs, executors, administrators and assigns, doth, &c. [*covenant by lessor for quiet enjoyment, as ante, p.* 900; *then going on as follows:*] freed and discharged, and acquitted of and from the payment of land tax and all other taxes, rates, assessments and payments for water, or otherwise whatsoever, and of what nature or kind soever, now payable, or hereafter to become payable, in respect of the said premises hereby demised, or any part thereof, by authority of parliament, or otherwise howsoever: AND which said taxes, rates, assessments and payments the said *A. B.* doth hereby for himself, his heirs, executors, administrators and assigns, covenant, promise and agree with and to the said *C. D.*, his executors, administrators and assigns, to pay and satisfy: AND ALSO to indemnify the said *C. D.*, his executors, administrators and assigns, of and from the payment of all and every or any sum or sums of money in respect thereof, and also of and from all costs, charges, expenses, claims and demands, which he the said *C. D.*, his executors, administrators or assigns, shall bear, pay or sustain, for or by reason or on account of his or their being liable, or being considered as liable to serve parish offices. [*Conclude with a proviso for re-entry on non-payment of rent, or non-performance of covenants, as ante, p.* 899.] IN WITNESS, &c.

Reddendum by Quarterly Payments.

Covenants by Lessee.

Covenant by Lessor for Quiet Enjoyment.

Covenant by Lessor to pay all Taxes, &c. and also to indemnify Lessee from all Costs, &c. by reason of his being liable to serve Parish Offices.

SECT. 3.—*Lease of a Furnished House.*

Precedent of a Lease of a Furnished House.

THIS INDENTURE, &c.; all that, &c.; and also all the fixtures and articles of furniture in and belonging to the said messuage or tenement mentioned and comprised in the schedule or inventory hereunder written, TO HAVE AND TO HOLD, &c. [*Reddendum reserving a distinct rent for the fixtures, see post,* Chap. III., Sect. 2, AGREEMENT FOR LETTING A HOUSE AND FURNITURE FROM YEAR TO YEAR, *insert the usual covenants, and after the covenant to leave premises, as ante, p.* 895, *say*], together with all and singular the fixtures and articles of furniture hereinbefore mentioned and described in the inventory or schedule hereunder written, in as good plight and condition as the same now are (reasonable use and wear thereof only excepted). IN WITNESS, &c.

THE INVENTORY TO WHICH THE ABOVE-WRITTEN INDENTURE REFERS.

[*Here set out the articles: the inventory need not be signed by the parties* (*e*).]

(*e*) By statute 55 Geo. III. c. 184, schedule, part 1, if the inventory be separate and distinct from the lease, and not indorsed on or annexed to it, it will be subject to a stamp duty of 1*l.* 5*s.*, and a progressive duty afterwards.

SECT. 4.—*Lease for Years determinable on Lives.*

THIS INDENTURE, made, &c., between, &c. [*see ante, p.* 894.] Where the said *A. B.* hath agreed to demise the messuage or tenement and premises hereinafter described, to the said *C. D.*, for the term of 99 years, from the delivery of these presents, determinable on the lives of the three persons hereinafter named, and the life of the survivor of them: And whereas the said *C. D.* hath named the lives of *E. F.* of , in the county , Esquire, *G. H.* of the same place, Esquire, and *I. K.* of the same place, Gentleman: NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and in consideration of the yearly rent, covenants and conditions hereinafter contained on the part and behalf of the said *C. D.*, his executors, administrators and assigns, to be by him and them respectively paid, kept, observed and performed, he the said *A. B.* hath demised, leased and to farm let, and by these presents doth demise, lease and to farm let unto the said *C. D.*, his executors, administrators and assigns, ALL that messuage, &c. [*here describe premises according to the fact as ante.*] TO HAVE AND TO HOLD the said messuage, &c., with the appurtenances, unto the said *C. D.*, his executors, administrators and assigns for and during and unto the full end and term of ninety-nine years, if the said *E. F.*, &c., or the survivor of them, shall so long live, YIELDING AND PAYING, &c. [*and after the reddendum insert the covenants it is intended to have.*] IN WITNESS, &c.

SECT. 5.—*Lease by Husband and Wife.*

THIS INDENTURE, &c., between *A. B.*, of &c., and *E.* his wife (*f*) of the one part, and *C. D.*, of &c., of the other part: Whereas the said *E.*, the wife of the said *A. B.*, is seised of or entitled to an estate of inheritance in fee simple of and in the farm, lands, tenements, hereditaments and premises, hereinafter described and intended to be hereby demised: And the said *A. B.* is seised of the same premises during the coverture in her right: And whereas the said *A. B.* hath agreed to demise the said farm, lands, tenements, hereditaments and premises to the said *C. D.*, for the term of fourteen years, at the rent, and under and subject to the covenants and agreements hereinafter reserved and contained: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and also in consideration of the rent and covenants hereinafter reserved and contained on the part of the said *C. D.*, his executors, administrators and assigns, to be paid, observed and performed, he the said *A. B.* and *E.* his wife have and each of them hath bargained, sold, demised, leased and to farm let, and by these presents do and each of them doth bargain, sell, &c., unto the said *C. D.*, his executors, administrators and assigns, ALL that messuage, [*describe premises*], and all out-houses [*describe parcels.*] TO HAVE AND TO HOLD the said premises, with their appurtenances, unto the said *C. D.*, his executors, administrators and assigns, from the 25th day of March now last past, for and during and unto the full end and term of fourteen years thence next ensuing and fully to be complete and ended, YIELDING AND PAYING therefore yearly and every year during the said term, unto the said *A. B.* and *E.* his wife, and her heirs and assigns, the clear yearly rent or sum of 100*l.* on the four most usual days of payment of rent in the year, that is to say, &c., the first of such payments to begin and to be made on the 24th day of June now next ensuing [*here insert the covenants it is intended to*

(*f*) It seems that a lease by a husband seised jure uxoris is voidable only, and not void. See 3 Bac. Abr. 305; but see *Parry* v. *Hindle*, 2 Taunt. 181.

have, but they should be made with A. B. and E. his wife, and her heirs and assigns, instead of A. B., his heirs and assigns.] IN WITNESS, &c.

Signed *A. B.*
E. B.
C. D.

Signed, sealed and delivered by the said *A. B.* and sealed by the said *E.* his wife, in the presence of, &c.

SECT. 6.—*Building and Repairing Lease.*

(a) *A Lease for 99 Years.*

Date, Parties and Demise.

THIS INDENTURE, made, &c., between *A. B.*, &c., of the one part, and *C. D.*, &c., of the other part (*g*), WITNESSETH, that the said *A. B.*, for and in consideration of the yearly rents, covenants and agreements, hereinafter reserved and contained, by and on the part and behalf of the said *C. D.*, his executors, administrators and assigns, to be paid, done and performed, hath demised, leased, set and to farm let, and by these presents doth demise, lease, set and to farm let unto the said *C. D.*, his executors, administrators and assigns, ALL that piece or parcel of ground, situate, lying and being on, &c., in the parish of St. Pancras, containing in breadth on the north side thereof thirty feet, and in depth on the east side thereof fifty feet, be the same more or less, and on the west side thereof thirty feet east and from thence south and from thence east, be the same more or less, together with the messuages or tenements, and other the erections and buildings thereon, which the said *C. D.* shall have full liberty to pull down, and to take to and for his own use; which said piece or parcel of ground abuts north on East Street aforesaid, south on gardens to some houses on the north side of belonging to the said *A. B.* now on lease to *G. H.*, east on buildings, &c., and west, &c., and is more fully delineated and described in the plan or ground plot thereof in the margin of these presents, together with all erections and buildings which at any time hereafter, during the term hereby granted, shall be erected and built on the same piece or parcel of ground hereby demised, or any part thereof, and all cellars, vaults, areas, ways, paths, passages, drains, waters, watercourses, easements, profits, commodities and appurtenances whatsoever, to the said hereby demised premises belonging or in anywise appertaining. TO HAVE AND TO HOLD the said piece or parcel of ground, messuages or tenements, erections, buildings and premises hereby demised or intended so to be, with their and every of their appurtenances, unto the said *C. D.*, his executors, administrators and assigns, from the 25th day of December now last past, for and during and unto the full end and term of ninety-nine years, from thence next ensuing and fully to be complete and ended, YIELDING AND PAYING therefore for the first year of the said term hereby demised, the rent of one peppercorn on the last day thereof, if the same shall be demanded, and YIELDING AND PAYING therefore yearly and every year, during all the residue of the said term hereby demised, unto the said *A. B.*, his heirs and assigns, the yearly rent or sum of 10*l.* of lawful money of Great Britain and Ireland, by equal quarterly payments, on the 25th day of March, 24th day of June, 29th day of September, and the 25th day of December, in every year, free and clear of and from all taxes, rates (*h*) [rent-charges in lieu of tithes] (*i*), charges, impositions and assessments whatsoever imposed or to be imposed upon or in respect of the said hereby demised premises or

Parcels.

Habendum.

Reddendum of nominal Rent for First Year, and of 10*l.* for residue of Term.

(*g*) When a lease of this kind is granted by a tenant for life under a settlement by virtue of a power, it should be noticed in the lease; for a precedent of which kind see Jarman's Precedents in Conveyancing, by Geo. Sweet, vol. iv. p. 590, 3rd ed.

(*h*) See note (*h*), ante, 895.

(*i*) See note (*e*), ante, 895.

Covenant to paint in every Three Years.

Covenant that Lessor may enter during the last Seven Years, to take an Inventory of Fixtures.

To contribute in common with the other Tenants towards repairing Pavements, &c. Proportion to be fixed by Lessor's Surveyor.

Power to view.

Covenant by Lessee not to carry on offensive Trades.

Covenant by the Lessor for Quiet Enjoyment.

ALSO that the said *C. D.*, his executors, administrators and assigns, shall and will [*covenant to paint every three years, as ante, p.* 896.] AND ALSO that it shall be lawful for the said *A. B.*, his heirs and assigns, or his and their agent, or any person or persons deputed by him or them, to enter into and upon the premises hereby demised, at any seasonable hours in the day-time, within the last seven years of the aforesaid term of ninety-nine years, to take a schedule or inventory of all and every the fixtures and things to be yielded up at the expiration thereof as aforesaid: AND ALSO that the said *C. D.*, his executors, administrators and assigns, shall and will, during the term hereby granted, as often as need shall require, bear, pay and allow a reasonable share and proportion for and towards the costs and charges of making, supporting, repairing and amending all or any pavements, channels, fences, and party-walls, draughts, sewers and drains belonging, or which at any time during the said term shall belong, to the said demised premises, or any part thereof, in common with other premises near or adjoining thereto: And that such proportion shall be fixed and ascertained by the surveyor of the said *A. B.*, or his heirs or assigns, and shall be recoverable in the nature of rent in arrear. AND FURTHER, that it shall and may be lawful [*add power for lessor to enter to view state of repairs after notice given of his intention so to do; to leave notice to repair, and covenant by lessee to repair accordingly, as ante, p.* 896.] AND FURTHER, that the said *C. D.*, his executors, [*covenant not to carry on offensive trades, as ante, p.* 898,] nor do or cause, or wittingly or willingly suffer to be done, any act or thing on the said demised premises, which may be or grow to the annoyance, damage, or disturbance of the said *A. B.*, his heirs or assigns, or his or their tenant or tenants; [*add covenant to insure, as ante, p.* 897: *proviso for re-entry if rent shall be unpaid for twenty-one days, being first demanded, or on breach of any of the covenants, as ante, p.* 899. *Covenant for quiet enjoyment by lessor, as ante, p.* 900.] (*m*). IN WITNESS, &c.

(*m*) When several houses are intended to be built on the demised ground, and the lessee may wish to assign or underlet them separately, a covenant by the lessor to join in under-leases in order to apportion the rent is sometimes inserted. It is to the following effect: "And the said *A. B.* doth hereby, for himself, his heirs, executors, administrators and assigns, covenant with the said *C. D.*, his executors, administrators or assigns, that in case the said *C. D.*, his executors, administrators or assigns, shall at any time or times during the said term hereby granted, underlet or assign any messuage or tenement, messuages or tenements, or other erections and buildings, which he or they shall erect or build upon the said piece or parcel of ground hereby demised, or any part or parts thereof, then and in such case he the said *A. B.*, his heirs or assigns, shall and will, at any time or times after the said messuage or tenement, messuages or tenements, erections or buildings, which shall be so underlet or assigned, shall be completely finished and fit for habitation, at the request, costs and charges of the said *C. D.*, his executors, administrators or assigns, join and concur in any such under-lease or assignment, under-leases or assignments so to be made as aforesaid, for the purpose of ascertaining the proportions of the said yearly rent hereby reserved, which each such under-tenant or assignee, and the premises so underlet or assigned to him, shall be thenceforth subject or liable to pay (such proportions of the rent to be ascertained by the architect or surveyor for the time being of the said *A. B.*, his heirs or assigns), and for the purpose of exonerating the same, and each such under-tenant or assignee of the premises so to be underlet or assigned to him, of and from the remaining part of the said yearly rent of hereby reserved and made payable, but so and in such manner that the said *A. B.*, his heirs or assigns, shall not thereby release, prejudice or affect the same remaining part of the same rent, in respect of the remaining parts of the said hereby demised premises: AND ALSO for the purpose of covenanting and declaring that such under-tenant and assignee, and the premises so to be underlet or assigned to him, shall be thenceforth subject to the covenants, provisoes and agreements hereinbefore contained, so far only as such covenants, provisoes and agreements are or shall be respectively applicable to or shall concern the premises which shall be so underlet or assigned as aforesaid: PROVIDED ALWAYS, that each such under-lease and assignment shall contain and reserve unto the said *A. B.*, his heirs or assigns, a similar proviso for re-entry as is hereinbefore contained, to which such under-lessee or assignee, or the premises so to be underlet or assigned, is or are to be or continue liable as aforesaid." This proviso is necessary, as the original one is extinguished by the apportionment of the rents: see *Knight's*

(b) *Another Form.*

THIS INDENTURE, &c. Whereas it hath been agreed by and betwe the said parties to these presents, that the said *C. D.*, his executors, admin trators or assigns, shall, at his and their own costs and charges, pull do the messuages, houses and buildings hereinafter mentioned, and lay out t sum of in the erecting, building and finishing four other new, go and substantial messuages or houses, in the place and stead of such hous and buildings so to be pulled down as aforesaid: NOW THIS INDENTUR WITNESSETH, that in consideration of the said agreement, and also consideration of the sum of *5s.* of lawful money of Great Britain in har paid to the said *A. B.* by the said *C. D.* at or before the sealing and delive of these presents, the receipt whereof is hereby acknowledged, he, the sai *A. B.*, hath bargained, sold, demised, leased and to farm let, and by thes presents doth, &c., unto the said *C. D.*, his executors, administrators an assigns, ALL that, &c. [*describing the premises*] and all houses, &c. [*genere words, as ante, p.* 895:] TO HAVE AND TO HOLD the said house and premises, with their appurtenances, for and during the term or space o twenty years, at a peppercorn rent (*n*), in order and to the intent that h the said *C. D.*, his executors, administrators or assigns, or some or one o them, may and shall, within the said space of time, at his and their ow proper costs and charges, pull down and demolish all and every the sai messuages, tenements and buildings now standing or being on the said piece or parcel of ground hereby demised, and may and shall, in the room and place thereof, at his and their like costs and charges, erect, build and finish four new, good and substantial houses or messuages, in conformity with the houses in the same street or row, together with stables, cellars, outhouses and other conveniences, usual in such houses or buildings, in a good, strong and workmanlike manner: AND HE THE SAID *C. D.* doth hereby, for himself, his executors, administrators and assigns, covenant, promise and agree, to and with the said *A. B.*, his heirs and assigns, in manner following (that is to say), that he the said *C. D.*, his executors, administrators and assigns, or some or one of them, shall and will, at his and their own proper costs and charges, pull down, or cause to be pulled down, all the said messuages, houses and buildings hereinbefore described, situate, standing or being upon the said piece or parcel of land hereby demised, during the said term, and shall and will, within the same term, at his and their like costs and charges, erect, build and finish, or cause to be erected, built and finished, four new, good and substantial messuages or buildings, with stables, cellars, outhouses and other conveniences usually attached to such buildings, with good and substantial materials, in a good and workmanlike manner, in the place and room of the said messuages or buildings, so to be pulled down as aforesaid, and in conformity with the other houses in the same row or street, and shall and will completely finish and render habitable the said messuages or buildings so to be erected: AND ALSO shall and will, at his and their own proper costs and charges, make, or cause to be made, a good and sound drain, inches at least in diameter, to the satisfaction of the commissioners of sewers of the district in which the said houses or buildings shall be situate, in front of the same messuages or buildings, as and for a common sewer thereto: AND ALSO shall and will set up iron rails, or palisadoes, before the front of each of the said messuages or buildings, at a convenient distance from the same, so as to range in a straight line with the iron rails already set up in front of the houses heretofore erected in the

case, 5 Rep. 54; *Winter's case*, Dy. 308, 309. But in general, it seems to be the most convenient way, where the ground is intended to be leased for building houses, for the owner, instead of granting a lease with such a covenant as the present, to enter into a contract with the intended lessee to grant separate leases of the houses as they are finished, at certain rents.

(*n*) As to tithe commutation rent-charges, see note (*e*), ante, 895.

To pave a Footway.

To expend a certain sum of Money in building New Houses and produce Vouchers to Lessor.

Covenant by Lessee to build Party-Walls, and to permit Lessor or his Tenant to use the same.

Covenant by Lessee to Repair and leave in Repair.

said row or street: AND ALSO shall and will make a convenient footway or passage, corresponding with the footway or passage in front of the said other houses in the said street: AND ALSO that he, the said *C. D.*, his executors, administrators and assigns, shall and will lay out and expend, in and about the said messuages, erections and buildings, so to be erected and completed as aforesaid, the full sum of of such lawful money as aforesaid, at the least, and produce to the said lessor, his heirs or assigns, or his or their surveyor, proper vouchers and evidences of the workmanship thereof for the same, so that it may satisfactorily appear that the said sum has been so expended, and the said messuages and buildings completed in the manner hereinbefore expressed: AND FURTHER, that he the said *C. D.*, his executors, administrators and assigns, shall and will, at his and their like costs and charges as aforesaid, build, if necessary, the party-walls on all sides of the said new messuages, erections or buildings, so to be erected as aforesaid; and after the same are so erected and built, that he, the said *C. D.*, his executors, administrators and assigns, shall and will permit and suffer any or all of the tenants of him the said *A. B.*, his heirs and assigns, to make use of such party-walls without rendering or paying any compensation for the same; AND THE SAID *C. D.* doth, in the manner aforesaid, covenant, promise and agree that the said *C. D.* his executors, administrators and assigns, shall and will, from and immediately after the completion of the said messuages or buildings so to be erected as aforesaid, and from time to time and at all times during the said term hereby granted, at his and their own costs and charges, keep and support the same, and every part thereof, in good and sufficient repair, and the same premises, and every part thereof, with the appurtenances, so being well and sufficiently repaired, sustained and maintained, at the end or sooner determination of the said term, shall and will peaceably and quietly deliver up to the said *A. B.*, his heirs and assigns, [*add the other usual covenants.*] AND it is hereby further agreed and declared, by and between the said parties hereto, and the said *C. D.* doth hereby for himself, his executors, administrators and assigns, covenant, promise and agree, to and with the said *A. B.*, his heirs and assigns, that he the said *C. D.*, his executors, administrators and assigns, shall and will, if required by the said *A. B.*, his heirs or assigns, by any note in writing, signed by him or them, surrender and yield up these presents, and the lease or term hereby granted, and all his and their interest in the said buildings so to be erected as aforesaid, and in lieu thereof accept of several leases for each of the said messuages, houses or buildings, so to be erected as aforesaid, for the term of twenty years in each such lease, at the yearly rent of respectively, and under and subject to the usual covenants, agreements and conditions, inserted in leases of a like nature; AND HE THE SAID *A. B.* doth hereby, for himself, his heirs and assigns, covenant, promise and agree to and with the said *C. D.*, his executors, administrators and assigns, that he the said *A. B.*, his heirs and assigns, shall and will, on a like demand in writing signed by the said *C. D.*, his executors, administrators or assigns, during and previous to the expiration of the said term hereby granted, and upon such surrender being made as aforesaid, grant, execute and deliver such leases as aforesaid to the said *C. D.*, his executors, administrators or assigns, which said leases shall be made and prepared by the attorney or agent of the said *A. B.*, his heirs or assigns, at the sole cost and charges of the said *C. D.*, his executors, administrators or assigns. IN WITNESS, &c.

Covenant by the Lessee to deliver up this Lease and to accept separate Leases in lieu, on Notice in Writing from the Lessor.

The like Covenant by the Lessor.

SECT. 7.—*Farming Lease.*

Date, Parties and Demise.

THIS INDENTURE (*o*), made the first day of July, in the year of our Lord 1855, between *A. B.*, of &c., of the one part, and *C. D.*, of &c., of the

(*o*) It is necessary to premise, that this precedent of a farming lease is not intended to show a consistent course of husbandry, or even to be consistent with itself as a lease

other part, WITNESSETH, that for and in consideration of the yea rents, covenants, provisoes and agreements hereinafter reserved and co tained, by and on the part and behalf of the said *C. D.*, his executors, adm nistrators and assigns, to be paid, done and performed, he the said *A. B* hath demised, leased, and to farm let, and by these presents doth demis lease, and to farm let, unto the said *C. D.*, his executors, administrato and *assigns* (*p*), ALL that capital messuage (*q*), tenement or farmhous called Groves, with the barns, stables, lodges, court-yards, granaries an other outbuildings thereto belonging, or therewith used and occupied: An also all those two newly-erected cottages, and newly-erected cart-house and stable with their appurtenances, situate at the parish of Stoke in th county of Kent, all of which said buildings are more particularly describe in the plan thereof, drawn in the margin of these presents, and now in th possession of the said *C. D.*, [*or* "late in the possession of one *E. F.*"] with their appurtenances, situate, standing or being in the said parish of Stoke in the said county of Kent: together with all and singular the yards, gardens, orchards, backsides, barns, stables, outhouses, edifices and buildings thereunto belonging: And also all ways, lights, easements, waters, watercourses, commons, common of pasture, common of turbary, profits, commodities, hereditaments and appurtenances whatsoever, to the said messuage, tenement or farmhouse belonging, or in anywise appertaining: And also all those several closes, pieces or parcels of arable, meadow, pasture, marsh and woodland, containing by estimation 1000 acres (be the same more or less), lying and being in the said parish of Stoke, to the said messuage, tenement or farmhouse belonging, known by the name of Groves, now in the occupation of the said *C. D.*, [*or* "late in the occupation of *E. F.*"] and therewith held, used, occupied, possessed and enjoyed as part and parcel thereof: All which said several pieces or parcels of land are mentioned and described in the schedule hereunto annexed or underwritten, as also their respective admeasurements and nature, and as also therein severally numbered; saving, excepting and always reserving out of this demise, unto the said *A. B.*, his heirs and assigns (*r*), all timber and timber-like trees, and all other trees and saplings whatsoever, and all the wood and underwood, thorns, bushes and quicksets, now standing, being and growing, or which shall stand, be or grow hereafter upon the said demised premises, but not the fruit trees (*s*), for their fruit only, nor the lops and tops of pollards and stubs, nor the surplus thorns not required for fencing, which may be taken and used by the said *C. D.*, his executors, administrators or assigns, upon the said demised premises, WITH free liberty of ingress, egress and regress to and for the said *A. B.* (*t*), [his heirs and assigns, and his and their agents, servants and workmen, at seasonable times, during the said term hereby granted, into and upon and from the said demised premises for all reasonable purposes, and in particular to view the state and condition of the repairs thereof, and to repair and to lay materials there for the purpose of repairing the buildings thereon: AND ALSO with like liberty of ingress, egress and regress to and for the said *A. B.*,] his heirs and assigns, and his and their

Li gr Le the &c.

An exc &c.

of husbandry. It contains, under something like a classification of subjects, all the usual covenants inserted; and parties framing a husbandry lease will take such only as are intended to form part of the contract of tenancy.

(*p*) See ante, 496, note (*h*).

(*q*) It is best to describe the parcels as particularly as you can, viz. the messuages, lands, closes, &c., by their proper names (if any), or by their several abuttals and boundaries, &c.

(*r*) It is sometimes as well to except all copyhold land, to avoid a forfeiture, where the quantity is small, and it is therefore not worth obtaining the lord's license. See ante, 37.

(*s*) Fruit trees should be named, if intended to come within this exception. *Wyndham* v. *Way*, 4 Taunt. 316. This is proper, if not intended to be included. *Bullen* v. *Denning*, 5 Barn. & Cres. 842; 8 Dowl. & Ryl. 657.

(*t*) When the landlord is to keep the buildings in repair, the part within brackets should be kept in, and a covenant by him to that effect added.

agents, servants and workmen, at seasonable times during the said term hereby granted, with or without horses, carts and carriages, into, upon and from the said premises, or any part thereof, to view, fell, cut down, root up, hew, saw, convert and carry away the said excepted timber trees, underwood, thorns, bushes and quicksets, and to plant and transplant trees, and sow the seeds of trees in the hedge-rows, borders and waste places hereby demised, and to fence and preserve the same from injury, thereby doing no wilful hurt or damage to the grass or grain of the said *C. D.*, his executors, administrators and assigns (*u*): AND ALSO excepting and reserving all game, fish and wild fowl, with full and free liberty for the said *A. B.*, his heirs and assigns, and his and their gamekeepers, servants, friends and acquaintances, and all and every other person or persons, by their order and consent, at all seasonable times during the said time hereby granted, to hunt, fish, course, shoot and sport in, upon or over the said hereby demised premises, or any part thereof, or otherwise to destroy the game, fish and wild fowl thereon (*v*): TO HAVE AND TO HOLD the said messuage, tenement or farmhouse, closes, pieces or parcels of arable land, meadow, marsh and pasture land, and premises, with their and every of their appurtenances hereby demised, or so mentioned, and intended so to be (except as before excepted and reserved), unto the said *C. D.*, his executors, administrators and *assigns*, from the twenty-fourth day of June last past, for and during and unto the full end and term of twenty-one years thence next ensuing, and fully to be complete and ended, YIELDING AND PAYING therefore yearly and every year during the said term, unto the said *A. B.*, his heirs or assigns, at or in his now dwelling-house, situate, &c., the clear yearly rent or sum of 1000*l.* of lawful money of Great Britain, by equal quarterly payments on the respective days following; namely, on the twenty-ninth day of September, the twenty-fifth day of December, the twenty-fifth day of March, and the twenty-fourth day of June in every year, the first quarterly payment thereof to be made on the twenty-ninth day of September next ensuing the date hereof, and the last quarterly payment preceding the expiration of the term of twenty-one years hereby granted to be made on the first day of May preceding the expiration of this demise: AND ALSO YIELDING AND PAYING therefore yearly and every year during the said term, unto the said *A. B.*, his heirs and assigns, on the days and place and in manner aforesaid (over and above the said yearly rent of 1000*l.* hereinbefore reserved), the additional yearly rent of 10*l.* for every acre of meadow or pasture ground, parcel of the said premises hereby demised, not having been in tillage for ten years last past, that the said *C. D.*, his executors, administrators or assigns, shall plough up, dig up or convert into tillage (*x*), and so proportionably after that rate for every greater or less quantity than an acre: AND ALSO YIELDING AND PAYING unto the said *A. B.*, his heirs and assigns, during the continuance of this demise, yearly and every year, the further annual rent of 10*l.* for every acre of arable land hereby demised, which shall not be used or cultivated by the said *C. D.*, his executors, administrators or assigns, conformably with the covenants and agreements hereinafter contained, without the previous license in writing under the hand of the said *A. B.*, his heirs or assigns, or his or their agent; the said first-mentioned additional rent of 10*l.* an acre to commence and be payable as to each several parcel of land so ploughed up, dug up or converted into tillage as aforesaid, for such ploughing up, digging up or conversion of the same as

Reservation of Game and Right of Sport to the Lessor.

Habendum for 21 Years.

Reddendum at the Lessor's Dwelling-house Quarterly.

Reddendum of an additional Rent for converting into Tillage.

Reddendum of an additional Rent for improper Cultivation.

(*u*) Unless there is an exception of trees and there is a power reserved to the lessor to enter and fell them, as in the text, he would have no right to do so, 1 Ld. Raym. 552: and the lessee is not bound to provide fences to preserve excepted trees from being bitten by his cattle, but the lessor should himself protect them. *Glenham* v. *Hanby*, 1 Ld. Raym. 739; *Clithero* v. *Higgs*, Sir Wm. Jones, 388.

(*v*) See ante, 839, 840.

(*x*) Sometimes the words "without the license or consent of the said *A. B.*, his heirs or assigns, in writing for that purpose first had and obtained," are added.

aforesaid; and the said last-mentioned additional rent of 10*l.* an acre commence and be payable as to each several parcel of arable land so impr perly used or cultivated as aforesaid, from such improper usage or cultiv tion of the same as aforesaid, and to continue payable from thencefor respectively during the then residue of the said term, and to be paid on th same days, time and place as the said yearly rent of 1000*l.* hereinbefo reserved is made payable; and the first payment of the said additional re of 10*l.* an acre to be made on such of the said days as shall happen nex after such ploughing, digging or converting into tillage as aforesaid, or suc improper usage or cultivation of the said arable land as aforesaid; and th said yearly rents to be respectively payable and paid free and clear of an from all [rent-charges in lieu of tithes (*y*)], land tax, and all manner o present and future taxes, charges, rates, assessments and payments whatsoever, by authority of parliament or otherwise; AND THE SAID *C. D.* doth hereby for himself, his executors, administrators and assigns, and every of them, covenant, promise and agree to and with the said *A. B.*, his heirs and assigns, in manner following (that is to say), that he the said *C. D.*, his executors, administrators or assigns, shall and will, from time to time during the said term hereby granted, well and truly pay or cause to be paid unto the said *A. B.*, his heirs or assigns, the said yearly rents or sums hereby respectively reserved, on the days, and at the times and places, and in such manner as hereinbefore limited and appointed for payment thereof, without any deductions on any account whatsoever, according to the respective reservations thereof, and the true intent and meaning of these presents, clear of all deductions: AND ALSO shall and will [*covenant to pay land tax and all other taxes, as ante, page* 896]: AND ALSO that the said *C. D.*, his executors, administrators and assigns, shall and will, at his and their own proper costs and charges, from time to time, and at all times during the continuance of this demise, when and as often as need or occasion shall be or require, well and sufficiently repair, uphold, maintain, amend, scour, cleanse, preserve and keep in repair the said messuage, tenement or farmhouse, and all other the houses, outhouses, edifices, buildings, barns, stables, dove-houses, gates, rails, pales, stiles, hedges, ditches, fences, banks, bridges and mounds belonging or appertaining to the said hereby demised premises, with all and all manner of needful and necessary reparations and amendments, so as to keep the same in good and sufficient and tenantable repair; he the said *A. B.*, his heirs and assigns, upon request and notice given to them in writing, finding and allowing on the said premises, or within four miles distance thereof, all rough timber, brick, lime, tiles and all other materials whatsoever (except straw) for doing thereof, to be carried to the said hereby demised premises at the charge of the said *C. D.*, his executors, administrators or assigns: AND the said messuage, tenement or farmhouse and premises, [*covenant to leave in repair, as ante, page* 896, *add power for lessor to enter to view state of repairs, &c., and covenant by lessee to do them* (*z*), *as ante, page* 896]: AND THE SAID *A. B.*, for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree to and with the said *C. D.*,

(*y*) See ante, 895, note (*e*).

(*z*) Where the landlord is to repair the main buildings, and the tenant the windows, &c., only, instead of the above covenant to repair, insert as under, and leave out the power to view. "And shall and will, at all times during the continuance of this demise, when need or occasion shall be or require, and whether any notice shall be given for the reparation of the same or not, at his or their own proper costs and charges, maintain in good and substantial condition and repair, during the said term, all the glass windows and lead work thereof, doors, shelves, shutters, fixtures, locks, keys, bolts, bars and other fastenings, racks and mangers, &c., belonging to the said farmhouse, barn, stable and other outbuildings, and also the well, and the going gear thereof, and all the gates, gate-posts, gate-irons, pales, rails, battens, hedges, ditches, drains, water-courses and fences belonging to the said premises, and leave and deliver up the same respectively in such good condition and repair, at the end or other sooner determination of the said term, being allowed by the said *A. B.*, his heirs or assigns, sufficient rough timber and thorns for and towards such repairs."

his executors, administrators and assigns, that he the said *A. B.*, his heirs or assigns, shall and will lay out and expend a sum not exceeding 1000*l.*, in case that sum shall be necessary for the purpose hereinafter mentioned, videlicet, in converting the present cart-horse stable near the dwelling-house into a nag-horse stable [*and so on, describing the things which are agreed to be done*]: Provided nevertheless, that any further or other buildings or alterations which may be required, unless the same can be completed for the said sum of 1000*l.* shall be made or done at the expense of the said *C. D.*, his executors, administrators or assigns, unless the said *A. B.*, his heirs or assigns, shall prefer to make and perform such further or other buildings and alterations at his or their own expense, in which case the said *C. D.* for himself, his heirs, executors, administrators and assigns, covenants and agrees to and with the said *A. B.*, his heirs and assigns, to pay to the said *A. B.*, his heirs and assigns, an additional rent, over and above the rents hereby reserved, at the rate of 8*l.* for every 100*l.* which may be so expended over and above the said sum of 1000*l.*: AND ALSO that he the said *C. D.*, his executors, administrators and assigns, shall and will, at his and their own costs and charges, perform and do all the carrying of the materials which may be required in making and completing the buildings and alterations hereby covenanted to be done by the said *A. B.*, or such further or other buildings and alterations as may be required: AND ALSO that he the said *C. D.*, his executors, administrators and assigns, shall and will forthwith insure, or cause to be insured, at some well-established insurance office in London or Westminster, or the said county of Kent, the said messuage or tenement, buildings and premises, from damage by fire, to the extent, amount or value of 600*l.*; and shall and will keep the same so insured during the said term, and in case of any damage by fire, shall and will rebuild or repair the same, as the case may be, to the extent, amount or value of the sum which shall be due for such insurance as aforesaid (*a*): AND ALSO that he the said *C. D.*, his executors, administrators or assigns, shall not nor will let, underlet or assign over, or otherwise part with, all or any part of the said premises hereby demised, for all or any part of the said term of twenty-one years, without the previous consent in writing of the said *A. B.*, his heirs or assigns (*b*): AND ALSO that in case he the said *C. D.*, his executors or administrators, shall assign, set or let the said premises, or any part thereof, at any time or times during the said term, to any other person or persons, he the said *C. D.*, his executors or administrators, shall and will give notice in writing to the said *A. B.*, containing a full and proper description of the parcels so assigned, set or let, and of the person or persons to whom they are set or let, and for what term or time [and shall and will remain answerable for the rents hereinbefore reserved, which shall be recoverable by distress or otherwise, as if the same had been occupied by himself (*c*):] AND ALSO shall and will, at his or their own proper costs and charges, cause the wood and iron work belonging to the exterior and interior parts of the said farmhouse, buildings and premises to be well and sufficiently painted, with two coats of paint at the least, in every seven years of the said term: AND ALSO shall not keep any swine unringed on the said premises during the said term hereby granted: AND SHALL AND WILL yearly, during the said term hereby granted, cause all the tiles belonging to the said buildings hereby demised to be cleaned, and the moss and dirt to be cleaned therefrom, without any allowance: AND ALSO shall and will during the said term cut open and spread all mole-hills and ant-hills, and destroy the moles and ants there: and cut and mow all rushes and weeds growing on the meadow and pasture grounds hereby demised, and at such times

Any further Buildings or Alterations, which may be required, to be done by Lessee.

Lessee to carry Materials.

Covenant by Lessee to insure.

Not to assign without a License.

Covenant by Lessee to give notice of Assignment and Underletting.

Covenant by Lessee to paint the House.

Not to keep Swine unringed.

To clean Tiles Yearly.

To level Mole-hills and cut Rushes and Weeds.

(*a*) See as to insurance the notes to the lease in Sect. 1, ante, 896, &c.

(*b*) Or "without giving notice in writing within fourteen days then next to the said *A. B.*, his heirs or assigns." See *Lease of a House in Town*, ante, 898.

(*c*) As the assigning or underletting will not discharge the lessee of his covenants, the part within brackets is wholly unnecessary. Even if the lessor recognize the assignee as his tenant, the lessee will not be discharged. See ante, 343, 344, on this subject.

and seasons as will prevent their future increase: AND ALSO shall and w yearly during the said term, upon the request and at the appointment of tl said *A. B.*, his heirs or assigns, deliver to him or them one good waggon loa of winter corn straw, without any allowance for the same: AND ALSO sha and will find and provide good winter corn straw sufficient for thatching an daubing all or any part of the said buildings and premises hereby demised, o any part or parts thereof, without any allowance being made in respect of th same: AND ALSO shall and will yearly and every year during the conti nuance of this demise, at his or their own costs and charges, perform fourteei successive days' carriage work with a waggon and team of three horses and a servant, for the said *A. B.*, his heirs or assigns, he or they giving to the said *C. D.*, his executors, administrators or assigns, three days' previous notice of the time and place when and where the said work is to be done; but nevertheless the said waggon shall not be compelled to go to any greater distance than seven miles from the farm-house hereinbefore demised; AND ALSO shall and will, at his and their own costs and charges, fetch and carry away all the materials which shall be wanted to repair any of the buildings and premises hereinbefore demised, and lay the same in convenient places for use, provided the carriage thereof does not exceed the distance of twelve miles from the said farm-house; AND ALSO shall and will find and provide the workmen with good and wholesome beer, according to the custom of the country, during the time in which any such repairs shall be doing, without any allowance being made to him or them in respect of the same: AND shall and will at all times during the said term, upon the request of the said *A. B.*, his heirs or assigns, well and sufficiently keep and maintain for him or them one dog in good order and condition, without any remuneration for the same: AND ALSO shall and will during the said term well and sufficiently maintain and keep one such hound, greyhound or spaniel, as the said *A. B.* shall require of him or them to keep: AND ALSO that he the said *C. D.*, his executors, administrators or assigns, shall not nor will permit or suffer any person or persons whomsoever, to shoot or trespass upon any of the said premises hereinbefore demised, or any part or parts thereof, without the leave in writing of the said *A. B.*, his heirs or assigns; but shall and will, at his or their request, give proper notice or notices in writing to forbid any person or persons sporting or trespassing thereon, and at the request of the said *A. B.*, his heirs or assigns, give or cause such notice or notices to be given in evidence and proved in any Court or Courts that shall be thought necessary to convict any such person or persons sporting or trespassing thereon: AND ALSO that it shall and may be lawful for the said (landlord), his heirs and assigns, from time to time, and at all times during the term hereby granted, to enter upon all or any of the said demised lands, there to throw, plant or place in convenient, proper or necessary positions, thorns or other material commonly used for the purpose of preventing the illegal taking and snaring game, or poaching, and do all such other acts and things as he or they shall deem necessary and proper for the better preservation of the game in and upon the lands hereby demised: AND that he the said (tenant), his executors, administrators or assigns, shall and will give to the said (landlord), his heirs and assigns, immediate notice of any person who shall hunt, hawk, fish or sport, or otherwise trespass upon the said premises: AND that it shall and may be lawful for the said *A. B.*, his heirs or assigns, to bring any action or actions in the name or names of the said *C. D.*, his executors, administrators or assigns, against any person or persons who shall or may be found sporting or trespassing on the said premises hereby demised, or any part thereof, and which action or actions neither he nor they shall wilfully release, discontinue or discharge, or become nonsuit therein, and shall not nor will disclose or make known anything relating thereto, which may be prejudicial to the prosecuting of the same; the said *A. B.*, his heirs or assigns, indemnifying the said *C. D.*, his executors, administrators and assigns, from all costs and damages to be incurred thereby: AND ALSO

liver Notices about Game, &c.

at Lessor y bring Ac- s in name ee.

o preserve nd give up igeons.

To deliver to Lessor half Pigeons killed.

Covenant by Lessee to follow course of Husbandry.

Covenant by Lessee to cultivate in a Husbandlike manner.

that it shall be lawful for the said *A. B.*, his heirs and assigns, or his or their agent or attorney, by his or their direction, from time to time, and at all times, in case any person or persons shall at any time or times during this demise, hunt, course, fish, fowl or sport upon the said premises, or take, kill, destroy or disturb the game, fish or rabbits thereon, or attempt so to do, to warn or give notice, in the name or names of the said *C. D.*, his executors, administrators or assigns, to such person or persons to forbear coming upon the said premises; and that the said *C. D.*, his executors, administrators or assigns, will, upon the request of the said *A. B.*, his heirs or assigns, or his or their attorney or agent, sign and cause to be delivered such notice to such person or persons as aforesaid: AND ALSO that it shall be lawful for the said *A. B.*, his heirs or assigns, if he or they shall think fit, to bring any action or actions, suit or suits, and prosecute the same, or otherwise proceed against all and every such person or persons, in the name or names of the said *C. D.*, his executors, administrators or assigns; and that the said *C. D.*, his executors, administrators or assigns (*c*), shall not at any time release, disavow or otherwise discharge any such action, suit or proceeding, without the previous consent in writing of the said *A. B.*, his heirs or assigns, he the said *A. B.*, his heirs, executors, administrators or assigns, defraying the costs and charges of every such suit, action and proceeding, and saving harmless the said *C. D.*, his executors, administrators or assigns therefrom: AND ALSO shall and will, from time to time and at all times during the term hereby demised, endeavour to preserve and keep the dove-house with a good flight of pigeons, dove-house like, and at the end, expiration or other sooner determination of the said term of twenty-one years, shall and will give up the same, so preserved and kept, into the hands of the said *A. B.*, his heirs or assigns: AND ALSO shall and will at all times hereafter, during the continuance of this demise, allow and deliver, or cause to be delivered, unto the said *A. B.*, his heirs and assigns, at his or their residence in aforesaid, one half of the pigeons which shall from time to time be killed from the dove-cote upon the said premises: AND ALSO that he the said *C. D.*, his executors, administrators or assigns, will not after the four first years of the said term (in which time the lands hereby demised are to be brought into the proper course, consistently with the subsequent cultivation thereof hereinafter mentioned), take two successive crops of corn, grain or pulse from off any part of the said lands; and that every crop of winter corn or pulse shall be taken upon land broken up from olland or grass of one year's lying; and that immediately after such such crop of winter corn or pulse, he the said *C. D.*, his executors, administrators or assigns, will summer-till the land on the fourth earth, and sow good turnip seed thereon, and cause the turnips produced therefrom to be hoed, scoured and preserved for a crop; and that immediately after every crop of turnips, he, the said *C. D.*, his executors, administrators or assigns, will take one crop of lent or summer corn, and with such lent or summer corn lay the land down with sound grass seeds, and continue the same so laid down for one year, to be computed from the first day of August next after sowing such grass seeds, and will, at the end of the said term, leave the said arable lands in four equal divisions or shifts (as near as the pieces will admit), according to the course or mode of husbandry above prescribed, and leave all the last year's hay and turnips for the benefit of the said *A. B.*, his heirs or assigns, on being paid for the same according to a valuation to be made thereof as hereinafter mentioned: AND ALSO that the said *C. D.*, his executors, administrators and assigns, shall and will from time to time and at all times during the continuance of the said term hereby granted, plough, dig, manure and cultivate the farm, lands, tenements, hereditaments and premises hereinbefore described, and expressed to be hereby demised,

(*c*) Assigns are proper here, although there is a qualified restriction on assignment; and it will be construed to mean assigns with consent only.

according to the best and most improved course of husbandry in that part of the country where the same are situated (*d*), and also shall and will from time to time and at all times as aforesaid, preserve and keep all and singular the lands, tenements, hereditaments and premises in a clean and husbandlike condition, free from all nettles, thistles and other noxious weeds, growing or to grow on the said lands and premises, or any part thereof: AND ALSO shall and will, as often as there shall be occasion, cut and make drains and ditches on such part of the said demised lands and premises as shall be of a wet and marshy nature, so as effectually to drain the same: AND THAT THE SAID *C. D.*, his executors, administrators and assigns, shall and will in all other respects, cultivate and manage the lands hereby demised, and every part thereof, in a good and husbandlike manner, according to the custom of the country, and the most improved state of agriculture (*d*), and use his and their best endeavours to keep the same clear and free from moles: And shall and will observe every reasonable direction made by the said *A. B.*, his heirs and assigns, or his and their agent, respecting such cultivation, from his and their personal view, and deliver from time to time, when required so to do, to the said *A. B.*, his heirs and assigns, or to his agent, a true account of the manner in which each and every of the said pieces or parcels of land hereby demised, hath been or is intended for the year ensuing to be cropped and cultivated: And permit and suffer the said *A. B.*, his heirs and assigns, or his or their agent, from time to time to enter upon the said demised lands for the purpose of examining the state of the cultivation thereof: AND ALSO shall not nor will at any time during the present demise, crop or sow above two years together, any of the arable lands and closes hereby demised, but every third year permit the same to lie fallow and unsown: AND ALSO that the said *C. D.*, his executors, administrators or assigns, shall and will well and effectually summer-fallow each part of the said lands that shall at any time be used in tillage, once at least in every six years: And shall not nor will at any time or times take from off, or have upon any part thereof, more than two crops of white corn, without the intervention of a summer's fallow (he or they being at liberty to take one crop of pulse between the said two crops of white corn), and hereby agreeing also to have one or more crop or crops of clover, or some other well-known ameliorating crop or crops, in the course of tillage, which shall tend to replenish and improve the said land, and being at liberty to sow and grow upon the said lands when in fallow, coleseed or turnips, or any other green crop, provided the same be eaten upon the said lands by sheep or other cattle, and not suffered to stand for seed: AND FURTHER, that he the said *C. D.*, his executors, administrators or assigns, shall and will take a crop of oats or barley after the fallow, and sow on the same not less than twelve pounds per acre of good clover or trefoil seed, and after it shall have been so laid down one year, shall and will take a crop of wheat, after that a crop of beans or peas, and shall and will cause the same to be twice well hoed, and shall and will afterwards take another crop of wheat, oats or barley, and then leave the same to fallow again: AND ALSO shall and will at all times during the continuance of this demise so manage and cultivate the arable lands, parcel of the said premises hereinbefore demised, that no more than two successive crops of corn, pulse or grain (and those two not of the same kind) shall be grown upon, or had or taken from off the same, or any part or parts thereof, without giving the same a clear summer-fallow, and sowing the same with turnips the ensuing year; and for the next crop after such turnips, laying down the same land in a husbandlike manner with a sufficient quantity of sound clover and other grass seeds, and continuing the same for two years, to be accounted and computed from Midsummer-day next after sowing the same seeds: AND FURTHER, that the said *C. D.*, his executors, administrators or assigns, shall not, nor

Covenant cut Drain Ditches fo draining L

Covenant cultivate L according Custom of Country.

To observe reasonable rections of L sor as to the Cultivation.

To permit L sor to enter examine the state of Culti vation.

The Tenant's Covenant not to sow the san Land above Two Years together.

To Summer-fallow once in Six Years.

Not to have more than Two Crops of White Corn without a Summer's Fallow.

To fallow Land once in Four Years, then sow a Crop of Barley with Clover; Wheat in the Second Year; Beans or Peas in the Third; Wheat, or Oats, or Barley, in the Fourth.

Not to take more than Two successive Crops without a Summer-fallow, and to sow Turnips, and afterwards to lay down with Clover for Two Years.

(*d*) As to these covenants, see ante, Book II., Chap. IV., Sect. 4, (b), p. 451, &c.

Not to sow Lands not being deemed Fen Lands Two successive Years with exhausting Crops.

Not to sow upon Fen Lands more than Two successive Crops of Wheat, &c.

To sow Clover with Second Crop, and to lay Four Years.

Not to plough Meadow or Pasture Ground.

Not to mow fatting Lands under a Penalty of 50*l.*

Not to mow Meadow or Pasture Land Two Years successively during the last Five Years of Term.

Covenant by Lessee to repair the Fences, &c. in and about the Farm.

Covenant by Lessee to dress and repair Hedges.

Not to buckstall any of the Fences.

To cut and scour One-Twelfth Part of the Fences Yearly.

will, at any time or times during the term hereby granted, sow or cultivate upon any part of the said demised land, not being deemed or considered as fen lands, in any two successive years, an exhausting crop, such as wheat, oats, barley, rye, hemp, flax, mustard-seed, teazles, woad or coleseed, but that a fallow, or green or ameliorating crop, properly hoed and cleared, shall intervene between every two such crops, and that such green ameliorating crop shall be eaten or consumed on the said demised premises: NOR shall nor will sow or cultivate upon any part of the said demised lands which are deemed and considered to be fen lands, for more than two successive years, any exhausting crop, such as wheat, oats, barley, rye, hemp, flax, mustard-seed, teazle, woad or coleseed: And that he the said *C. D.*, his executors, administrators and assigns, shall and will with the second of such successive crops, sow a proper quantity of clover seed, or other artificial grass, and suffer the lands so sown to remain in laying for four years successively, without breaking up the same or any part thereof: AND ALSO that he the said *C. D.*, his executors, administrators or assigns, shall not nor will, at any time or times during the said term denture, pare, plough up, dig up or convert into tillage any meadow or pasture grounds, parcel of the said demised premises not having been in tillage within seven years last past, without the license or consent of the said *A. B.*, his heirs or assigns, in writing for that purpose first had and obtained: NOR mow any of the fatting lands, or pieces or parcels of land, numbered in the schedule hereunto annexed, or underwritten with the respective numbers 124, &c., under the penalty of 50*l.* per acre per annum, to be paid by the said *C. D.*, his executors, administrators and assigns, to the said *A. B.*, his heirs and assigns, by equal quarterly payments, *nomine pœnæ*, as an increase of rent over and above the said yearly and other rents hereby reserved, and to be recovered in the same manner: AND THAT THE SAID *C. D.*, his executors, administrators and assigns, shall not nor will at any time or times within the last five years of the term hereby granted, mow the meadow and pasture lands hereby demised, or any part thereof, two years successively, nor more than once in each successive year, but will feed or graze the same in each alternate year during that time: AND ALSO shall and will from time to time, during the term hereby granted, make anew the quick and other hedges, ditches and fences, of or belonging to the said premises, or such part and parts thereof, as shall require to be new made, in a good and husbandlike manner, and at proper seasons of the year; and ditch, and bank up, and fence the same hedges, and every of them, on either side, according to the most improved mode of good husbandry, and so as to protect and preserve all such young trees and woods as shall be growing thereon from being barked, destroyed or injured by cattle: And also shall and will from time to time, and at all times during the said term, foster and preserve the young trees, spires and thrifts, and layers and quicksets of all kinds, standing, growing or being in or upon the said farm, lands and premises, or any parts thereof: AND ALSO that he the said *C. D.*, his executors, administrators and assigns, shall and will from time to time during the said term hereby granted, well and sufficiently fence, dress, cut, scour, cleanse and keep in repair all the hedges, ditches, fences, mounds, ways, watercourses, drains, ponds, wears, goyts, sinks, sluices, gutters, walls, pales, gates and stiles, in, upon or belonging to the said hereby demised premises, or any part thereof; and at the end, expiration or other sooner determination of the said term, shall and will leave and yield up the same well and sufficiently fenced, dressed, cut, scoured, cleansed and repaired: AND ALSO shall not nor will buckstall or brow any of the fences belonging to the said premises: AND will yearly during the said term cut and scour one-twelfth part of the said fences, and the ditches belonging thereto, when and where the said *A. B.*, his heirs or assigns, shall before the first day of February in every year appoint, and for want of such appointment, where the same, in the judgment of the said *C. D.*, his executors, administrators or assigns, shall

be most wanted: and shall take care of and preserve all pieces of *wood* or *timber* useful for repairs arising from such cutting: AND THE SAID *C. D.* doth hereby for himself, his executors, administrators and assigns, covenant, promise and agree to and with the said *A. B.*, his heirs and assigns, that he the said *C. D.*, his executors, administrators and assigns, shall and will open and scour [excavate, cast and bottomfy], in each year of this present demise, one-tenth part of all the ditches and watercourses in or belonging to the said demised premises; and lay soughs, and cut and maintain, wherever the same may be necessary, proper drains for carrying off the surface water: and make and plash down in a workmanlike manner, in each year of this present demise, one-tenth part of all the quick hedges upon or belonging to the said demised premises, and make such subdivision fences thereon as shall be thought necessary and proper, and which shall be required by the said *A. B.*, his heirs and assigns, or such agent as he or they may appoint for that purpose; and in default of any such direction and request, then that he the said *C. D.*, his executors, administrators or assigns, shall and will make such subdivision fences wheresoever he or they shall deem them to be most useful and proper; and shall and will also set good whitethorn plants wherever there shall be no sufficient quick fence, and set therewith a plant of oak, ash, elm, or other trees, at every four yards' interval or space, and shall protect and make good the same, the said *A. B.*, his heirs and assigns, allowing and providing such number of plants of oak, ash, elm, or other trees, as may be required for that purpose: AND THAT HE THE SAID *C. D.*, his executors, administrators and assigns, shall not nor will, at any time or times during the said term, cut, plash or new make any of the hedges belonging to the hereby demised premises, but such as shall be of twelve years' growth, and those only at seasonable times in the year; and when the closes and land to which such hedges belong shall be sown with wheat, rye or barley, on a summer's tilth, or be closes of old pasture, and after the same shall have been cut, plashed or new made as aforesaid, the same to preserve and keep from being ate or destroyed by cattle or otherwise; and shall and will, at such cutting and plashing thereof, cleanse and scour the ditches against such hedge or hedges, where ditches have been heretofore, and do lie next to any lane or highway, and the offal wood which shall arise by the cutting or plashing of such hedges, to faggot and make up, and carry unto the said demised messuage, or farm-house, there to be spent by way of fire-wood, and not to be sold or disposed of in any other manner whatsoever: AND FURTHER, that he the said *C. D.*, his executors, administrators and assigns, shall not nor will cut, or permit to be cut, any hedges under ten years' growth, or at unseasonable times, and that he the said *C. D.*, his executors, administrators and assigns, shall and will bear and sustain all expenses which have been incurred, or which may be necessarily incurred, in clearing, raising and protecting any of the quick now growing in or upon the said demised premises; it being mutually agreed by and between the parties to these presents, that it shall and may be lawful to and for the said *C. D.*, his executors, administrators and assigns, to take and use upon the said demised premises all the posts and rails which now are upon the said demised premises, for the purpose of raising and protecting any new quick to be planted by him: AND ALSO that he the said *C. D.*, his executors, administrators or assigns, shall and will yearly and every year during the continuance of this demise, in a husbandlike manner, cut and scour [excavate, cast and bottomfy], or cause to be cut and scoured, one hundred yards of the fences and ditches upon such part of the arable lands hereinbefore demised, and fifty rods of the fences and ditches upon such part of the marsh lands as shall most require cutting and scouring, and do or cause to be done all such out-hauling, banking and planting necessary for that purpose, being allowed bushes, thorns and other fencing stuff, to be taken upon the premises: AND ALSO that he the said *C. D.*, his executors, administrators or assigns, shall not nor will, at any time or times

To scour Tenth Pa Ditches, Yearly, ar Drains fo rying off Water.

To plash (Tenth of t Quick He Yearly, an where no s ficient Fen to plant Qu and set Oa other Trees therewith.

Not to cut Hedges und certain Grow &c.,

and to spend Wood in the House.

Not to cut any Hedges under 10 Years' Growth; and to protect Quick, being allowed Posts, &c. on Premises for protecting them.

Lessee to cut and scour 100 Yards of Fences, &c. of Arable Land, and 50 Rods of Marsh Lands, being allowed Bushes, &c. on the Premises.

Not to break down or injure Trees.

during the said term, fell, cut down, stub, root up, destroy, lop, top, injure, maim or deface, or cause or suffer to be felled, cut down, stubbed, rooted up, destroyed, lopped, topped, injured, maimed or defaced, any timber or other trees, wood or underwood whatsoever, now standing, growing or being, or which shall at any time during the said term hereby granted, stand, grow, or be in or upon the lands, grounds and premises hereby demised, or any part or parts thereof, but shall and will, to the utmost of his and their power, preserve and keep the same from any hurt, spoil or damage, either by cattle or otherwise: AND THAT THE SAID *C. D.*, his executors, administrators and assigns, shall not nor will, at any time or times during the term hereby demised, lop, top, shred or cut any of the trees or spring wood belonging to the said demised premises, but such pollard trees and spring wood as have been usually lopped, topped and cut by former and other tenants, and those only of twelve years' growth; and the lops and tops which shall arise and come therefrom carry into the said hereby demised messuage or farm-house, there to be spent by way of fire-bote, and not to be sold or disposed of in any other way whatsoever; and shall not nor will, at any time or times during the said term, inordinately burn or waste any of the fire-wood which is so allowed to be spent by way of fire-bote as aforesaid, and shall preserve and keep the said pollard trees, as also all the fruit trees and spring wood belonging to the said hereby demised premises, from all wilful or negligent waste: AND FURTHER, that the said *C. D.*, his executors, administrators and assigns, shall and will, during the continuance of this demise, preserve all the timber trees and other trees, spires and saplings likely to become timber, from all spoil, injury and destruction; and that the said *C. D.*, his executors, administrators and assigns, shall not nor will cut down or shred any timber trees, pollard or other trees, spires or saplings likely to become timber, under a penalty of 20*l.* for each timber tree, and 10*l.* for each other tree, pollard, spire or sapling, over and above the value of such timber or other tree, spire or sapling respectively: AND THAT if any of the said fruit trees shall perish or decay, then that he the said (tenant), his executors, administrators or assigns, shall and will at his or their own expense, plant and set to grow in the room or stead of every such tree so perishing or decaying, one other fruit tree of approved quality, to be found and supplied by and at the expense of the said (landlord), his heirs or assigns, and shall and will in like manner, at his and their own expense, plant and set to grow in the hedgerows, shaws and woodland hereby demised, all such plants as shall be supplied by and at the expense of the said (landlord), his heirs or assigns: AND shall not nor will top or lop any trees whatsoever, except such pollards as have been periodically lopped and cut previously to the day of the date of these presents, and those only of ten years' growth, at the times when the fences upon the said demised premises shall be repairing: AND FURTHER, that the said *C. D.*, his executors, administrators or assigns, shall not nor will cut any coppice-wood or underwood, which now is, or at any time during the continuance of the term hereby granted may be, growing upon the said demised premises, except at the intervals or seasons of the year fixed by the custom of the country, and at the following periods of growth, that is to say, the thorns or bushes at not less than ten years' growth, the willows at five years' growth, and oziers at two years' growth, and then only in equal proportions: NOR shall nor will commit or suffer to be committed, any waste, spoil or destruction, by digging or sinking in or upon the said demised lands, or any part thereof, any pit or pits (except for drinking places for cattle), or by taking therefrom by means of such pit or pits, or by any drift or level opened or to be opened thereon, or on the lands adjoining thereto, any metal, metallic ore, mine or mineral, coal, marble, limestone, slate or other stone, gravel and brick earth, clay, loam, chalk, marl or other soil whatsoever (except clay for laying on the said demised lands, and any necessary materials for making or repairing roads thereon), without the license and consent in writing of the said *A. B.*,

Not to lop Trees, except Pollards.

The Loppings to be spent in the House.

Lessee to preserve Trees, and not to cut down any under a Penalty.

To replant Fruit Trees.

Not to lop or top Pollards, except those of 10 Years' Growth, and which have been cut previously.

Lessee not to cut Underwood, &c. except Thorns, at 10 Years' Growth, Willows at 5 Years' Growth, and Oziers at 2 Years' Growth.

Not to commit Waste by digging Pits, &c. for Metal, &c.

his heirs or assigns, for that purpose: AND ALSO shall not nor will, at any time during the said term hereby granted, hew, fell, cut down, lop, top, stub up or destroy, or cause or suffer to be hewn, felled, cut down, lopped, topped, stubbed up or destroyed, without the consent in writing of the said *A. B.*, his heirs or assigns, any of the timber, timber-like or other trees hereinbefore excepted, other than such as shall have been assigned or appointed to him or them by the said *A. B.*, his heirs or assigns, for the repair of the said premises or any part thereof, nor cut down any alders, willows, sallows, pollards, hazels, thorns, bushes, springs, quicksets, wood or underwood, which are now growing and being on the premises, save only and except for necessary repairs and fences, to be allowed and set out by the said *A. B.*, his heirs or assigns: AND that in case any of the excepted trees or wood shall be so hewn, felled, cut down, lopped, topped, stubbed up or destroyed by the said *C. D.*, his executors, administrators or assigns, or any of them, then and in such case the said *C. D.*, his executors, administrators and assigns, or some or one of them, shall and will pay unto the said *A. B.*, his heirs or assigns, the sum of 20*l.* for every load of timber and wood, and the sum of 5*l.* for every young tree of the age of six years and upwards, likely to become timber, which shall be so hewn, felled, stubbed up or destroyed, and so proportionably for a greater or less number or quantity: PROVIDED ALWAYS, that the said *C. D.*, his executors, administrators and assigns, shall and may, at all times during the said term, have and take the underwood growing upon the said lands and premises, and also lop the pollard trees, and trim the timber trees which have been heretofore lopped and trimmed, and the plashings of the quick hedges, as and for estovers, and by way of house-bote, plough-bote, cart-bote and hedge-bote, so as the same are taken in a husbandlike manner, and only at seasonable times in the year: AND ALSO that he the said *C. D.*, his executors, administrators or assigns, shall not nor will at any time or times hereafter, during the continuance of this demise, commit any waste upon the said premises hereby demised, or any part thereof, by felling, cutting down, grubbing up, lopping, topping, cutting or stubbing, or causing, or willingly or negligently permitting or suffering to be felled, cut down, hewn, grubbed up, lopped, topped, cut or stubbed, any timber or timber-like trees, or fruit trees, or any seedlings, stover or young spires thereof, or any bodies of pollards or willows now growing or being, or which shall at any time or times hereafter during the continuance of this demise grow or be on the said premises hereby demised, or any part or parts thereof; nor shall nor will fell, stub, lop, top or injure any quickthorns or bushes (except the lops and tops of the pollards, stubs and surplus thorns required for firing, and the quickthorns and bushes required for fencing), but shall and will, on the contrary, use his and their utmost endeavours to preserve the same from being spoiled or injured: AND ALSO shall not nor will commit any waste upon the said premises hereby demised, or any part thereof, by ploughing or digging any of the marshes or pasture grounds hereinbefore demised: PROVIDED ALWAYS, that notwithstanding the covenants and reservations hereinbefore contained, the said *A. B.*, his heirs or assigns, shall and may pursue any remedy in equity, to which he or they would otherwise be entitled, to restrain the conversion or digging of the said marshes or pasture ground, or the cutting any trees, quickthorns, or bushes, contrary to the covenants hereinbefore contained in that behalf: PROVIDED ALWAYS, and it is hereby agreed and declared, that for and notwithstanding any thing hereinbefore contained to the contrary, it shall be lawful for the said *C. D.*, his executors, administrators and assigns, at all times during the said demise, to dig for and take any quantity of clay or marl out of the said demised premises, as he or they shall judge proper, for the improvement of the lands hereby demised; and also all such quantity of gravel as shall be necessary to keep the roads in and upon the said premises in good repair and condition, but not for sale, nor for the purpose of carrying any part of the same off the

demised premises: AND ALSO that he the said *C. D.*, his executors, administrators and assigns, shall and will from time to time, and at all times during the continuance of this demise, use his and their best endeavours to kill and destroy, or cause to be killed and destroyed, all moles found in or upon the premises hereinbefore demised: AND ALSO shall and will, at all proper seasons in every year during the continuance of this demise, and particularly before seeding time, mow and keep down all thistles, docks and other seeding weeds upon the said premises hereby demised; and every part thereof respectively; and shall not nor will cut or carry away from the said premises any whins or brakes between Lady-day and Michaelmas-day in every year: AND ALSO that he the said *C. D.*, his executors, administrators or assigns, shall and will duly and regularly set, lay and spread upon the said demised premises, all the dung, compost and manure which shall from time to time be made upon the said demised premises, or from the produce arising therefrom during the said term: or (if at the determination of the said term any such dung, compost or manure shall remain unspread thereupon) shall and will leave the same for the benefit of the said *A. B.*, his heirs or assigns, or his or their succeeding tenant or tenants of the said premises, without being paid for the same: and in general shall and will manage, till and use all and singular the lands and grounds hereby demised, in a good and husbandlike manner, so that the same may not be impoverished, but improved; and at the end, expiration or other sooner determination of the said term, leave and yield up the same in a due and regular course of husbandry and cultivation, and such as shall be consistent with any restrictions aforesaid: AND FURTHER, that he the said *C. D.*, his executors, administrators or assigns, shall and will spend, spread and bestow all such manure, dung and compost that shall arise or be made upon the said demised premises, on such part of the lands hereby demised as shall most require the same, except such muck, manure, dung and compost as shall be made during the last year of the said term hereby granted, which shall be left in the yard of the said demised premises by the said *C. D.*, his executors, administrators or assigns, without any allowance or compensation for the same: AND ALSO that he the said *C. D.*, his executors, administrators and assigns, shall and will lay and spread upon every acre of the said lands, when in fallow, twenty-four horse-loads of well-burnt and unfallen lime, or twelve sufficient cart-loads of manure, or some other kind of filth of equal value and proper for the said lands, when and so often as the same shall be fallowed: AND ALSO shall and will, every third year of the said term hereby granted (the first three years to be computed from the commencement of the said term), cause three hundred good cart-loads of marl or clay to be carried, laid and spread upon the arable lands hereby demised: AND that whenever coleseeds, turnips or any other such-like crop, shall be sown or grown on any of the said lands, at any time or times during the said term, the same shall be eaten upon the said lands by sheep or other cattle, and not suffered to stand for seed: AND ALSO shall and will from time to time, and at all times during the said term, keep a flock of two thousand sheep; and shall and will fold the same in a fair, proper and husbandlike manner, on such part or parts of the said farm, lands and premises as shall be most in need in manure, except only during the last year of the said term hereby demised, when the same shall be folded on such part or parts of the said premises as the said *A. B.*, his heirs or assigns, shall from time to time direct; and in default of such direction, then on such part or parts of the said farm, lands or premises as shall most want or require the same: AND ALSO will yearly during the said term spend and consume, by cattle or otherwise, on the said premises, all the turnips, mangel-wurzel, root crops, hay, straw, chaff, tares, vetches, stover and green crops, which, during the first twenty years of the said term shall arise from the said premises, and will cause all the muck, dung, manure and compost which shall be made upon the said premises and arise from the hay, straw, chaff, tares, vetches, turnips, mangel-

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wurzel, root crops, stover and green crops, that shall be so spent and consumed on the said premises during the said first twenty years, to be spread and laid upon such part of the said land as shall most require the same, in a husbandlike manner, and cause all the muck, dung, manure and compost produced upon the premises in the last year of the said term (except such part thereof as shall be used in preparing for turnips), to be shovelled and turned up in heaps upon some convenient part of the said premises, and there left for the benefit of the said *A. B.*, his heirs or assigns, without any allowance or compensation being made to him or them in respect of the same: AND THE SAID *C. D.* doth hereby for himself, his executors, administrators and assigns, covenant, promise and agree to and with the said *A. B.*, his heirs and assigns, that he the said *C. D.*, his executors, administrators and assigns, shall and will, at the end of the said term, leave upon some convenient part of the said premises, for the use and benefit of the said *A. B.*, his heirs and assigns, one full moiety or half part of the hay which shall arise from the said demised premises in the last year of the said term, he the said *A. B.*, his heirs or assigns, allowing unto the said *C. D.*, his executors, administrators or assigns, such a sum of money as the same shall be adjudged to be worth by two indifferent persons, one to be chosen by the said *A. B.*, his heirs or assigns, and another by the said *C. D.*, his executors, administrators or assigns, or by an umpire or third person to be named by such two persons in case of difference between them: AND ALSO shall and will, before the day of , in the last year of the said term, carry out and lay on such of the said demised premises as are to be sown with corn in the winter next after the expiration of the said term, all such part of the muck, dung and compost, which shall be made or produced on the premises within the last year of the said term, as the said *A. B.*, his heirs or assigns, shall direct: AND ALSO shall and will leave all the remainder of the said last year's muck, dung and compost in the yards belonging to the said farm, messuage and premises hereby demised, turned up in heaps in a proper and husbandlike manner, for the use of the said *A. B.*, his heirs or assigns, without requiring any allowance or compensation for the same: AND ALSO, within the last year of the said term, will lay and place all the crops of corn and grain that year growing upon or arising from the said premises, in the barns and stack-yards belonging thereto, and in the succeeding winter season thresh out the same by manual labour, and not with a machine, in the said barn, and deliver or leave the straw, chaff and calder arising therefrom in good condition and at convenient times, for the use of the said *A. B.*, his heirs or assigns, or his or their incoming tenant, without requiring any allowance or compensation for the same: AND FURTHER, that the said *C. D.*, his executors, administrators or assigns, shall not, at any time or times during the last two years of the said term hereby demised, sell, give away or otherwise dispose of any of the straw which shall grow and arise upon the said demised premises, and shall not burn any straw, except it be for the necessary singeing of his or their hogs, for the use of his or their own families: AND ALSO shall not nor will, at any time or times, sell or dispose of, or carry away any hay, grass, straw or fodder, which shall at any time or times during the said term grow upon or be produced from the said demised premises, or any part thereof, but shall and will spend and consume the same upon the said demised premises: AND ALSO that he the said *C. D.*, his executors, administrators and assigns, shall at any time during this demise, except only in the last year thereof, have liberty to sell and dispose of any quantity of hay and straw arising from the said premises, on his and their spreading upon such parts of the same premises as shall stand most in need of manure and compost, one good load of rotten dung for every load of hay or straw that shall be carried off the premises: AND THE SAID *C. D.* doth hereby for himself, his executors, administrators and assigns, and for every of them covenant, promise and agree to and with the said *A. B.*, his heirs and assigns, that he the said *C. D.*, his executors, administrators and

Lessee to l[illegible] at end of T[illegible] One-half of th[illegible] last Year's H[illegible] on the Premises for th[illegible] Lessor, to [illegible] paid for by [illegible] him.

Lessee to c[illegible] out Part of [illegible] last Year's [illegible] Dung, and [illegible] it on the L[illegible] to be sown wi[illegible] Winter Corn.

Remainder [illegible] be left on [illegible] mises.

To leave Str[illegible] Chaff and Cal[illegible] der.

The Lessee not to dispose of Straw within the last Two Years.

To consume Hay, &c. upon Land.

Covenant by Lessor that Lessee may sell Straw, if he bring Compost instead.

Lessee to in-barn Crops of Corn, Grain and Hay, and spend and con-

assigns, shall and will, during the continuance of the term hereby granted, lay and in-barn all the crops of corn, grain and hay, which shall be growing and arising upon the said demised premises, in every year of the said term, upon some part of the said demised premises; and spend and consume with cattle upon the said premises all the green crops and all the hay, straw, chaff and fodder arising from such corn and grain, under a penalty of 10*l.* per load for any which may be moved off the said demised premises; and shall and will spread and bestow the dung and compost that shall arise thereby, or be brought upon the said premises, at proper times, on such of the said demised lands as shall most need it, in a good and husbandlike manner: AND THAT THE SAID *C. D.*, his executors, administrators and assigns, shall and will, yearly and every year during the said term, lay in and in-barn, or stack up, all the crops of grain which shall grow and arise upon the said hereby demised premises, in the barns and rick-yards belonging to the said demised premises, and not elsewhere, and there thresh out the same, and the straw, fodder, chaff and stover, which shall arise therefrom and thereby, turn into the yard and yards, and with the same to feed up and fodder up his or their cattle, for the better increasing and making of dung and compost; and the dung, soil and compost, which shall arise thereby, lay, spread and bestow upon the hereby demised premises, in a husbandlike manner, and not elsewhere; and shall and will leave unto and for the use of the said *A. B.*, his heirs or assigns, all the dung and compost which shall be made on the said hereby demised premises during the three last years of the said term, which shall arise from the two last crops of corn and grain, for manuring the premises, or otherwise to be disposed of as he the said *A. B.*, his heirs and assigns, shall think fit and convenient: AND ALSO shall and will, yearly and every year during the said term, in-barn or stack up in the said premises all the corn or grain which shall arise or grow therefrom, and there thresh the same, and spend and consume on the said premises, by feeding and foddering cattle therewith, or otherwise, all the straw, chaff, and calder, arising therefrom; and also all the hay or turnips that shall grow or arise from or upon the said premises hereinbefore demised, except the winter corn-straw that shall be wanted for thatching and daubing work; and also except half the hay and clover which shall arise in the last year of this demise, and the whole of the straw, chaff and calder, arising from the corn in the said last year, which half hay and entirety of which straw, chaff and calder, shall be left upon the premises for the benefit of the said *A. B.*, his heirs or assigns, or his or their succeeding tenant or tenants of the same premises, for which hay it is agreed that so much money shall be paid by the person or persons taking the same as the same shall be reasonably worth, in the judgment of two competent persons, one of them to be chosen by the said *C. D.*, his executors, administrators or assigns, and the other of them to be chosen by the person or persons taking the same; and in case the said two persons so named shall disagree as to the amount of such valuation, then the same shall be referred to the valuation of a third competent person, to be chosen by the said two so first chosen, and the valuation so to be made by them or him, as the case may be, shall be binding and conclusive upon all the said parties; and in consideration of the said straw, chaff or calder, the said *A. B.*, his heirs or assigns, shall, at his and their own costs and charges, carry or cause to be carried all the corn and grain from which the said straw, chaff and calder shall arise, to any distance which the said *C. D.*, his executors, administrators or assigns shall require, not exceeding seventeen miles from the farm-house hereinbefore demised: AND ALSO that it shall and may be lawful for the said *A. B.*, his heirs or assigns, after the first of June of the last year of the said term, to deposit, stack and thatch, hay and fuel for firing upon a convenient part of the said premises: AND IT IS HEREBY AGREED AND DECLARED that the said *A. B.*, his heirs and assigns, or his or their lessee or lessees, or incoming tenant or tenants, shall be at liberty, at any time within the last summer season next before the end of the said term hereby demised, to sow such of the said demised

[illegible]ne the Green [illegible]ps, Hay, [illegible]raw, &c. [illegible]ising from [illegible] Corn, &c. [illegible]n Cattle, [illegible]der a Pe[illegible]y of 10*l.* [illegible] Load.

[illegible] in-barn the [illegible]n upon the [illegible]mises,

[illegible] to use the [illegible]w there.

[illegible]-barn, &c. [illegible], &c. and [illegible]re Thresh [illegible] same and [illegible]end on Pre[illegible]ses, and also [illegible]ay or Tur[illegible]ps, except [illegible]raw required [illegible]r Thatching, &c.

Liberty for Landlord to stack Hay, &c. on the Premises.

Liberty for Lessor to enter in the last Summer Sea-

premises with turnips as shall be fit and proper to receive and grow the same; and also full liberty to hoe and weed the same at pleasure, and free ingress, egress and regress, with horses, carts, servants and others, for that purpose; and that the said *C. D.*, his executors, administrators and assigns, shall not suffer any sheep or cattle to depasture thereon, or the same to be otherwise damaged or destroyed: AND IT IS HEREBY FURTHER MUTUALLY AGREED AND DECLARED by and between the parties hereto, that it shall and may be lawful to and for the said *A. B.*, his heirs or assigns, at any time or times during the continuance of the said term, to enter upon the said demised premises or any part thereof, except where any crops of corn shall be standing or growing, and there to plant and make any plantation or plantations of trees, not exceeding for that purpose, or planting in the whole, more than fifteen acres; and that in such case the said *A. B.*, his heirs or assigns, shall and will make to the said *C. D.*, his executors, administrators or assigns, an allowance, by way of abatement from the rent hereby reserved, of 2*l.* 10*s.* per acre for every acre of arable land which shall be so planted, and 3*l.* 10*s.* per acre for every acre of fatting land which shall be so planted, and so proportionably for every greater or less quantity than an acre: AND THE SAID *C. D.* shall, on the 24th day of June immediately preceding the expiration of this demise, give and deliver up the peaceable possession unto the said *A. B.*, his heirs or assigns (without being entitled to any diminution of rent), one-sixth part of the arable lands hereinbefore demised, and which one-sixth part shall be in olland of two years' laying, having been sown with good sound clover and rye grass, along with a crop of corn next immediately after a crop of turnips, at the rate of twelve pecks of clover and one peck of rye-grass seeds per acre: AND ALSO shall and will, at the expiration of this demise, leave one other sixth part of the said arable land in olland of one year's laying, having been sown as aforesaid: AND ALSO that he the said *C. D.*, his executors, administrators and assigns, shall and will, at the proper times in the last year of this demise, plough one other sixth part of the arable lands hereinbefore demised, with three clean earths at the least, and shall, in due season after the same shall be ploughed, sow the same with turnip seed, and harrow in the same, and hoe and keep clean and preserve the same for a crop; and, at the expiration of this demise, leave the same unfed, for the benefit of the said *A. B.*, his heirs and assigns, or his or their succeeding tenant or tenants; for which turnips it is hereby agreed that he and they, or his or their succeeding tenant or tenants of the same premises, shall pay unto the said *C. D.*, his executors, administrators or assigns, so much money as the same shall be valued at and be reasonably worth in the judgment of two competent persons, one of them to be chosen by the said *C. D.*, his executors, administrators or assigns, and the other of them to be chosen by the person or persons taking the same; and in case the said two persons so named shall disagree as to the amount of such valuation, then the same shall be referred to the valuation of a third competent person, to be chosen by the said two first chosen, and the valuation so to be made by them or him, as the case may be, shall be binding and conclusive upon all the said parties: AND ALSO shall not nor will, during the last three years of this demise, mow, or cause or suffer to be mowed, the fields, closes, pieces or parcels of land hereinbefore demised, or any of them, or any part or parts thereof respectively, more than once a year; or during the continuance of this demise, to be trodden down or damaged by heavy cattle: AND ALSO that the said *C. D.*, his executors, administrators and assigns, shall not nor will, in the three last years of this present demise, sow, plant or cultivate more than one crop of potatoes on the said demised lands, or any part thereof (garden ground alone excepted), without the consent of the said *A. B.*, his heirs or assigns: AND THAT THE SAID *C. D.*, his executors, administrators and assigns, shall not nor will permit or suffer any crop of coleseed to grow, stand, be and remain, as and for a crop of seed, upon the lands

son to sow Turnips.

Liberty for Lessor to enter and make Plantations, not exceeding 15 Acres in the whole, and to make an Allowance out of the Rent.

Lessee to deliver up a Sixth Part of Arable Land in last Year, having been sown with Clover; and at the end of Term, leave one other Sixth Part sown as aforesaid; and, in the last Year, to plough one other Sixth Part, and to sow same with Turnips, and leave the same for the Lessor, to be paid for by Valuation.

Lessee not to mow more than once during the last Three Years.

Not to plant more than one Crop of Potatoes during last Three Years.

Not to suffer any Crop of Coleseed to

hereby demised, at any time or times within the last four years of the term hereby granted, under a penalty of 50*l.* for every acre of the said demised lands which shall be so sown with coleseed, and shall remain as a crop for seed, such penalty to be recovered by the said *A. B.*, his heirs and assigns, in the same manner as is hereinbefore provided touching the additional rents hereby reserved, or in such other manner as he or they shall be advised: AND THE SAID *C. D.*, for himself, his heirs, executors, administrators and assigns, and for every of them, doth covenant, promise and agree to and with the said *A. B.*, his heirs and assigns, that he the said *C. D.*, his executors, administrators and assigns, shall and will, at the commencement of the last year of the said term of twenty-one years, hereby granted, leave to be fallowed one moiety or full half-part, at least of the land hereby demised, which shall be then in course of succession to be cultivated for green crops or fallowed: AND, on the 24th day of August then next ensuing, leave the other moiety of such last-mentioned lands in clover ley, after cutting the first crops of clover therefrom, and leave the same on the said demised premises: AND leave on the said demised premises all the dung and manure made thereon during the last year of the said term of twenty-one years, and during such part of the year then next following after the expiration of the said term of twenty-one years, as the said *C. D.*, his executors, administrators or assigns, shall continue to occupy the said farm-house, or homestead, and out-buildings, as hereinafter mentioned, without claiming or receiving any allowance for such dung and manure: AND shall and will also lay down with the summer corn, such as barley or oats, in the last year of the said term of twenty-one years hereby granted, a sufficient quantity, according to the usual and accustomed practice of the said lessee, at all times during the term hereby granted, of good clover and other grass seeds, in and upon such of the said demised lands as may have been cultivated for green crops or fallows in the preceding season, such clover and other grass seed to be paid for by the next incoming tenant: AND that, after such summer corn shall be cut, no stock, except hogs, well ringed, shall be turned in upon the seeds so sown: AND THAT THE SAID *C. D.*, his executors, administrators and assigns, shall and will permit the said *A. B.*, his heirs and assigns, or his or their next succeeding tenant or tenants, to plough the lands to be fallowed at any time from and after the commencement of the said last year of the said term hereby granted, and to plough the lands so to be left in clover ley, at any time from and after the 24th day of August in the same year: AND ALSO to sow seeds in any of the corn crops of the said last year of the term hereby granted; but in case the said *A. B.*, his heirs or assigns, or his or their next succeeding tenant or tenants, shall neglect to enter upon the said demised premises, for the purposes last aforesaid, then that the said *C. D.*, his executors, administrators or assigns, shall and will plough such fallows and clover leys, and sow such seeds (*e*): AND THE SAID *A. B.*, his heirs, executors, administrators and assigns, covenants, promises and agrees to pay, or procure to be paid, by the next succeeding tenant or tenants, to the said *C. D.*, his executors, administrators or assigns, a reasonable compensation for such ploughing and sowing of seeds, or for the turnip or coleseed crops, at a fair valuation, to be fixed by two referees, or their umpire, chosen and appointed in the usual manner: AND THE SAID *C. D.*, for himself, his executors, administrators and assigns, doth further covenant, promise and agree to and with the said *A. B.*, his heirs and assigns, that the said *C. D.*, his executors, administrators and assigns, shall and will permit the said *A. B.*, his heirs or assigns, or his or their succeeding tenant or tenants, to sow grass seeds with the summer corn, to be sown on the said premises, in the last year of this demise, and will harrow in the same gratis, and give him or them, or his or their incoming tenants four days' previous

Lessee to permit Landlord to enter during last Year of Term to plough Fallows.

And to sow Seeds.

But in case the Lessor neglects to enter for the above Purposes, Lessee to plough and sow.

To be paid for by Landlord, or succeeding Tenant, by Valuation.

Liberty for Landlord to sow Grass Seeds in last Year.

(*e*) See another form for this, post, Sect. 8, (h), p. 934.

notice of the time of sowing the summer corn: AND ALSO that he the said *C. D.*, his executors, administrators and assigns, shall and will provide for the next succeeding tenant or tenants, in the said farm-house, or homestead and out-houses, on the lands and premises hereby demised, necessary and reasonable rooms and accommodation for his, her or their servants and horses, from and after the said respective times for entering upon the lands so to be left fallowed and in clover ley, without demanding or receiving any abatement of rent or allowance for the same: AND shall and will permit and suffer such next succeeding tenant or tenants to carry out the dung from the farm-yards and other parts of the premises hereby demised to and upon the lands to be left for fallow and in clover ley, or any part thereof: IN CONSIDERATION WHEREOF, the said *A. B.*, for himself, his heirs and assigns, agrees to allow the said *C. D.*, his executors, administrators or assigns, the use of the barns, stable room, and accommodation for eight horses, the use of all other necessary out-buildings, part of the granary, sufficient of the farm-yards and straw-yards on or belonging to the said demised premises, for any time not exceeding nine months after the expiration of the term hereby granted, for threshing out and disposing of the corn and other produce of the said demised premises, and for foddering the cattle thereon; the said *C. D.*, his executors, administrators or assigns, yielding and surrendering up to such next succeeding tenant or tenants, such straw and other fodder of the said last year's crops as shall not have been consumed on the said demised premises, by his, her or their cattle: AND THAT THE SAID *C. D.*, his executors, administrators or assigns, shall and will provide the said *A. B.*, or his or their incoming tenant or tenants, with two waggon loads of straw per month in each and every month after the expiration of the said term hereby granted, without demanding or being paid any compensation for the same, for so long as the said *C. D.*, his executors, administrators or assigns, shall enjoy, use and occupy, as is hereinbefore mentioned, the said barns and premises for threshing and disposing of his or their said corn and other produce, and for foddering his or their cattle: AND also shall and will leave upon the said demised premises, not less than one hundred tons of good hay, at the expiration of the said term, such hay, nevertheless, to be paid for by the said *A. B.*, his heirs or assigns, or his or their next incoming tenant or tenants, at a fair valuation, according to the custom of the country, to be fixed and settled by two referees or their umpire, to be named and appointed in the usual manner: AND ALSO that he the said *C. D.*, his executors, administrators or assigns, shall and will permit and suffer the said *A. B.*, his heirs and assigns, or his or their succeeding tenant or tenants in the same premises, and their or any of their servants and workmen, with horses and oxen, and all necessary implements of husbandry, in due season in the last year of this demise, to enter into and upon all such of the arable lands hereinbefore demised as shall then be sown with summer corn, and to harrow and roll in the same, and shall and will give timely notice to the said *A. B.*, his heirs or assigns, or the succeeding tenant or tenants of the said premises, at the proper time when the same ought to be sown as aforesaid, and shall and will carefully protect and preserve the same from being destroyed or damaged by cattle or otherwise; and also that it shall be lawful for the said (landlord), his heirs and assigns, or the next incoming tenant, to sow grass seeds with the corn in the last year of the said term, the said (tenant), his executors, administrators or assigns, harrowing in the same without being paid or allowed for the same, and without afterwards feeding off, or consuming the grass produced therefrom: AND ALSO shall and will find and provide convenient lodging-room for the servants and workmen of the said *A. B.*, his heirs or assigns, or his or their succeeding tenant or tenants of the said premises, and convenient stable room for his or their horses, and for hay and straw provided for such horses, during the time of such workmen, servants and horses being employed in sowing the said clover and other grass seeds, and in harrowing and rolling in

Lessee to fi Room in H for Servant and Stables Horses of t succeeding Tenant.

To permit s ceeding Ten to carry out Dung on Pr mises.

In considera tion of whic Landlord to allow use of the Barns, & forNineMont after the Exp ration of the Term.

Lessee to yiel up Straw, &c. of the last Year's Crop t succeeding Tenant.

Lessee to pro vide the Less or incoming Tenant with Two Loads of Straw per Month, as lon as he occupie the Barn, &c. after the Exp ration of the Term.

Lessee to lea 100 Tons of Hay, to be pa for by Valua- tion.

To permit Le sor to enter in the last Year for the Pur- poses of Hus- bandry:

Lessor may enter to sow Grass, &c.,

and find Lod ing for Lesso Workmen, &c

the same: AND FURTHER, that the said *C. D.*, his executors, administrators and assigns, shall and will from and after the feast day of St. Martin the Bishop, in the winter next preceding the expiration of the said term, and from thenceforth to the expiration thereof, permit and suffer the said *A. B.*, his heirs or assigns, or his or their next succeeding tenant or tenants, and his and their servants and workmen to enter into the said lands, grounds and premises hereby demised, or any part or parts thereof, for the purpose of making any kind of husbandry therein or thereupon, for the future occupation and cultivation of the said premises, as need or occasion may require: AND ALSO that it shall and may be lawful to and for the said *A. B.*, his heirs and assigns, with servants, horses, plough, carts and all other necessary implements of husbandry, at day next preceding the expiration of the said term hereby demised, to enter upon such closes and grounds, parcel of the said hereby demised premises, as then ought to lie fallow and unsown, and the same to cultivate, plough, fallow and manure, and have the grass, herbage, sheep walks and sheep common thereof; and also to enter upon the dung which shall be then in the yard or yards, and at the same time to have the dung in the dove-house, and the hen-dung in the hen-house: And also to have some convenient lodging-room in the said dwelling-house for his and their servants, and some convenient place to lay hay, straw and chaff in, and some convenient stable-room for their horses to stand and be in, without extinguishment of any of the yearly rents hereinbefore reserved, and without giving or making any allowance or satisfaction for the same: AND ALSO that in case the said *C. D.*, his executors, administrators or assigns, shall not consume all the grass and herbage, which shall be produced on the said premises, in the last year of the said term, he the said *A. B.*, his heirs or assigns, shall and will pay or allow to the said *C. D.*, his executors, administrators or assigns, so much money for the said grass and herbage on the said premises, at the end of the said term, as the same shall be valued to be worth *in the usual way* (*f*), [*or*, "as the same shall be valued by two indifferent persons, the one to be chosen by and on the part of the said *A. B.*, his heirs or assigns, and the other by and on the part of the said *C. D.*, his executors, administrators or assigns, or by such two persons as either of the said parties shall choose, in case the other of them shall neglect to make his nomination and choice within five days after notice in writing from the first-mentioned party so to do, such notice being delivered to him, or left at his or their usual place of abode in England;"] AND ALSO will pay unto the said *C. D.*, his executors, administrators or assigns, such sum of money as the last year's hay and turnips shall be valued at as aforesaid, within days after the valuation shall be made, and also the customary price and prices for threshing and dressing the last year's crop of corn, pulse and grain; and shall also cause the same to be carried out to such place or places, not exceeding the distance of miles from , as the said *C. D.*, his executors, administrators or assigns shall appoint, and shall take back the empty sacks: AND THAT THE SAID *A. B.*, his heirs and assigns, shall and will permit and suffer the said *C. D.*, his executors, administrators or assigns, to have the use of all the barns, yards and granaries hereby demised, for the laying in and threshing out of his or their crop or crops of corn or grain, which shall grow and arise upon the premises, in the last year of the said term hereby demised, for the spending of the straw, fodder, chaff and stover, which shall arise therefrom, with horses, cows, bullocks and other cattle, until the day of next after the expiration or other sooner determination of the said term of years hereby demised: AND ALSO to have some convenient lodging-room in the said hereby demised messuage or farm-house for his or their servants, and some convenient stable-room for his or their horses to stand and be in, and some convenient place to lay hay, straw

permit Lessor or succeeding Tenant to enter before the end of Term for the Purposes of Husbandry.

That the Lessor may enter within the Term to plough and fallow Ground.

And to have the Dung, and Lodging for Servants, &c.

Landlord to pay for Grass and Herbage upon the Premises.

Another Covenant in regard to the Valuation of Crops.

Landlord to pay for the last year's Hay and Turnips, and for threshing and dressing the last year's Crops, and to carry it same.

And to allow Room for threshing the Tenant's last Crop for Straw.

And Room for Servants.

(*f*) Or, instead of the words in italics, "according to the custom of the country in and about —— aforesaid."

Lessor to remove Cottages, &c.

(if any such there be), for necessary plough-bote to be used and spent upon the said premises, and not elsewhere, and to be set out for that purpose by the said *A. B.*, his heirs or assigns, on such notice as last aforesaid of the want thereof: AND ALSO that it shall be lawful for the said (landlord), his heirs and assigns, in case he or they shall be desirous so to do, at any time or times during the continuance of the said term, to remove any cottage or cottages now standing, or being upon the said premises, or to pull down or alter the site or position of any cottage or cottages in lieu thereof, in or upon such other part or parts of the said farm, as he or they may think fit: AND

Lessor to take

ALSO that it shall be lawful for the said (landlord), his heirs and assigns, at any time or times during the said term, to take any quantity of the land hereby demised for the purpose of making exchanges for the convenience of occupation, and also to take any quantity of the lands into his or their own occupation for the purpose of planting, building or otherwise, not exceeding ten acres; and also to alter, or divert, or stop up, or make any footpaths, roads, or ways, or any ponds, or pond, or streams, or stream of water, he the said (tenant), his executors, administrators or assigns, being allowed such deduction and abatement from the rent hereby reserved, as shall be determined by three indifferent persons, in the same manner as the effects left upon the premises in the last year of the term are hereby agreed to be valued

Allowance to Lessee at end of Term.

and paid for by the said (landlord), his heirs and assigns: AND that he the said (landlord), his heirs or assigns, shall and will, at the end of the said term, allow the said (tenant), his executors, administrators or assigns, for all the hay and straw grown on the said demised lands during the last year of the term hereby granted, at a feeding out price, the hop poles in use during the same year, and the growing underwood in the woods, shaws and hedgerows, down to the stub, the dung in mixens and in the yards, at a sale price, and the rent, rates, and taxes and labour, in respect of the fallows, left such sum of money as the same shall be valued at, between the 7th and 21st days of October in the said last year, by two or three indifferent persons (one to be chosen by the said (landlord), his heirs or assigns, one by the said (tenant), his executors, administrators or assigns, and the third by the two persons so to be first chosen), or any two of them, such third person to be chosen prior to such two persons entering upon their valuation; and it is hereby mutually agreed between the parties to these presents, that at the end or other sooner determination of this demise proper persons shall be appointed to view and examine the whole of the premises hereby demised, and if the whole of such premises shall not be left by the said (tenant), his executors, administrators or assigns, in good repair and condition, according to all the covenants hereinbefore contained for that purpose, then the said two indifferent persons or their umpire shall value, award and determine the sum of money which the said (tenant), his executors, administrators or assigns, shall pay or allow to the said (landlord), his heirs or assigns, as a compensation for the same, and the sum of money so awarded may and shall be deducted by the said (landlord), his heirs or assigns, from the amount of the valuation of effects hereinbefore mentioned; and it is hereby further agreed and declared between and by the said parties to these presents, that in case either of the said parties shall neglect or refuse to name a person on his or their part to proceed in such valuation, award and determination, as hereinbefore provided, for seven days after being required in writing by the other of such parties so to do, the person named by the party giving such notice shall proceed alone in such valuation, award and determination, as aforesaid; and the valuation, award and determination, of such valuer and arbitrator, made and delivered in writing to either of the said parties, shall be binding and conclusive on each of the said parties to these presents, their respective heirs, executors, administrators and assigns, in respect of the matters comprised in such valuation, award and determination: AND it is further agreed that the submission to arbitration, herein contained, and any award or valuation, to be made in pursuance thereof, may be made a rule of her Majesty's Court of Queen's

Schedule of Closes.

THE SCHEDULE TO WHICH THE FOREGOING INDENTURE REFERS.

Plan Number.	Names of the Fields.	Use.	Acres.	Roods.	Perches.
1	Denny Abbey, Homestead, Garden and Park	Pasture	8	3	12
3 & 9	The Grove	Wood	2	2	18
11	Little High Meadow	Arable	30	2	24
14	Marsh Lands.....	Marsh	20	1	6

SECT. 8.—*Covenants and Clauses.*

(a) *General Words in the Parcels.*

General Words in Leases of Houses.

AND ALL out-houses, buildings, coach-houses, barns, stables, dove-houses, yards, cellars, areas, vaults, benefits and advantages of ancient and other lights, ways, paths, passages, drains, pipes, waters, watercourses, lawful and customary rights and privileges of common; and all the rights, privileges, advantages, easements, and appurtenances whatsoever, to the said messuage or tenement and premises belonging, or in anywise appertaining, or with the same, or any of them, now or heretofore lawfully or usually holden, used, occupied or enjoyed.

General Words in a farming Lease.

AND ALL houses, out-houses, cottages, buildings, stables, yards, gardens, orchards, meadows, feedings, pastures, commons, and all commonable lands, timber and other trees, woods, underwoods, hedges, ditches, mounds, fences, ways, waters, watercourses, privileges, advantages and appurtenances, to the said messuage, tenement, or farm-house and premises belonging, or anywise appertaining, or at any time heretofore used, occupied or enjoyed therewith or accepted, reputed or deemed as part or parcel thereof, or any part thereof.

(b) *Covenants to Repair.*

Covenant by Lessee to repair Inside of Premises.

AND ALSO that the said *C. D.*, his executors, administrators or assigns, shall and will at all times, during the continuance of the said term hereby granted, well and sufficiently repair, and keep repaired, in a workmanlike manner, and with good materials, at his or their own proper costs and charges, all and singular the glass and other windows, shutters, doors, locks, fastenings, partitions, ceilings, floors, chimney-pieces, shelves, pavements, privies, sinks, drains, cisterns, pipes, watercourses, and all other the inside of the said premises hereby demised; and also shall and will, at the end or other sooner determination of the said term hereby granted, yield and deliver up the said messuage or dwelling-house and warehouse, in good and tenantable repair, to the said *A. B.*, his executors, administrators or assigns.

Covenant by Lessor to repair Outside of Premises.

AND THE SAID *A. B.*, for himself, his heirs, executors, administrators and assigns, hereby covenants and agrees with the said *C. D.*, his executors, administrators and assigns, in manner following, that is to say, that he the said *A. B.*, his heirs or assigns, shall and will at all times, during the continuance of the term hereby granted, at his or their own costs and charges, well and sufficiently repair and keep repaired the walls, roof, and outside of the said premises hereby demised; and also shall and will, once in every four years, during the said term, paint in good and proper oil colours, the doors, window frames, rails and other the outside wood and iron-work of the said premises.

Covenant as Party-Structures, &c. (*i*).

AND THE SAID —— (*k*), for himself, &c., hereby covenants and agrees with the said ——, his, &c., that he the said ——, his, &c., shall and will, during the said term, as often as occasion shall be or require, bear, pay and allow [(*l*) a reasonable sum towards] the building, making, supporting and repairing of all party-walls, party-gutters, party-structures and drains, which shall belong to the said demised premises, or any part thereof, with all the necessary reparations and amendments.

Covenant that Lessee shall not be liable to rebuild in case of accidental Fire.

AND LASTLY, it is hereby covenanted and agreed, by and between the said parties to these presents, that he the said *C. D.*, his executors, administrators, and assigns, shall not by virtue hereof, or by virtue of any thing herein contained, be chargeable with any damage, which shall or may be occasioned during the term hereby demised, by accidental fire; and that accidents by fire are wholly excepted out of the covenant hereinbefore mentioned, for keeping and leaving the said premises in repair; and the said *C. D.*, his executors, administrators and assigns, is not, nor shall be construed to be, by colour of any clause in these presents contained, liable to make good any such accidents or damage occasioned thereby, but that the same shall be repaired and made good, or if necessary the said premises be rebuilt, as soon as may be after the happening of any such fire, at the expense and charge of the said *A. B.*, his heirs or assigns, anything in these presents contained to the contrary thereof in anywise notwithstanding.

(c) *Covenant by Lessor to pay Taxes.*

Covenant by Lessor to pay Taxes or allow Lessee to deduct them out of the Rent.

AND THE SAID *A. B.*, for himself, his heirs, executors, administrators and assigns, hereby covenants and agrees with the said *C. D.*, his executors, administrators and assigns, that the said *A. B.*, his heirs or assigns, shall and will discharge and pay, as they severally and respectively become due, all taxes, assessments, rates(*m*) [rent-charges in lieu of tithes (*n*)] and other impositions whatsoever, which now are or shall at any time or times hereafter, during the said term hereby granted, be taxed, charged or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or will from time to time allow the said *C. D.*, his executors, administrators and assigns, to deduct and retain the amount of such taxes, assessments and impositions, out of the rent which shall have become payable by him or them in respect of the same premises by virtue of these presents, whether such taxes, assessments and impositions shall have accrued and become payable for or in respect of and within the same period as the rent out of which the same shall be deducted or not (*o*).

(d) *Covenants in Leases of Public-Houses.*

Covenant by Lessee of a Public-House to keep and leave in proper Condition, Garden and Bowling-Green.

AND ALSO shall and will keep and leave, in a proper state and condition, the aforesaid garden and bowling-green [*they should be named in the parcels*]: and shall and will with all convenient speed repair and make good again all such injuries, breaches and damages as shall happen or be done to the said demised premises, by the negligence or fault of the said *C. D.*, his

(*i*) It would be as well in all leases and agreements for leases of property within the operation of the Metropolitan Building Act, that an *express* contract should be inserted as to party-structures. See ante, 574, 575.

(*k*) This may be a covenant on the part of either lessor or lessee, according to agreement.

(*l*) Instead of the words between brackets, which leave the amount uncertain, the words "all the expenses of," or "one-half of the expenses of," or other words, according to the agreement between the parties, may be inserted. See *Barrett* v. *Bedford* (*Duke*), 8 Term Rep. 602; and see ante, 577.

(*m*) See note (*h*), ante, 896.

(*n*) See note (*i*), ante, 896.

(*o*) The latter part is necessary, for it has been frequently decided that the lessee cannot set off against the rent of a given year the land-tax of a former year, which was omitted to be deducted out of the rent of that former year; *Stubbs* v. *Parsons*, 3 Barn. & Ald. 516; *Andrew* v. *Hancock*, 3 Moore, 278; 1 Brod. & Bing. 37; and see *Spragg* v. *Hammond*, 4 Moore, 431; 2 Brod. & Bing. 59.

executors, administrators or assigns, or his or their inmates, servants, guests or customers.

Not to convert House into a private one.

AND FURTHER, he the said *C. D.*, his executors, administrators or assigns, shall not nor will, at any time during the continuance of this demise, convert the said messuage into a private house, or use the same, or suffer it to be used for any other purpose than as an inn, tavern or public-house.

and so manage House as to lose the Licence: to endeavour to extend Custom.

AND shall and will conduct and manage the same in a proper and orderly manner, so as to afford no ground or pretence for discontinuing the licence thereof; but shall and will use his and their best endeavours, at all times, to increase and extend the custom and business thereof.

Sell such liquors only as have been purchased of the Lessor.

AND FURTHER, that the said *C. D.*, his executors, administrators or assigns, shall not nor will, during the said term hereby granted, buy, receive, sell or dispose of, either directly or indirectly, or permit to be bought, received, sold or disposed of, either directly or indirectly, in, upon, out of or about the said messuage, tenement, and public-house and premises hereby demised, or any part thereof, any wine, brandy, rum, hollands, geneva, shrub, beer, ale, porter, stout, purl, perry, cider or any other spirit or liquor whatsoever, other than such as shall have been bonâ fide purchased of the said *A. B.*, his executors, administrators or assigns, provided he or they shall at such time deal in and vend such liquors as aforesaid, and shall be willing to supply the same to the said *C. D.*, his executors, administrators or assigns, at the fair current market price thereof.

(e) *Covenants when there is an original Lease.*

Covenant by Lessor to produce original Lease and Assignment.

AND FURTHER, that he the said *A. B.*, his executors, administrators and assigns, will, during the said term (if not prevented by fire or other inevitable accident), at the request and costs of the said *C. D.*, his executors, administrators or assigns, produce and show, for the purpose of defending and proving his or their title to the said premises, an indenture of lease, dated the day of , whereby the said [*original landlord*] demised the said premises with others to one *E. F.*, and also a deed-poll indorsed thereon, whereby the said *E. F.* assigned the said premises to the said *A. B.*, [*lessor.*]

Covenant for quiet Enjoyment free from the original Lease.

[*After the usual covenant for quiet enjoyment of the premises, go on to say:*] And that freed and discharged, or otherwise by the said *A. B.*, his executors, &c., saved harmless and indemnified, from the rents, covenants, provisoes and agreements, reserved and contained in a certain indenture of lease bearing date the day of , in the year of our Lord , whereby the said *A. B.* holds the said messuage or tenement and premises hereby demised, from the date thereof, for the term of sixty-one years, and from all claims and demands whatsoever in respect thereof(*o*).

Covenant to refer Disputes to original Landlord.

AND THAT IF, at any time hereafter, any dispute shall arise between the said *C. D.*, his executors, administrators or assigns, and any other of the tenants of the said original landlord, his heirs or assigns, touching the premises to them respectively demised, or the walls, lights, privileges or appurtenances belonging thereto, or any annoyance arising therefrom, the said *C. D.*, his executors, administrators or assigns, will from time to time refer every such dispute to be determined by the said [*original landlord*], his heirs or assigns, and in case of infancy, by the guardians of the infant, whose determination, respectively, the said *C. D.*, his executors, administrators and assigns, will abide by and perform.

Covenant as to Party-Structures in London.

[Covenant as to party-structures in London, see ante, 931(*p*).]

(*o*) A covenant for the lessee to indemnify his lessor against the nonperformance of the covenants in the original lease is also useful. See *Walker* v. *Hatton*, 10 Mees. & Wels. 249; 2 Dowl., N. S., 263; *Logan* v. *Hall*, 4 C. B. 598.

(*p*) This is a very useful covenant to prevent future litigation; see ante, 574, 575.

(f) *Covenant for Renewal.*

AND THE SAID *A. B.* doth hereby for himself, his heirs and assigi further covenant, promise and agree, to and with the said *C. D.*, his ex cutors, administrators and assigns, that in case the said *C. D.*, his executoı administrators or assigns, shall be desirous of taking a new lease of the sa premises, after the expiration of the said term hereby granted, and shì within three calendar months before the expiration thereof (*q*), signify su his or their desire in writing under his or their hand, he the said *A. B.*, h heirs or assigns, shall and will, at or before the expiration of the said ter hereby granted, at the proper costs and charges of the said *C. D.*, his ex cutors, administrators or assigns, and on payment of the sum of ı and by way of fine or premium for such renewal, make, execute and delive or cause to be made, executed and delivered, a new and fresh lease of th messuage or tenement, and all other the premises hereby demised, for further term of twenty-one years, to commence from and after the expiratioı of the present term hereby granted, the same to be at the same yearly rent payable in like manner, and under and subject to the like covenants, pro visoes and agreements, as are contained in these presents (except a covenan for the renewal thereof at the end of such further term (*r*)), [*or*, "including the said covenant for renewal," *as the case may be.*]

(g) *Proviso for Determination.*

PROVIDED ALWAYS, and it is hereby declared and agreed by and between the said parties hereto, that it shall be lawful for the said *A. B.*, his heirs or assigns, or for the said *C. D.*, his executors [*or if the premises are leasehold, say* "for either of the said parties, his respective executors, administrators or assigns," *and leave out the words between brackets underneath*], to determine and put an end to this present demise, and the term hereby granted of the said messuage or dwelling-house and premises, at the end of the first or any succeeding year of the said term, upon delivering to the other of them, his executors, administrators or assigns [*or*, "his heirs or assigns," *as the case may be*], six calendar months' previous notice in writing, or leaving the same at his or their usual place or places of abode; and in either of the said cases, this present indenture, and every clause, matter and thing herein contained, shall, upon the expiration of the said notice, and performance of the covenants hereinbefore contained relative thereto, on the part of the persons giving the same notice, cease, determine and be void, any thing hereinbefore contained to the contrary notwithstanding (*s*).

(*q*) The lessee should take care to apply for the new lease before the expiration of the old one, or he may lose the benefit of this covenant by his default; see *Rubery* v. *Jervoise*, 1 Term Rep. 229. It would seem that a covenant for renewal is not personal to the lessee; and Lord Mansfield held, in *Hide* v. *Skinner*, 2 P. W. 196, "that a covenant to renew at the request of the lessee extended to his executors, the executors of every person being implied in himself;" and that assignees of a bankrupt are entitled to the benefit of the covenant: in framing it, however, care should be taken to insert "executors, &c."

(*r*) This exception does not seem necessary, as it has been repeatedly held that a proviso in general terms, that the lease to be granted shall contain the same covenants and agreements as the lease containing the covenant, will not extend to a covenant for renewal; and in a late case it was held, that a tender of a new lease, with all the other covenants except the covenant for renewal, satisfied this covenant; *Iggulden* v. *May*, 7 East, 237; 2 New Rep. 449; 3 Smith, 269. See ante, 305.

(*s*) It has been held, that the payment of rent, and the performance of the other covenants, form a condition precedent to the lessee's determination of the term, under a proviso of this kind, at the end of the first seven or fourteen years; and that his merely giving six months' notice, expiring within either of these periods, was not sufficient for that purpose; see *Porter* v. *Sheppard*, 6 Term Rep. 665; see also *Frier* v. *Grey*, 5 Exch. 584; ante, 95. A proviso of this sort, for determining the lease by notice, will not authorize the determination of the

Another Form of Proviso enabling the Lessee to determine the Lease at the end of Seven or Fourteen Years, giving Six Months' Notice.

PROVIDED ALSO, and it is hereby agreed between the several parties to these presents, that if the said *C. D.*, his executors, administrators or assigns, shall be desirous of putting an end to this present demise, at the expiration of the first seven years, or fourteen years of the said term of twenty-one years hereby granted, and shall for that purpose deliver to the said *A. B.*, his heirs or assigns, or leave at his most usual place or places of abode, six months' previous notice in writing, of such his or their desire, and shall pay or cause to be paid all arrears of rent, and perform all and every the covenants hereinbefore contained, and on his and their part and behalf to be performed, then, and in such case (*t*), immediately after the expiration of the said term of seven or fourteen years, this present lease, and every thing herein contained, shall cease and be absolutely void to all intents and purposes whatsoever.

(h) *Exceptions in Farming Leases.*

Exceptions of Woods, &c.

EXCEPT AND ALWAYS RESERVED unto the said *A. B.*, his heirs and assigns, all and all manner of woods, groves, coppices and springs, and all trees of oak, ash, elm, and all other timber and timber-like trees whatsoever, and the branches, and sheds, and lops of the same; and all fruit trees, but not the fruit thereof; and all pollards and willows, and all other trees whatsoever, and all the underwood, thorns, bushes and quicksets, in, upon or about the said premises, except the lops and tops of pollards, stubs and surplus thorns required for firing, which may be taken by the said *C. D.*, his executors, administrators and assigns (*u*); and all the reeds in the marshes now standing, growing and being, or which, at any time or times hereafter, during the continuance of this demise, shall stand, grow or be upon the said premises or any part thereof; and also all mines and quarries in, under and upon the said premises (*x*); and all such marl, clay, chalk, brick earth, gravel, sand, stones and other materials, which now are, or hereafter during the continuance of this demise shall be, under or upon the said premises, or any part or parts thereof, as the said *A. B.*, his heirs or assigns, may choose to have and carry away; with free liberty of ingress, egress and regress to and for the said *A. B.*, his heirs and assigns, and his and their agents, servants and workmen, at seasonable times in the year, during the continuance of this demise, with or without horses, carts, carriages and all other necessary things, into, upon, from and out of all or any part or parts of the premises hereinbefore demised, to view, fell and cut down, hew, grub up, cut, saw, convert, dig for and carry away the said excepted woods trees, minerals and other things respectively, or any part or parts thereof respectively; and also to graft and plant and transplant trees, and sow seed-trees, in or near the hedge-rows, borders and waste places, and in the woods, groves, coppices and springs of or belonging to the said premises, and to fence about and preserve the same from injury by cattle or otherwise, at his and their free will and pleasure, thereby doing as little damage as possible to the said *C. D.*, his executors, administrators or assigns: AND ALSO except and always reserved unto the said *A. B.*, his heirs and assigns, all manner of game, fish and wild fowl, with free liberty for him or them, and his and their

Mines, &c.

Game, &c.

lease as to part only, though it contains several demises of distinct parts; *Doe* d. *Rodd* v. *Archer*, 14 East, 245; and where it is so intended, a special clause to that effect should be introduced. As to the party to whom the notice should be directed, see *Roe* d. *Bamford* v. *Haley*, 12 East, 464; and *Right* d. *Fisher* v. *Cuthell*, 5 Esp. 149; 5 East, 491; 2 Smith, 83.

(*t*) If the power of determining is to be mutual, add, "or if the said *A. B.*, his heirs or assigns, shall be desirous of determining the said term hereby granted at the end of the said seven or fourteen years, and of such his or their desire shall give unto the said *C. D.*, his executors, administrators or assigns, such previous notice as is hereinbefore provided to be given by the said *C. D.*, his executors, administrators and assigns, for such purpose, then, and in either of the said cases, immediately," &c.

(*u*) See another form, ante, 908.

(*x*) See another form, post, 935.

servants and friends, at all seasonable times, to hunt, hawk, fish, fowl, set, course, shoot and sport upon or over the said premises hereby demised, or any part or parts thereof (*y*): AND full and free liberty of ingress, egress or regress to and for him and them, and his and their agents, servants, and workmen, at all seasonable times in the year, into, upon, from and out of any part or parts of the said premises, to view the state and condition of the buildings thereon, and to pull down, rebuild, alter and repair the houses and buildings thereon, or any of them, at their or his pleasure, and also to view the state and condition of the repairs hereinafter covenanted to be done by the said *C. D.*, his executors, administrators and assigns, to give notice in writing to the said *C. D.*, his executors, administrators and assigns, for doing such repairs as shall from time to time be necessary and proper to be done; and also to bring, carry, fetch, lay and make all the materials and things necessary and proper to be used in or about the pulling down, rebuilding, altering or repairing the said house, buildings and premises, or any part or parts thereof, thereby doing as little damage as possible to the said *C. D.*, his executors, administrators and assigns (*z*): AND ALSO except and reserved unto the said *A. B.*, his heirs and assigns, free liberty for him and them, and his and their succeeding tenant or tenants of the said premises hereby demised, and their or any of their servants and workmen, with horses and all necessary implements of husbandry, in due season, in the last year of this demise, to enter into and upon so much of the arable land hereby demised, as shall be then sown with summer corn, there to sow clover or grass seeds with such summer corn, and to harrow and roll in the same (*a*): AND ALSO except and reserved unto the said *A. B.*, his heirs and assigns, convenient lodging room for his or their servants and workmen, and convenient stable room for his or their horses, and for hay, straw and provender for such horses, during the time of such horses and workmen being employed in sowing the said clover and other grass seeds, and in harrowing and rolling in the same. And also free liberty of ingress, egress and regress for him and them, and his and their servants and workmen with horses and carriages, or otherwise, to come, go, pass and repass into, over, upon and from the said premises, or any of them, or any part or parts thereof, at all seasonable times, for any reasonable cause or thing whatsoever: TO HAVE AND TO HOLD, &c.

Power to enter and do Repairs.

Power to enter on Part in last Year.

Lodging for Servants.

(i) *Exception of Mines.*

AND ALSO excepting all coals and seams of coals, mines, minerals, and quarries of stone, beds of sand, gravel, marl or clay, of what nature and kind soever, which now are, or at any time, and from time to time hereafter, shall or may be found in, upon or under the said hereby demised premises, or any part thereof; with free liberty of ingress, egress, and regress to and for the said *A. B.*, his heirs and assigns, and his and their agents, servants, and workmen, and all others to be by him or them, or any of them authorized, to come into and upon the said hereby demised premises, and every part thereof, to work and dig for the said coals, mines, minerals, and quarries of stone, beds of sand, gravel, marl or clay, and to sell and dispose of whatever may be there found at his and their respective will and pleasure; and also with full and free liberty to erect steam-engines, and to sink pits, and make waggon-ways, and to use all other inventions of what nature or kind soever, for the draining, working, leading, carrying away, selling and disposing of the same (*b*).

Exception of Mines, &c. and Reservation of Power to work them.

(j) *Covenant for Lessee's Purchase.*

AND LASTLY, that if the said *C. D.*, his executors, administrators or assigns, shall at any time before the day of , which will be in the

Lessee to have Liberty to purchase the Fee for a certain Sum.

(*y*) See another form, ante, 910.
(*z*) See another form, ante, 909.
(*a*) See another form, ante, 924.
(*b*) See another form, ante, 934.

year , be desirous of becoming the purchaser or purchasers of the said hereditaments and premises hereby demised, or intended so to be, and the reversion and inheritance thereof in fee simple, free from all incumbrances at the price or sum of , and shall give to the said *A. B.*, his heirs or assigns, or leave at the last or most usual place of his or their residence or abode in England, seven days' notice in writing of such his or their desire, then and in that case he the said *C. D.*, his executors, administrators or assigns, shall be entitled to become the purchaser or purchasers of the same at that sum: and in case the said *C. D.*, his executors, administrators or assigns, shall, on or before the said day of pay, or tender, or cause to be paid or tendered unto the said *A. B.*, his heirs or assigns, the said sum of (and pay all arrears of rent up to that time), then the said *A. B.*, his heirs or assigns, and all other necessary and proper parties, shall and will, at any time after such payment or tender shall be made as aforesaid, on the request, and at the costs and charges of the said *C. D.*, his executors, administrators or assigns, make, do, act, acknowledge, levy, suffer and execute, or cause to be made, &c., all such acts, deeds, conveyances and assurances, in the law whatsoever, for effectually conveying and assuring the hereditaments and premises hereby demised, and the inheritance in fee simple thereof, and of every part thereof, with their appurtenances, unto and to the use of the said *C. D.*, his executors, administrators and assigns, for ever, or to the use of such other person or persons, and in such other manner, as he or they shall direct, free from all incumbrances, as by the said *C. D.*, his executors, administrators or assigns, or his or their counsel in the law shall be lawfully and reasonably devised or advised and required, and to be tendered to be made, done and executed. IN WITNESS, &c. (*c*).

(k) *Proviso that Lessee may take his Son Partner.*

Power for Lessee to take his Son as a Partner in the Farm.

Lessee's Son to be jointly responsible for Rent, &c.

PROVIDED NEVERTHELESS, and it is hereby further agreed and declared, that it shall and may be lawful to and for the said *C. D.*, at any time during the continuance of this present demise, to take his son *E. F.* into partnership with him in regard to the premises hereby demised, as co-tenant thereof, in case the said *C. D.* shall be minded or desirous so to do, any thing hereinbefore contained to the contrary notwithstanding; PROVIDED, and upon this express condition nevertheless, that immediately the said *C. D.*, and his said son *E. F.*, their executors and administrators, shall be jointly and severally bound and liable for the payment of the said several yearly rents hereby reserved, and to the performance of all and singular the covenants and agreements hereinbefore and hereinafter mentioned and contained, as fully and effectually as if he, the said *E. F.*, was a party to and executed these presents: AND FURTHER, that in such case, the said *E. F.* shall at his own proper cost and charge, execute unto the said *A. B.*, his heirs or assigns, all such reasonable deeds and assurances for the payment of the said rents, and performance of the said covenants and agreements herein reserved and contained, as he the said *A. B.*, his heirs or assigns, or his or their counsel learned in the law, shall advise or devise.

Lessee's Son to execute Deeds for securing Rent and performing Covenants.

(l) *Covenant not to occupy another Farm.*

Covenant not to occupy any other Farm.

AND ALSO, that he the said *C. D.*, his executors or administrators, shall not nor will, during the said term, hire, occupy or carry on, or be directly or indirectly, as principal, agent or otherwise, concerned or engaged in hiring, occupying or carrying on any other farm or lands whatsoever, without the previous consent in writing of the said *A. B.*, his heirs or assigns; AND ALSO shall and will personally inhabit and occupy the farm-house with his or their family during the said term.

(*c*) This should be the last covenant in the deed.

and assigns, all that messuage, &c. [*here transcribe the description of the parcels from the deed, but omitting the general words*] TO HOLD to the said *C. D.*, his executors, administrators and assigns, from the day of last past, for forty years, at the rent of 15*l.* The execution of which said indenture of lease is witnessed, as to the said *A. B.*, by [*first witness*] of, &c., and [*second witness*] of, &c.; and as to the said *C. D.*, by [*first witness*] of, &c., and [*second witness*] his clerk; and the same is hereby required to be registered by the said *C. D.* AS WITNESS his hand and seal.

[*Lessee's signature and seal.*]

Signed and sealed in the presence of { *E. F.* of, &c.
G. H. of, &c.

CHAPTER III.

AGREEMENTS.

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SECT. 1.—*Agreement for a Term, with a Covenant to grant a Lease at the End of the Term.*

MEMORANDUM OF AN AGREEMENT (*a*), made and entered into this 10th day of June, 1855, by and between *A. B.*, of, &c., of the one part, and *C. D.* of, &c., of the other part, whereby, in consideration of the rent hereinafter mentioned and agreed to be paid to the said *A. B.*, it is agreed that the said *A. B.* shall demise and let to the said *C. D.*, and the said *C. D.* shall take, hold, possess and enjoy, a certain messuage or tenement, with the garden and appurtenances thereto belonging, situate, lying and being in, &c., in the parish of, &c., in the county of, &c., now or late in the occupation of *E. F.*, together with all that field or close, situate, lying, and being in, &c. aforesaid, called or known by the name of, &c., now or late in the occupation of, &c., together with all ways, paths, passages, watercourses, easements, and appurtenances whatsoever thereunto belonging, from the 25th day of March last, for and during the term of four years, the said *C. D.* YIELDING AND PAYING the sum of 100*l.* yearly, by four equal quarterly payments, on the respective days following, that is to say, the 24th day of June, the 29th day of September, the 25th day of December, and the 25th day of March; and the said *C. D.* also yielding and paying the said yearly sum or rent of 100*l.* for and during the time that the said *C. D.* shall hold and enjoy the said messuage or tenement and its appurtenances, and the said field or close and its appurtenances, after the expiration of the term for which they are respectively hereby demised, by equal quarterly payments on the respective days and times aforesaid: AND IT IS FURTHER AGREED, that the said *A. B.* shall, on or before the 25th day of December next, put in good and tenantable repair, order and condition, the said messuage or tenement, with

(*a*) Agreements of this kind are certainly not to be recommended, on account of the unsatisfactory state in which they place the rights and remedies of the respective parties.

its appurtenances, and on or before the day last aforesaid put the hedges and ditches of the said field or close in good order and condition: IT IS ALSO AGREED, that the said *C. D.* shall, for and during the time he shall hold, occupy, possess and enjoy the same, keep the said messuage or tenement with its appurtenances in good and tenantable repair (*b*) (reasonable wear excepted), and preserve the hedges and ditches of the said field or close in good state, order and condition: AND IT IS FURTHER AGREED, that if the said *C. D.* shall or do, at any time or times hereafter, underlet or assign over all or any part of the said messuage or tenement, and its appurtenances, or all or any part of the said field or close and its appurtenances, to any person or persons whomsoever, it shall and may be lawful to and for the said *A. B.*, either by himself or his agent, immediately to re-enter and repossess the said messuage or tenement, and close, with their respective appurtenances, as if this agreement had never been made: AND THE SAID *A. B.* agrees that if the said *C. D.* shall be minded or desirous to take a lease of the said messuage or tenement, with its appurtenances, or of the said field or close, with its appurtenances, after the expiration of the said term of four years, for the further term of four years, at the yearly rent of 120*l.*, payable quarterly as aforesaid, the said lease to contain the common and usual covenants, he the said *A. B.* will grant to the said *C. D.* such lease for such further term, at such rent and payable as aforesaid; the costs and charges of the said lease to be defrayed and discharged by and between the said parties equally, provided the said *C. D.* gives the said *A. B.* notice in writing of such wish or desire within three months next before or prior to the expiration of the said term of four years, for which the said premises are hereby agreed to be let (*c*). AS WITNESS, &c.

Sect. 2.—*Agreement for Letting a House and Furniture from Year to Year.*

Parties.

Letting from Year to Year.

MEMORANDUM OF AN AGREEMENT, entered into this 20th day of March, 1855, between *A. B.* of, &c. of the one part, and *C. D.* of, &c. of the other part. THE SAID *A. B.* doth hereby agree to let unto the said *C. D.*, and the said *C. D.* doth hereby agree to take of the said *A. B.* all that messuage or tenement of him the said *A. B.* situate in , with the yards, garden, buildings and appurtenances thereto belonging, now in the occupation of the said *C. D.* for one whole year, from the 25th day of March instant, and so on from year to year, until this agreement shall be determined by one of the said parties giving, in the first or any subsequent year, to the other of them three calendar months' notice in writing for that purpose: AT AND UNDER the yearly rent of 100*l.*, payable by equal half-yearly payments, on the 29th day of September and the 25th day of March in each year, without any deduction (*d*): AND IT IS ALSO AGREED between the said *A. B.* and *C. D.* that the said *C. D.* shall and may have, hold, use and enjoy in and upon the said messuage and premises, the furniture and other effects belonging to the said *A. B.*, and mentioned or specified in the schedule hereunder written, during such time as the said *C. D.* shall continue to hold and occupy the said messuage and premises under this agreement, but not in any other manner, or for any further or other time, and not in any other house or place whatsoever: AND THAT HE, the said *C. D.*, his executors or administrators, shall pay to the said *A. B.*, his executors, administrators or assigns, for the use of the said articles of furniture, the sum

Rent payable Half-yearly.

Tenant to hold Furniture while he occupies the House.

Tenant to pay an additional Rent for Furniture.

(*b*) This will make the tenant liable to rebuild in case of fire; see ante, 896, note (*l*).

(*c*) It is as well in all agreements to add a clause similar to that at the end of the form in Sect. 7, p. 944, or in Sect. 10, p. 946, to prevent any question arising as to the effect of the instrument. See ante, Book I., Chap. IV., Sect. 16, p. 130.

(*d*) Under this clause the tenant will be obliged to continue to pay rent notwithstanding the premises are destroyed by fire. See ante, 895, note (*g*), and 896, note (*l*).

of 40*l.* a year, in addition to the said yearly rent of 100*l.*, and by half-year payments on the days and times appointed for the payment of the said rei of 100*l.*, and clear of all deductions on any account whatsoever (*e*): AND TH SAID *C. D.* doth hereby agree with the said *A. B.*, that he the said *C. D.*, h executors or administrators, shall and will, from time to time during the tim he shall continue to hold and occupy the said messuage and premises unde this agreement, well and substantially repair and keep repaired, at his or the own expense, all the glass and other windows, window shutters, locks, fasten ings, bells and all other fixtures in, upon and belonging to the said pre mises, and leave the same in such good repair at the time of quitting th occupation of the said premises: AND SHALL NOT NOR WILL wilfull injure all or any of the said furniture and effects, or use them as furnitur for or in any other house than the said messuage: and so far as circumstance will permit (and the reasonable use thereof, and damage thereto by fire, onl excepted) shall and will keep and preserve the same in such, or the same or the like state and condition as at present: and supply and make good (b replacing articles of the same sort and value) all such articles of furnitur and effects as shall be broken or destroyed by any unavoidable accident AND AT THE time of quitting the occupation of the said messuage and premises, shall and will deliver up to the said *A. B.*, his executors, administrators or assigns, or leave in or upon the said messuage or premises all the said furniture and other effects, in such state and condition as aforesaid, except such articles as shall be broken or destroyed as aforesaid, and in lieu thereof all such articles as shall have been substituted as aforesaid (*f*), and damage thereto by fire also excepted. WITNESS the hands of the said parties.

THE SCHEDULE to which the above-written memorandum of agreement refers. [*Here set out the articles.*]

SECT. 3.—*A short Agreement for Letting a House for One Year certain, and afterwards on a Three Months' Notice.*

MEMORANDUM OF AN AGREEMENT, made and entered into this 1st day of June, in the year of our Lord 1855, between *A. B.* of, &c. of the one part, and *C. D.* of, &c. of the other part, whereby the said *A. B.* hath agreed to let to the said *C. D.*, and the said *C. D.* hath agreed to take, all that messuage or tenement with the appurtenances, situate at , in the county of , for one year certain from the date hereof; and afterwards until the expiration of a three months' notice to quit, which shall at any time be given by either of the said parties to the other of them, for leaving the said premises at, or at any time after, the expiration of the said year; at and under the yearly rent or sum of 100*l.* of lawful money of Great Britain, or a proportionate part thereof, for any time less than a year that the said *C. D.* shall occupy the said premises after the expiration of the said first year hereinbefore mentioned. IN WITNESS, &c.

SECT. 4.—*Agreement for Letting a Cottage at a Weekly Hiring.*

AGREEMENT made this day of , in the year of our Lord 1855, between *A. B.* of , in the county of , of the one part, and *C. D.* of , in the county of , of the other part: THE said *A. B.* agrees to let and the said *C. D.* agrees to hire all that messuage, tenement or cottage, with the garden and premises belonging thereto, situate at

(*e*) It is perhaps better not to reserve the two rents separately; see *Newton* v. *Anderton*, 2 New Rep. 224; ante, 349.

(*f*) If the landlord is to pay taxes, &c., a clause similar to that, ante, p. 902, should be added. A clause may also be added to oblige the landlord to repair the roof and main walls and timbers, or to do other necessary repairs.

aforesaid, and now in the occupation of *L. M.* upon the terms following, that is to say, that the said *C. D.* may peaceably hold and occupy the said premises so long as the said *A. B.* and *C. D.* shall agree, that is, until one party shall give to the other party one week's notice to quit or of his intention to quit, such notice to be delivered either personally or left at the usual place of residence of the party so warned, and to end on a Saturday in any week: THAT the said *C. D.* shall pay to the said *A. B.* the rent or sum of shillings per week and every week during the continuance of this agreement; and for every week he shall hold over after such notice to quit shall have been given, and one week shall have expired from the service or delivery of such notice, double the rent hereby reserved shall be payable in respect of the same premises, and shall be recoverable by distress and sale of the goods and chattels of the said *C. D.*, and by every other manner provided by law for the recovery of rent in arrear; nevertheless the said *A. B.* shall not be in anywise prevented by the last-mentioned clause from proceeding by ejectment or summons, or otherwise to recover possession of the said premises after the expiration of such notice as aforesaid: AND the said *C. D.* hereby agrees faithfully to fulfil the terms of this agreement on his part to be performed, that he will keep all the glass windows and all the inside parts of the said premises well repaired, that he will reinstate and repair all such damage to the outside parts of the said premises, and the outbuildings and fences, as shall be occasioned by his own neglect or default, that if he fail to do so after one week's notice from the said *A. B.*, or his steward or agent, then the said *A. B.* may repair and make good the same, and recover the cost and expense thereof from the said *C. D.*: THAT he the said *C. D.* will not carry on or permit to be carried on any trade or business whatsoever on the said premises, nor underlet any part of the said premises, nor take a lodger without the previous consent in writing of the said *A. B.*; and also that he will keep the garden ground well tilled, cultivated and in good condition: AND the said hereby agrees to pay all rates and taxes in respect of the said premises: WITNESS the hands of the said parties the day and year first above written.

Witness to the signing by }
the said }
Witness to the signing by }
the said }

Sect. 5.—*Agreement for Unfurnished Lodgings.*

MEMORANDUM OF AN AGREEMENT, made and entered into this 20th day of May, 1855, by and between *A. B.* of, &c. of the one part, and *C. D.* of, &c. of the other part, whereby the said *A. B.* agrees to let, and the said *C. D.*, agrees to take the rooms or apartments following: that is to say, the entire first floor, and one room in the attic story or garrets, and a back kitchen and cellar opposite [with the use of the yard for drying linen, or beating carpets or clothes], and other conveniences and appurtenances thereto belonging, being part of a house and premises in which the said *A. B.* now resides, situate and being in Tower Street, in the city of London; to have and to hold the said rooms or apartments with their appurtenances [and the use of the said yard as aforesaid] for and during the term of half a year, to commence from the 1st day of June next after the date hereof, at and for the yearly rent or sum of 52*l.* of lawful money of Great Britain, payable quarterly, by even and equal portions (*f*); the first quarterly payment to be made on the 1st day of September next ensuing the date hereof; and it is further agreed by and between the parties hereto, that at the expiration of the said term of half a year, the said *C. D.* may hold, occupy and enjoy the said rooms or apartments [and have the use of the said yard as

(*f*) See the notes to the form in Sect. 2 as to fires and taxes.

aforesaid], from quarter to quarter, for so long a time as the said *C. D.* *A. B.* shall and may agree, at the rent of 13*l.* for each quarter, and each party shall be at liberty to determine the tenancy, on giving to other a quarter's notice in writing. And it is also further agreed by between the said parties hereto, that when the said *C. D.* shall quit the mises, he shall leave them in as good state, condition and repair as t shall be on his taking possession thereof (reasonable wear only excepte AS WITNESS, &c.

SECT. 6.—*Agreement for Furnished Lodgings.*

MEMORANDUM OF AN AGREEMENT, made and entered into t 1st day of June, in the year of our Lord 1855, by and between *A. B.* of, & grocer, of the one part, and *C. D.* of, &c. gentleman, of the other part, which the said *A. B.* agrees to let to the said *C. D.* a room or apartment one pair of stairs forwards in his the said *A. B.*'s house, situate in Chisw Street, in the parish and county aforesaid, ready furnished; together with t use and attendance of his woman servant, in common with the other lodge (at such hours and times when he himself can spare her); and also the u of a cellar, at the rent of 5*l.* of lawful money of Great Britain per quarte And the said *C. D.* agrees to take the said room or apartment, with the u of the servant and cellar as aforesaid, at the rent aforesaid, and also to fin and provide for himself all manner of linen, and china or crockery wa whatsoever, that he shall have occasion for, and that if he shall break c damage any part of the furniture of the said *A. B.*, he will make good o repair the same, or pay him sufficient to enable the said *A. B.* to put the sam in the same plight and condition as they now are in. And it is further agreed that if either party shall be desirous of determining the tenancy, he shal respectively give or take a quarter's notice in writing, to expire at the en of any quarter (*g*). AS WITNESS, &c.

SECT. 7.—*Short Demise from Year to Year of a Farm.*

MEMORANDUM, made the 1st day of March, in the year of our Lor 1855, between *A. B.* [*landlord*] of, &c. of the one part, and *C. D.* [*tenant* of Bray, in the county of Berks, farmer, of the other part, whereby the sai *A. B.* lets, and the said *C. D.* agrees to take and hold of him as tenant ALL that and those farms and lands called Ockwells, situate in the parishe of Bray and Waltham, in the county of Berks (excepting a small plantatio called Timber Close), from Michaelmas-day now next ensuing, upon th terms following: that is to say, tenant to be deemed tenant from year t year; to enter on fallows at Lady-day, 1855, on the other lands, and th house and buildings (except barns), at Michaelmas next, and on the barn at May-day, 1856; either party may determine the tenancy by a notice i writing, of nine calendar months or upwards, expiring on any Michaelmas day; tenant to quit in like manner as before expressed concerning his entry RENT 120*l.* payable half-yearly, at Lady-day and Michaelmas-day, withou any deduction on account of any [rent-charge in lieu of tithes (*h*)], tax, rate (i or assessment, now in existence, or hereafter to be imposed, or on any othe account, except the quit-rent and the land-tax, which are to be paid by th landlord: LANDLORD to cause the under-mentioned repairs to the barn to be done as soon as conveniently can be after Lady-day, 1855, at his ow costs, and to do the other undermentioned repairs before Christmas, 1855 landlord to keep buildings in tenantable repair; tenant to keep the gates stiles, bars and fences in good repair, landlord providing rough timber TENANT not to lop, cut or top any oak, ash or elm tree, or tiller, o

(*g*) See the notes to the previous forms in Sects. 1 and 2.

(*h*) See ante, note (*e*), p. 895.

(*i*) See ante, notes (*g*) and (*h*), p. 895.

sapling on the estate, except pollards usually lopped and topped, and that only for the loppings and toppings to be solely used for making and repairing the fences to the estate; and to cut and plash the quick-hedges and other fences on the premises, in a husbandlike manner, to throw up the soil to the roots of such quick and other fences, and to keep the ditches cleaned and scoured, and the drains and watercourses free and open: TENANT not to mow any grass or meadow-land above once in any one year of his tenancy, and if he break up any old meadow or pasture-land, unless by the landlord's consent in writing, then to pay the further yearly rent of 10*l.* for every acre so broken up, and so in proportion for any greater or less quantity than an acre: Tenant to crop the arable land in each year as follows: namely, one equal third part thereof with wheat or barley, one other equal third part with beans, peas, tares, clover or oats, and the remaining third part to be in fallow: All turnips grown on any part of the farm to be consumed by sheep on the land whereon such turnips may be grown: same land not to be cropped with wheat twice, or with wheat and barley in any period of three years: Tenant to use and consume on the farm all hay and straw made and grown thereon: Tenant to use and spread dung and manure arising or made on the farm, in such manner as that every acre in tillage of the farm aforesaid may be well manured once in every three years of his tenancy (except that all hay and wheat straw on the farm, unconsumed at the expiration of the tenancy, may be purchased by the landlord or succeeding tenant, at a fair valuation by two indifferent persons, one to be named by each party): Tenant to leave on the premises, without compensation, not only lent and white straw arising upon or from the premises, remaining unconsumed thereon at the expiration of his tenancy, but also all dung and manure arising or made on the farm, and then remaining unconsumed: Tenant to keep clean by well hoeing, twice at least, and weeding all the land whilst cropped with beans, peas, tares or clover: Tenant to endeavour to prevent any injury by persons, cattle or sheep, to any of the hedges, or trees, or fences, and to preserve the same, and not to do any injury to any timber or other trees, in taking such loppings as before allowed him: LANDLORD alone, or with any other or others in his company, may shoot game on the estate: Tenant to permit the cottager to continue personally to hold the cottage on the estate at the present rent of 40*s.* per annum: Tenant not to crop or sow any of the land with rape, flax, hemp or woad: TENANT not to underlet or assign the premises, or any part thereof (except the cottage): TENANT, on quitting the farm, to receive such pecuniary compensation for improvements in banking and fencing within five years, and good under-draining within ten years, as two arbitrators shall award; which arbitrators shall abate, according to the benefit derived by the tenant from such repairs, improvements and additions, and take into consideration how far, at the expiration of the tenancy, they may be beneficial to the estate; and such arbitrators shall be nominated one by each party, on the request of either party, and if either party neglect or refuse to nominate his arbitrator, the other party may nominate both arbitrators. Provided always, that this present instrument shall operate as a lease or present demise of the said premises and of every part thereof, and not as an agreement for a future lease merely (*i*). IN WITNESS whereof the said parties hereto have set their hands and seals (*j*) the day and year first aforesaid.

Course of Husbandry.

Landlord may shoot Game.

Tenant not to underlet, &c.

To receive Compensation for Improvements.

Signed, sealed and delivered in the presence of } *A. B.* (L.S.) *C. D.* (L.S.)

G. H.
G. P.

(*i*) See *Perring* v. *Brooke*, 1 Mood. & Rob. 510; 7 Car. & Pay. 360; and ante, Book I., Chap. IV., Sect. 16, p. 130.

(*j*) See statute 8 & 9 Vict. c. 106, ante, 59.

SECT. 9.—*Agreement for Granting a Lease of a House, &c.*

Parties and Agreement to demise.

MEMORANDUM OF AGREEMENT made and entered into this first day of November, 1854, between *A. B.*, of , of the one part, and *C. D.*, of , of the other part, whereby the said *A. B.* agrees that he will by indenture, to be executed on or before Michaelmas-day next, demise and let to the said *C. D.* ALL that messuage or tenement, with the garden and appurtenances thereto belonging, situate, lying and being in Bray, in the parish of Bray, in the county of Berks, now or late in the occupation of *J. F.*, together with all that field or close situate, lying and being in Bray aforesaid, called or known by the name of Foxley-close, now or late in the occupation of *G. H.*, TO HOLD to the said *C. D.*, his executors, administrators and assigns, from Michaelmas-day aforesaid, for and during the term of twenty years, at and under the clear yearly rent of 40*l.*, payable quarterly, clear of all taxes and deductions whatsoever (*l*) (land tax excepted): AND in which said lease there shall be contained covenants on the part of the said *A. B.*, his executors, administrators and assigns, for quiet enjoyment: and that he shall allow out of the first year's rent of the said premises the sum of towards the repairs thereof: and that he shall also pay all the taxes in respect of the said house up to Michaelmas-day next: [and shall also indemnify the said *C. D.* and his executors, administrators and assigns, from the ground-rent thereof during the said term]: and on the part of the said *C. D.*, his executors, administrators and assigns, to pay the rent; and to pay all taxes, rates and assessments (the land tax excepted), to repair and keep in repair the premises (damages by fire excepted), and to deliver up the same at the end of the term in good repair (except as last aforesaid): with all other usual and reasonable covenants; and a proviso for the re-entry of the said *A. B.*, his executors, administrators or assigns, in case of non-payment of the rent for the space of twenty-one days after either of the said rent days, or the non-performance of the covenants. AND THE SAID *C. D.* hereby agrees to accept of the said lease on the terms aforesaid. PROVIDED ALWAYS, &c. (*m*). AND it is mutually agreed that the costs of this agreement, and of making the said lease and a counterpart thereof, shall be borne by the said parties equally. IN WITNESS, &c.

Specification of Covenants.

Agreement to accept.

SECT. 10.—*Agreement for granting a Farming Lease.*

Parties, &c.

MEMORANDUM OF AN AGREEMENT made this first day of June, in the year of our Lord 1855, between *A. B.*, &c., of the one part, and *C. D.*, &c., of the other part, whereby it is agreed that the said *A. B.* shall, on or before the 29th day of September next ensuing, make and execute unto the said *C. D.*, his executors or administrators, a good and valid lease of all that messuage, &c., and all those several closes, pieces or parcels of land, &c, with the appurtenances thereunto belonging, for the term of fourteen years from the said 29th day of September: AT THE yearly rent of , payable half-yearly, clear of all deductions for taxes, or on any other account whatsoever (*n*) (except land tax): the first payment of the said rent to be made at Lady-day next: AND AT AND under the further yearly rent of 5*l.* for every acre, and so in proportion for a less quantity of meadow or pasture ground, which shall be ploughed or converted into tillage, contrary to a covenant to be contained in the said lease, as hereinafter directed; the first payment of the last-mentioned rent to be made on the first half-yearly rent day after such ploughing and conversion into tillage as aforesaid: AND IN THE SAID LEASE there shall be contained covenants on the part of the said *C. D.*, his executors, administrators and

Yearly Rent.

And a further Rent of 5*l.* for ploughing Meadow or Pasture Ground.

Lease to contain Covenants on the Part of the Tenant;

(*l*) See ante, notes (*e*), (*f*), (*g*) and (*h*), p. 895.

(*m*) See the proviso at the end of the next form.

(*n*) See ante, notes (*e*), (*f*), (*g*) and (*h*), p. 895.

sent demise of the said premises, or of any part thereof, or any further or otherwise than as an agreement for a future lease (*p*). IN WITNESS, &c.

Sect. 11.—*Another Agreement for granting a Farming Lease.*

Parties, &c.

MEMORANDUM OF AN AGREEMENT made and entered into this day of , in the year of our Lord 1855, between *A. B.*, of, &c., of the one part, and *C. D.*, of, &c., of the other part. THE SAID *A. B.* doth hereby for himself, his heirs and assigns, agree with the said *C. D.*, his executors and administrators, in manner following; that is to say, that he the said *A. B.*, his heirs or assigns, or some or one of them, shall and will, on or before the 25th day of December now next ensuing the date hereof, make, execute and deliver an indenture of lease to the said *C. D.*, his executors and administrators, at the costs and charges of the said *C. D.*, his executors or administrators, of all that messuage, farm and hereditaments called or known by the name of, &c., situate at, &c., with the appurtenances, for the term of fourteen years, to be computed from the said 25th day of December, at the yearly rent of : And it is hereby further agreed and declared, by and between the said parties, that there shall be contained in the said indenture of lease, all such covenants, provisoes and conditions as are reasonable and usual in leases of premises of a like nature in the neighbourhood or county where the said farm and hereditaments are situate; and that in the meantime, and until the said indenture of lease shall be executed, nothing in these articles contained shall be construed into a present actual demise of the said farm and premises (*q*): And the said *C. D.* doth hereby for himself, his executors and administrators, promise and agree to and with the said *A. B.*, his heirs and assigns, that he or they, or some or one of them, shall and will execute and deliver to the said *A. B.*, his heirs or assigns, a counterpart of the said intended indenture, at the same time that the said *A. B.*, his heirs or assigns, shall execute and deliver unto the said *C. D.*, his executors or administrators, such intended indenture of lease as aforesaid. IN WITNESS, &c.

Covenants.

Not to operate as an actual demise.

Sect. 12.—*Another Agreement for granting a Farming Lease.*

MEMORANDUM OF A FUTURE LEASE to be granted by *A. B.* to *C. D.*, of, &c.

Term—Twenty-one years and a half, terminable on any eleventh day of October by three years' notice to quit given by either party.

Rent—150*l.* per annum, the tenant paying all rent-charges in lieu of tithes, parochial rates and assessments, quit rents and all other charges on the property except the landlord's portion of the property tax.

Repairs.—The tenant to covenant to keep and leave the house and premises in good tenantable repair (damage by fire excepted), the landlord finding bricks, lime, timber, tiles, slates and paint for the said repairs within ten miles of the premises, the tenant to find all labour for the repairs, straw for thatching and carriage of materials, not exceeding ten miles.

The interior of the house to be painted with two coats of good oil colour paint at least once in three years.

The tenant not to do any act to invalidate any policy against fire effected by landlord.

The tenant to cultivate the lands in a good and husbandlike manner during the term, and to covenant for the last three years of the term or after notice

(*p*) See *Perring* v. *Brooke*, 1 Mod. & Rob. 512; 7 Car. & Pay. 360; and ante, Book I., Chap. IV., Sect. 16, p. 130. If the agreement does not contain more than 1080 words, this clause will certainly make it subject to a stamp of 2*s.* 6*d.* only; see ante, 112.

(*q*) See another form at the end of the previous agreement.

to quit has been given to cultivate the lands in the following manner: N to leave more than one-third of the said arable lands in any one of the l three years or in any one of the three years after notice to quit has be given, cropped with wheat, or one-sixth barley or oats, and not to leave le than one-third of the said arable lands during the time before mentione wheat tilth, not less than one-third of which shall be clover ley, the clov having been sown in barley or oats after fallow, the remainder of the whe tilth to be bean or pea gratten, to be three times horse hoed and twice han hoed, and kept free from weeds, and left in the last year clean, fit for a whe tilth: And not to leave less than one-sixth of the said arable lands durin the said three years fallow, three times ploughed and dressed, cropped wit turnips, the turnips to be set out and side hoed, and left in the last year fre from weeds, the manure and turnips previously to the last year to be used an spread on the land: The tenant to pay an additional rent of three pounds fo every acre, and in proportion for less than an acre, for any of the lands no so used and cropped during the last three years or after notice to quit ha been given to be recoverable as rent.

The lease to contain all other usual clauses as to timber, game, and re-entry for nonpayment of rent, whether demanded or not, and for bankruptcy, insolvency and nonperformance of covenants.

The rent to be paid half-yearly, that is to say, on the 11th October and the 6th April.

The lease to commence from the day of , 18 .

The landlord to covenant to pay for the rent, rates and labour with the turnip seed on fallow, the labour on the manure, and feed price for the straw, being the produce of the last year, by valuation to be made in the usual way.

Either party to be at liberty to demand an indenture of lease at any time. This instrument to be an agreement for a future lease only. Dated this day of , A.D. 18.

IN WITNESS, &c.

SECT. 13.—*Agreement for the Purchase of a Freehold House and Premises.*

MEMORANDUM OF AGREEMENT, made and entered into this day of , 1855, between *A. B.*, of , of the one part, and *C. D.*, of , of the other part, as follows; viz. The said *A. B.* doth hereby agree, by good and sufficient conveyances in the law, at or before Christmas-day next, to assign, sell and convey unto the said *C. D.*, his heirs and assigns, free from all incumbrances whatsoever and howsoever, ALL THOSE three houses, yards and appurtenances, together with all and every the gates, locks and fixtures therein and thereon, situate in , in the parish of , London, and also a piece of ground near thereto adjoining, now in the possession of *E. F.*, Esq., to hold unto him the said *C. D.*, his heirs and assigns for ever, at and for the price or sum of pounds of lawful money, &c., to be paid unto the said *A. B.* by the said *C. D.*, on a sufficient title being made out and executed unto the said *C. D.* by the said *A. B.*: AND ALSO to assign over unto the said *C. D.* the several policies of insurance of the said houses, and clear, pay and discharge all taxes, charges, incumbrances and impositions charged or assessed on the said premises unto Christmas-day aforesaid, and to indemnify the said *C. D.*, or reimburse him on account thereof: AND THE SAID *C. D.*, on his having by the conveyances aforesaid the said premises assigned and conveyed unto him, at or by the time aforesaid, and in manner aforesaid, doth hereby agree to pay unto the said *A. B.* the price or sum aforesaid for the same, and has now paid unto the said *A. B.* the sum of 10*l.* (*r*) in part of the purchase-money aforesaid. AS WITNESS, &c.

(*r*) There should be a receipt for the money in part of the purchase.

SECT. 14.—*Agreement for the Sale of Leasehold Property.*

Parties, &c.

Agreement to sell.

MEMORANDUM OF AN AGREEMENT, made and entered into this day of , 1855, between *C. D.*, of, &c., and *E. F.*, of, &c., as follows: THE SAID *C. D.* doth hereby agree to sell and the said *E. F.* to purchase, at and for the price or sum of of lawful money of Great Britain, all the estate and interest of the said *C. D.* of and in the several messuages, lands, tenements and hereditaments, now held by the said *C. D.* for the term of years [*or* "for and during the life (or lives) of, &c.," *as the case may be*] by virtue of a lease thereof, bearing date the day of , and granted by *A. B.*, of, &c.: AND THE SAID *C. D.* doth hereby promise and agree to deliver at his own expense to the said *E. F.*, his executors or administrators, a full and satisfactory abstract of title, within seven days next after the date hereof, but so as he shall not be compelled to produce the title of the said *A. B.*, the original lessor of the said hereditaments and premises: AND FURTHER, that he will, on or before the day of now next ensuing the date hereof, upon receiving from the said *E. F.*, his executors or administrators, the said sum of of such lawful money as aforesaid, make, execute and deliver proper conveyances and assurances of the said premises to the said *E. F.*, his executors or administrators, at the costs and charges nevertheless of the said *E. F.*, his executors and administrators: AND IT IS HEREBY AGREED and declared, that on the payment of the said sum of , the said *E. F.*, his executors, administrators and assigns, shall be entitled to the rents and profits of the said lands and premises from the day of now last past, up to which time all taxes, rates and assessments, payable in respect of the said premises, have been paid by the said *C. D.* IN WITNESS, &c.

C. D.
E. F.

To deliver Abstract.

To convey.

Agreement as to Rents, &c.

SECT. 15.—*Agreement for Building a new House in the room of an old one.*

Agreement between a Landlord and Tenant for building a new House in room of an old one to be pulled down, with a Surrender and Grant of new Lease.

ARTICLES OF AGREEMENT, made and entered into the 14th day of February, 1855, between *A. B.* and *C. D.*, of, &c. (executors and trustees, named in the last will and testament of *R. C.*, late of the same place, deceased, for and on behalf of *R. C.*, an infant), of the one part, and *E. F.*, of, &c., widow, of the other part. WHEREAS the said *E. F.* is tenant for the remainder of an unexpired term of thirty-one years, commencing on the 25th day of December, which was in the year of our Lord 1845, of a certain messuage or public-house, known by the name of the Goose and Gridiron, in street, in the county of (part of the estate of the said infant), at the yearly rent or sum of 20*l.*, late in the occupation of *J. P.*, as under-tenant to the said *E. F.*, at the yearly rent or sum of 40*l.* AND WHEREAS the said messuage hath lately been irreparably damaged by accidental fire, and the said *A. B.* and *C. D.*, being advised that it is necessary and proper, under the circumstances of the case, that the same should be rebuilt for the said *E. F.*, on the terms and conditions hereinafter mentioned, have agreed to rebuild the same accordingly. NOW THESE PRESENTS WITNESS, and it is hereby agreed by and between the said *A. B.* and *C. D.*, on the part of the said infant as aforesaid, and the said *E. F.*, that they the said *A. B.* and *C. D.*, or the survivor of them, his heirs, executors or administrators, shall and will on or before the 25th day of December now next ensuing, or as soon thereafter as may be, erect and finish, or cause to be erected and finished, a good and substantial private brick dwelling-house, upon the site and in the room of the said public-house so damaged by fire as aforesaid, with all necessary appurtenances thereto, agreeably to a plan and elevation thereof accompanying these presents, marked with the letter *A.*, and signed by the parties hereto, (the said house so to be erected to be finished as to the inside conveniences, ornaments and decorations thereof, according to the directions of *H. H.*, of, &c., on the part of the said *E. F.*, her executors,

Contract to build.

administrators or assigns, and *P. N.*, of, &c., on the part of the said *A.* and *C. D.*): AND ALSO SHALL AND WILL, when the said house, w the appurtenances, shall be so erected and finished, grant a good and effect demise or lease thereof unto the said *E. F.*, her executors, administrat and assigns, to have and to hold unto the said *E. F.*, her executors, adi nistrators and assigns, from the said 25th day of December now next ensuii or such other time as aforesaid, for the term of nineteen years thence ne ensuing, at and under the yearly rent or sum of 5*l.* for every 100*l.* whi shall be necessarily and reasonably expended by the said *A. B.* and *C. 1* or the survivor of them, his heirs, executors or administrators, in erecti and finishing the same fit for the reception and habitation of the said *E. 1* her executors, administrators or assigns; and which said rent is to be fr and clear of all manner of taxes and assessments whatsoever (*s*) (the lai tax excepted), the amount of such expenditure to be ascertained and settle by the said *P. N.* on the part of the said *A. B.* and *C. D.*, and the said *H. 1* on the part of the said *E. F.*, or such other persons, being builders or su veyors, as the said *A. B.* and *C. D.*, on the one part, and *E. F.* on the othe shall severally appoint; and in case of any difference between the said builde or surveyors, then by one other person or umpire, to be by them appointe the determination in either case to be made by the said appointees or umpir within fourteen days after reference shall be made to them; the said rent t be paid and payable half-yearly, on the days and times whereon the rent i the now subsisting lease of the said *E. F.* is made payable: AND THI SAID *E. F.*, for herself, her executors, administrators and assigns, dotl consent and agree to accept and take the said house and premises, so to b erected and finished as aforesaid, on the terms and conditions hereinbefor expressed, and to execute a counterpart of the lease so to be to her and them granted as aforesaid, and to surrender and give up her now subsisting lease, and all her estate, right, title and interest therein at the same time: AND IT IS further agreed between the said parties, that the said *E. F.* shall be discharged from the payment of rent reserved on her said now subsisting lease, from Michaelmas-day last past until the said 25th day of December next, or such other time thereafter as the said house to be erected shall, with the appurtenances, be in tenantable condition and fit for habitation; and in the said lease to be granted of the said new erected house and premises, there shall be contained an allowance of land tax in favour of the said *E. F.*, and all such other covenants, clauses, provisoes and agreements (such only excepted as may tend to vary the terms of the agreement) as are inserted in the now subsisting lease to the said *E. F.* IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered, &c.

A. B.
C. D.
E. F.

SECT. 16.—*Agreement for Building a House.*

MEMORANDUM OF AGREEMENT, made and entered into this day of , 1855, between *A. B.*, of , of the one part, and *C. D.*, of , of the other part, as follows; viz. THE SAID *C. D.*, for the consideration hereinafter mentioned, doth agree with the said *A. B.* that he the said *C. D.*, or his assigns, will, within the space of three calendar months next following the day of the date hereof, find and provide all fit and proper materials and things, and erect, build and finish, in a good, sound, substantial and workmanlike manner, one brick house or building on a certain piece or parcel of ground, situate in , &c., according to a plan thereof hereunto annexed, and the dimensions following; that is to say, [*here insert*

(*s*) See ante, notes (*e*), (*g*) and (*h*), p. 895.

the dimensions of the building and scantlings of the timber intended to be used in the building of the house]: AND THE SAID *A. B.*, for the consideration aforesaid, doth agree with the said *C. D.* well and truly to pay or cause to be paid unto the said *C. D.* the sum of pounds of lawful money of Great Britain, in manner following; that is to say, pounds, part thereof, as soon as the foundation of the said house shall be laid, pounds, other part thereof, when the brick work of the said house shall be carried up and covered in, and pounds, being the remainder thereof, in full payment of and for building the said house, when the same shall be completed inside and out fit for occupation, subject to the approbation of *E. F.*, as the surveyor of the said *A. B.*: AND LASTLY, THE SAID *A. B.* and *C. D.* do further agree to execute to each other, with all convenient speed, articles of agreement, in the penalty of pounds, for the true performance of all and every the matters and things aforesaid. AS WITNESS, &c.

Sect. 17.—*An Agreement to surrender a Public-house.*

MEMORANDUM OF AN AGREEMENT, made the, &c., between, &c., as follows: THAT THE SAID *C. D.* doth hereby covenant and agree to assign and surrender, or procure to be assigned or surrendered, unto the said *A. B.*, on or before the 20th day of June now next ensuing, the messuage or tenement and public-house called the Lion and Dog, now or lately tenanted by him, in street aforesaid, with the appurtenances (freed and discharged of and from all mortgages and other incumbrances), AND all his estate, right, title and interest therein: AND THE SAID *A. B.* doth hereby agree to accept the same (all rent and arrears of rent being paid up to Christmas-day next), and to discharge the said *C. D.* from his covenant to repair the said house and premises. AS WITNESS, &c.

C. D.
A. B.

CHAPTER IV.

ASSIGNMENTS, ATTORNMENTS, &c.

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SECT. 1.—*Assignment by Indenture.*

THIS INDENTURE, made, &c., between *A. B.*, of, &c., of the one pa and *C. D.*, of, &c., of the other part. WHEREAS by indenture of lea bearing date on or about the day of made between *E. F.* of tl one part, and the said *A. B.* of the other part, It is witnessed, that for tl consideration therein mentioned, he the said *E. F.* did demise, lease and t farm let unto the said *A. B.* all those two messuages or tenements and pre mises, situate, lying and being on the south side of in the county c , which said houses are abutting on a passage leading from part of the said houses being built against the said passage, and then lat in the several tenures or occupations of *J. S.* and *B. G.*, widow, as the sai premises are particularly described on the map or ground plot thereunt annexed, together with all vaults, lights, easements, ways, passages, waters watercourses and appurtenances which of right belong or in anywise appertain to the said premises, to hold unto the said *A. B.*, his executors, administrators and assigns, from the day of then next ensuing, for the term of years, at and under the clear yearly rent of , payable quarterly, free from all taxes, rates, assessments and impositions whatsoever, at the times and manner therein mentioned, and under and subject to the covenants, provisoes and agreements therein contained, as by the said recited indenture of lease, reference being thereunto had, will more fully appear: AND WHEREAS the said *C. D.* hath contracted and agreed with the said *A. B.* for the absolute purchase of the said lease and leasehold premises for the remainder of the said term of years which is now to come therein and unexpired at or for the price or sum of (*a*): NOW THIS INDENTURE WITNESSETH, that for and in consideration of the sum of of lawful money of Great Britain, to the said *A. B.* in hand well and truly paid by the said *C. D.*, at or before the sealing and delivery of these presents (the receipt whereof he the said *A. B.* doth hereby acknowledge, and thereof, and of and from the same, and every part thereof, doth acquit, release and discharge the said *C. D.*, his executors and administrators, and every of them, for ever by these presents): HE THE SAID *A. B.* hath bargained, sold, assigned, transferred and set over, and by these presents doth bargain, sell, assign, transfer and set over unto the said *C. D.*, his

(*a*) Where there is a clause in the original lease not to assign without a license in writing from the lessor, but which has been given, it is as well to insert here; "and whereas the said *E. F.* hath given his consent in writing to this assignment of the said demised premises." See a form of license, post, Sect. 6.

Premises and Lease.

executors, administrators and assigns, fully and absolutely, ALL those two messuages or tenements then late in the several tenures or occupation of *J. S.* and *B. G.*, widow, and all and singular other the premises mentioned and contained in and demised by the said above in part recited indenture of lease, with their and every of their appurtenances thereunto belonging, or in anywise appertaining, or therewith usually held, occupied or enjoyed: and also the estate, right, title, interest, use, trust, possession, property, claim and demand whatsoever, both at law and in equity, of him the said *A. B.*, of, into or out of the said premises, and every part and parcel thereof,

Habendum for remainder of term.

together with the said indenture of lease, TO HAVE AND TO HOLD the said two messuages or tenements, and all and singular other the premises hereinbefore mentioned, and intended to be hereby assigned, with their and every of their appurtenances, together with the said lease thereof, and all benefit and advantage thereof respectively, unto the said *C. D.*, his executors, administrators and assigns, from the twenty-fifth day of March now last before the day of the date of these presents, for and during all the rest, residue and remainder of the said term of years, by the said in part

Subject to Rent.

recited indenture of lease granted and now to come and unexpired: SUBJECT NEVERTHELESS to the payment of the rent reserved in and by the said in part recited indenture of lease, and to the performance of all and singular the covenants, conditions and agreements therein contained, from the said twenty-fifth day of March, and which on the lessee's or assignee's part and behalf from thenceforth are to be observed, performed, fulfilled

Covenant by Assignor that Lease is good and valid;

and kept: AND THE SAID *A. B.*, for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree to and with the said *C. D.*, his executors, administrators and assigns, in manner following; that is to say, that the said recited indenture of lease, now, at the time of the sealing and delivery of these presents, is a good and valid lease in the law of the premises hereby demised, and now is and stands in full force, virtue and effect, not forfeited, surrendered or otherwise incumbered or

and that he hath good Right, &c. to transfer;

made void or voidable by the said *A. B.*: AND ALSO that the said *A. B.*, now, at the time of the sealing and delivery hereof, for and notwithstanding any act, deed, matter or thing whatsoever by him the said *A. B.* made, done, committed, permitted or suffered to the contrary, he the said *A. B.* hath in himself good right, true title, and full and absolute power and authority to bargain, sell, alien and assign the said in part recited indenture of lease, and the premises thereby demised and hereby assigned unto him the said *C. D.*, his executors, administrators and assigns, in manner aforesaid, and according

and that he hath performed all covenants;

to the true intent and meaning of these presents (*b*): AND ALSO that the said yearly rent by the said in part recited lease reserved, and the several covenants, clauses, conditions, provisoes and agreements therein contained, on the part and behalf of the said *A. B.*, his executors, administrators and assigns, to be paid, observed, performed and kept, have been duly paid, observed, performed and kept by the said *A. B.* up to the said twenty-fifth

and that the Assignee shall have quiet Enjoyment.

day of March last past: AND ALSO (*c*) that the said *C. D.*, his executors, administrators and assigns, paying the said rent, and performing, fulfilling and keeping the covenants, conditions and agreements in and by the said in part recited indenture of lease reserved and contained, on the part and behalf of the lessee or assignee, his executors, administrators and assigns, from the said twenty-fifth day of March, to be paid, done and performed, shall and lawfully may at all times hereafter during the residue of the said term of years above mentioned, peaceably and quietly have, hold, use, occupy, possess and enjoy all and singular the said premises hereby assigned or intended so to be, with their and every of their appurtenances, [*and to receive and take the rents and profits thereof, and of every part thereof, to and for his*

(*b*) Under-leases should be recited, and exceptions made in respect of them.

(*c*) See note to covenant for quiet enjoyment in town lease, ante, 900, and that for further assurance, &c. below.

and their own use and benefit (c),] without any let, suit, trouble, hindr eviction or interruption whatsoever, of, from or by him the said *A. B* executors, administrators or assigns, or any other person or persons wl soever lawfully or equitably claiming or to claim, by, from or under them or any of them (*d*): AND FURTHER, that the said *A. B.*, his cutors or administrators, shall and will, at any time or times hereafter du the residue of the said term of years, at the request, costs and charg the said *C. D.*, his executors, administrators or assigns, make, do and cute, or cause and procure to be made, done and executed, all such fur or other act or acts, deed or deeds, assignments and assurances in the whatsoever, for the further and better assigning, assuring and confirming said in part recited indenture of lease and premises thereby demised hereby assigned, and every part thereof, unto the said *C. D.*, his execut administrators and assigns, as by him or them, or his or their counsel in law, shall be lawfully and reasonably devised or advised and required (AND LASTLY, the said *C. D.*, for himself, his heirs, executors and ministrators, doth hereby covenant, promise and agree to and with the s *A. B.*, his executors, administrators and assigns, that he the said *C. D.*, executors, administrators or assigns, shall and will from time to time, during the remainder of the said term of years hereby assigned, well truly pay or cause to be paid, the said rent in and by the said indenture lease reserved as therein mentioned, unto such person or persons as for time being shall be entitled to receive the same, and which from the s twenty-fifth day of March shall grow due: and shall and will well and tr observe, perform, fulfil and keep all and singular the covenants, conditic and agreements therein contained, and which from the said twenty-fifth d of March last past, on the part of the lessee or assignee of the said premis are or ought to be observed, performed, fulfilled and kept: and of and fr the payment of the said rent, and performance of the covenants, conditio and agreements in the said indenture of lease contained, shall and will f ever hereafter save, defend, keep harmless and indemnify the said *A. B.*, h heirs, executors and administrators, and his and their lands and tenement goods, chattels and effects (*f*): IN WITNESS WHEREOF, the said parti

(*c*) The words between brackets should be omitted if the assignee intends to occupy the premises himself.

(*d*) Sometimes this part of the deed is in the following form:—

"And that free and clear, and freely and clearly acquitted, exonerated and discharged, or otherwise by the said *A. B.*, his heirs, executors or administrators, well and sufficiently saved, defended, kept harmless and indemnified, of, from and against all and singular former and other gifts, grants, bargains, leases, mortgages, estates, titles, troubles, charges and incumbrances whatsoever, had, made, done, committed or suffered by the said *A. B.*, or by any other person or persons lawfully claiming or to claim, by, from, through or under him."

(*e*) Sometimes the covenant by the assignor that the rent and taxes have been paid, and all covenants performed up to a certain time, is in the following form:—

"And further, that the rent in and by the said recited indenture of lease reserved, and the covenants, conditions and agreements therein contained, and on the lessee's part to be paid, kept, observed and performed, and all taxes, rates and assessments due and payable by the occupiers of the said premises, are and have been well and truly paid, kept, done, performed and fu filled up to the day of last."

Where premises are within the operatic of the Building Act, it would be as well insert a covenant similar to that, ante, 93 that the *assignee* shall bear the expenses rebuilding party-walls; as the assignor ma become liable to contribute, if he has take a sum for the lease. See per Lord Kenyo in *Southall* v. *Leadbetter*, 3 Term Rep. 461 and ante, 575, 576.

(*f*) Covenants to pay rent and perforn covenants, and to indemnify the assigno therefrom, in another form:—

"And the said *C. D.* doth hereby fo himself, his heirs, executors and administrators, covenant, promise and agree to and with the said *A. B.*, his heirs, executors and administrators, in manner following that is to say, that he the said *C. D.*, his executors, administrators and assigns, during the continuance of the said demise, shall and will pay the said rent in and by the said indenture of lease reserved and contained, and perform and keep all and singular the covenants, conditions and agreements therein contained, and which from the said day of last, by and on the part of the tenant or assignee of the said premises, are or ought to be paid,

to these presents have hereunto set their hands and seals the day and year first above written.

Sect. 2.—*Assignment of a Lease for Years determinable on Lives.*

Recital of Original Lease.

THIS INDENTURE, made, &c., between, &c. WHEREAS by indenture of lease bearing date, &c., and made between, &c. All those two messuages, &c. [*here describe the premises as in original indenture, but omit the general words*], with their appurtenances, were demised unto the said *G. H.* for the term of 99 years, determinable on the lives of *E. F.*, &c., hereinafter named, who are now all living: AND WHEREAS by mesne assignments and other acts good and available in law, and lastly, by an indenture bearing date the, &c., and made or expressed to be made between, &c., the said two messuages, tenements and premises hereinbefore described and comprised, with the said recited indenture of lease, were assigned and conveyed to the said *A. B.* for all the rest and residue of the said term of 99 years, so determinable as aforesaid, then to come and unexpired: AND WHEREAS the said *A. B.* hath contracted to sell the same premises, and all his right and interest therein, to the said *C. D.* in consideration of the transfer of 3 per cent. Bank consolidated annuities: NOW THIS INDENTURE WITNESSETH, that in performance of the said contract, and also in consideration of the capital sum of 3 per cent. Bank consolidated annuities, this day well and truly transferred by the said *C. D.* into the name and for the benefit of the said *A. B.* in the books of the Governor and Company of the Bank of England, the transfer of which said sum of 3 per cent. consolidated Bank annuities the said *A. B.* doth hereby acknowledge, and of and from the same, &c.: HE THE SAID *A. B.* hath granted, bargained, sold, assigned, transferred and set over, and by these presents doth, &c., unto the said *C. D.*, his executors, administrators and assigns, all those two messuages, tenements and premises, hereinbefore described and comprised in the said first-recited indenture of lease, bearing date, &c., with all and singular the rights, members and appurtenances to the same belonging, or thereunto usually or now holden, occupied and enjoyed: And all the estate, &c., and the said indenture of lease first hereinbefore recited, and all other deeds, evidences and writings that relate to or concern the premises expressed to be hereby assigned, now in the custody or power of the said *A. B.*, or which he can procure without suit at law or in equity: TO HAVE AND TO HOLD the said two messuages, tenements and premises, with their appurtenances, unto the said *C. D.*, his executors, administrators and assigns, for and during the rest and remainder of the said term of 99 years granted by the said hereinbefore first recited indenture, bearing date the day of yet to come and unexpired, if the said *E. F.*, &c., or the survivor of them, shall so long live, subject nevertheless to the payment of the rent, and observance of the covenants and agreements in the said first recited indenture of lease reserved and contained, and on the lessee's part to be paid, observed and performed. [*Here add covenants as in last precedent.*] IN WITNESS, &c.

Assignment and Bargain and Sale to the Governor.

Consideration.

Habendum for Remainder of Term, determinable on Three Lives.

performed and kept, according to the purport and true intent and meaning of the said recited indenture of lease: And shall and will from time to time, and at all times during the continuance of the said term, save, defend, keep harmless and indemnified, the said *A. B.*, his heirs, executors and administrators, and his and their lands, tenements, goods and chattels, of and from the same rents, covenants and agreements, and every breach, default or neglect of or in payment or performance thereof respectively: And of, from and against all actions, suits, costs, damages and expenses whatsoever, which he or they, or any of them, shall or may pay, bear or sustain, or which shall or may arise or be occasioned by reason of the nonpayment of the said rent, or the non-performance or non-observance of the said covenants or agreements."

Sect. 3.—*Assignment of Part of Premises, with a Covenant to produce Lease.*

THIS INDENTURE, made, &c., between, &c.:. WHEREAS by in ture of lease bearing date, &c., and made, &c., between, &c., all those, [*here describe the parcels intended to be assigned from the words of the orig lease*] with their appurtenances, were, together with other hereditament much greater value, demised to the said *A. B.* for the term of twenty- years, from the date of the said indenture: AND WHEREAS the said *A* hath contracted to sell the said hereditaments and premises hereinbe described, and intended to be hereby assigned to the said *C. D.*, for during all the residue of the said term now to come and unexpired: A WHEREAS it hath been agreed that the said recited indenture of lease s remain in the hands of the said *A. B.*, his executors, administrators assigns, upon his entering into a covenant for producing the same, giving attested copies thereof, as hereinafter expressed: NOW THIS I DENTURE WITNESSETH, that in pursuance of the said agreement in consideration, &c. [*as in assignment of lease for a term of years*], he the s *A. B.* hath bargained, &c., unto the said *C. D.*, his executors, administrat and assigns, the said messuage, tenement and premises hereinbefore describ and intended to be hereby assigned, being part of the hereditaments contain in the said indenture of lease, with their rights, members and appurtenanc and all the estate, right, title, &c., together with a true and attested copy the said recited indenture of lease, to be made, written and delivered by a at the costs and charges of the said *C. D.*: TO HAVE AND TO HOL &c. [*the conclusion will be the same as the assignment of a lease for a term years, with the exception of adding the following covenant at the end.*] AN THE SAID *A. B.*, for himself, his heirs, executors, administrators ar assigns, doth hereby covenant, promise and agree to and with the said *C. D* his executors, administrators and assigns, in manner following: that is to sa that he the said *A. B.*, his executors, administrators and assigns, shall and wi from time to time, and at all times hereafter, unless prevented by fire or othe inevitable accident, upon every reasonable request in writing, and at the cost and charges of the said *C. D.*, his executors, administrators and assigns, pro duce or show forth, or cause to be produced and shown forth, in any part o the United Kingdom of Great Britain and Ireland, unto and for the perusa of the said *C. D.*, his executors, administrators and assigns, or his or thei trustee or trustees, or the counsel or solicitor of him, them or any of them at any trial, hearing or examination directed by any court of law or equity, and unto or before any commissioners, arbitrators or umpire, lawfully appointed, and upon every other necessary and proper occasion, and in such manner and form and for such time as shall be reasonable, the said recited indenture of lease, for the manifestation, support or defence of the estate, right, title, interest or possession of the said *C. D.*, his executors, administrators or assigns, of, in or to the said premises mentioned to be hereby assigned, or any part thereof: And also shall and will, and at and upon the like request, costs and expense, and for the like or any other purpose or purposes, make and deliver, or cause to be made and delivered to him or them, with all reasonable despatch, true and attested copies duly stamped of the same indenture, or of any covenants, provisoes, clauses or agreements therein contained. IN WITNESS, &c.

Sect. 4.—*Assignment by Deed-poll.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, the within-named *A. B.* sends greeting. WHEREAS the said *A. B.* hath contracted and agreed with *C. D.*, of , in the county of , for the absolute sale to him of all and singular the premises comprised in and demised by the within-mentioned [*or* "recited"] indenture of lease, and all his estate

and interest therein, for the residue of the term now to come in the within-mentioned lease, at the price or sum of : NOW KNOW YE AND WITNESS THESE PRESENTS, that for and in consideration of the sum of of lawful money of Great Britain, to the said *A. B.* in hand well and truly paid by the said *C. D.*, at or before the sealing and delivery of these presents, the receipt whereof the said *A. B.* doth hereby acknowledge, and thereof and of and from the same, and every part thereof, doth acquit, release and discharge the said *C. D.*, his executors and administrators for ever, by these presents, HE THE SAID *A. B.* hath bargained, sold, assigned, transferred and set over and by these presents doth bargain, sell, assign, transfer and set over unto the said *C. D.*, his executors, administrators and assigns, all that the within-mentioned and described piece of land, messuages, cottages, stables [*as the case may be*], and other the premises, by the within-mentioned and recited indenture of lease demised, with the appurtenances; and all the estate, right, title, interest, term or terms of years therein yet to come and unexpired, trust, property, profit, advantage, claim and demand whatsoever, both at law and in equity, of him the said *A. B.*, of, in, to or out of the same, and every or any part thereof, by virtue of the within-mentioned [*or* "recited"] indenture of lease, or otherwise howsoever, together with the said lease, and all benefit and advantage thereof: TO HAVE AND TO HOLD the said piece of land, messuages, cottages and stables, and all and singular other the premises hereby assigned, or intended so to be, with the appurtenances, unto the said *C. D.*, his executors, administrators and assigns, from the 29th day of September now next ensuing, for and during all the rest, residue and remainder of the within-mentioned term of sixty-one years yet to come and unexpired, subject nevertheless to the payment of the within-mentioned rent of , and to the observance, performance and keeping of all and singular the covenants, clauses and agreements in the within-mentioned indenture of lease reserved and contained, and which on the tenant's or lessee's part and behalf, from the said 29th day of September now next ensuing, are and ought to be paid, observed and performed: AND THE SAID *A. B.* doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said *C. D.*, his executors, administrators and assigns, by these presents, in manner following; that is to say, that for and notwithstanding any act, deed, matter or thing whatsoever, made, done, committed or suffered by him the said *A. B.* to the contrary, the within-mentioned indenture of lease at the time of the sealing and delivery of these presents, is a good, sufficient and effectual lease, valid in law, whereby to hold and enjoy the said premises for all the residue and remainder of the term hereby granted: AND THAT HE THE SAID *A. B.* hath not at any time heretofore made, done, committed, suffered or executed, any act, deed, matter or thing whatsoever, whereby or by reason or means whereof, the premises hereby assigned, or any part thereof, or the said term of years therein, are, is, can, shall or may be in anywise charged, affected, lessened or incumbered in anywise howsoever: AND ALSO that the said *C. D.*, his executors, administrators and assigns, shall and lawfully may from time to time, and at all times hereafter, during all the residue and remainder of the said term of sixty-one years, by the within-mentioned indenture of lease granted, peaceably and quietly have, hold, possess and enjoy all and singular the premises thereby demised and hereby assigned, with the appurtenances, and receive and take the rents and profits thereof, and of every part thereof, to and for his and their own use and benefit, without the lawful let, suit, trouble, denial, eviction, molestation or interruption of or by him the said *A. B.*, his executors or administrators, or any other person or persons whomsoever, lawfully claiming or to claim any estate, right, title, trust or interest whatsoever, of, in, to or out of the same premises, or any part thereof, by, from or under him or them, the rent and covenants reserved and contained in the within-mentioned indenture only excepted: AND FURTHER, that he the said

Consideration.

Bargain and

Sale and

Indemnity for

Covenant by the Assignor

And that he has done no-thing to in-cumber.

And that the Assignee may have that En-joyment.

Covenant by the Assignor

A. B., his executors and administrators, and all and every other person or persons whomsoever, having or lawfully claiming, or to claim, any estate, right, title, trust or interest of, in, to or out of the said hereby assigned premises, by, from or under him or them, shall and will at all times during the continuance of the said term, upon every reasonable request, and at the costs and charges in the law of the said *C. D.*, his executors and administrators, make, do and execute, or cause and procure to be made, done and executed, all and every such further and other reasonable acts, deeds, assignments and assurances in the law whatsoever, for the further and better assigning and assuring the said premises unto the said *C. D.*, his executors, administrators and assigns, for all the residue of the said term, as by him the said *C. D.*, his executors, administrators and assigns, shall be reasonably advised, devised and required. IN WITNESS whereof the said *A. B.* hath hereunto set his hand and seal the day of , 1855.

for furth
surance,
required.

SECT. 5.—*Indorsement of Assignment by Note in Writing.*

June 3, 1855.

THE within-named *C. D.* hath this day assigned and made over unto the undersigned *E. F.*, of, &c., in the parish of, &c., in the county of, &c., all and singular the premises and hereditaments in the within-written lease comprised and described and thereby granted, together with the whole estate and interest which he the said *C. D.* hath therein. AS WITNESS their hands now hereto set.

Witness, *C. D.*
S. T. *E. F.*

SECT. 6.—*License to assign.*

WHEREAS by indenture of lease, bearing date, &c., between, &c., the said *A. B.* did demise and lease unto the said *C. D.* all that, &c., to hold the same unto the said C. *D.*, his executors and administrators, from the 24th day of June then instant, for the term of twenty-one years, determinable as therein mentioned, at the clear yearly rent of payable as therein mentioned, and subject to the covenants or agreements and conditions therein contained; and in the said indenture is contained a covenant on the part of the said *C. D.*, that he the said *C. D.*, his executors or administrators, should not assign or part with the said indenture of lease, nor grant any under-leases of the said thereby demised premises, or any part thereof, without the consent in writing of the said *A. B.*, his heirs or assigns, for that purpose first had and obtained: AND WHEREAS the said *C. D.*, being desirous of assigning the said messuage or tenement, pieces or parcels of ground and premises, and the lease thereof, unto *E. F.*, of, &c., hath applied to the said *A. B.* for his license and consent for that purpose, which he hath agreed to grant, subject nevertheless as hereinafter mentioned or referred to: NOW THEREFORE the said *A. B.* doth hereby give and grant unto the said *C. D.* license and consent to assign and transfer all his estate, term and interest of, in and to the said demised premises, and every part thereof, with the appurtenances, unto the said *E. F.*, his executors and administrators, subject nevertheless to the payment of the rent, and the observance and performance of the provisoes, covenants, conditions and agreements in the said indenture of lease reserved and contained on the part of the lessee or assignee of the same premises, to be paid, observed and performed: AND ALSO to the covenants and agreements contained in a certain indenture of even date herewith, between the said *E. F.* of the one part, and the said *A. B.* of the other part (*g*); it being agreed and intended by all parties that the license and

(*g*) See the next precedent.

consent hereby given shall be, and the same is hereby expressly restricted to the assignment by the said *C. D.* to the said *E. F.*, his executors or administrators, and that in the event of the said *E. F.*, his executors or administrators, at any time hereafter, during the residue of the said term of twenty-one years, attempting to avail himself or themselves of the same license or consent, for the purpose of making any further assignment, transfer or underlease, the same shall be deemed and construed to be, and is hereby in such case revoked, determined and made void, anything herein contained, or any rule of law or equity to the contrary notwithstanding. AS WITNESS the hand of the said *A. B.* this 1st day of November, 1854.

A. B.

SECT. 7—*Indenture to prevent an Assignee assigning again* (*h*).

THIS INDENTURE, made the first day of November, 1854, between *E. F.*, of, &c., and *A. B.*, of, &c. WHEREAS by an indenture of lease, bearing date the 22nd day of June, 1844, and made between the said *A. B.* of the one part, and *C. D.* of, &c., of the other part, the said *A. B.* did demise and lease unto the said *C. D.*, his executors and administrators, all that, &c., to hold the same with the appurtenances unto the said *C. D.*, his executors and administrators, from the 24th day of June then instant, for the term of twenty-one years, at the clear yearly rent of 105*l.*, payable as therein mentioned, and subject to the covenants, agreements and conditions therein contained on the part of the said *C. D.*, his executors and administrators, to be paid, observed, performed and kept: AND WHEREAS by a certain instrument in writing, under the hand of the said *A. B.*, and bearing even date with these presents, reciting that the said *C. D.* was desirous of assigning the said messuage or tenement, pieces or parcels of ground and premises, and the lease thereof, unto the said *E. F.*, he the said *A. B.* did grant unto the said *C. D.* license and consent to assign and transfer all his estate, term and interest of, in and to the said demised premises, unto the said *E. F.*, his executors and administrators, subject to the payment of the rent and performance of the covenants, conditions and agreements reserved and contained in and by the said indenture of lease, and to the covenants, powers, provisoes and agreements contained in a certain indenture of even date therewith (meaning and being these presents), and also to the defeasance therein contained for making void the said license: AND WHEREAS by an indenture bearing even date with these presents, and made between the said *C. D.* of the one part, and of the said *E. F.* of the other part, for the considerations therein expressed, the said *C. D.* assigned, transferred and set over unto the said *E. F.*, his executors and administrators, the said messuage or tenement, pieces or parcels of ground and premises, to hold to the said *E. F.*, his executors and administrators, from the 24th day of June now next, for all the residue of the said term of twenty-one years, subject to the rent, covenants, agreements and conditions in the said indenture of lease reserved and contained, on the part of the lessee, his executors, administrators and assigns, to be paid, observed, performed and kept: AND WHEREAS at the time of the execution of the said indenture of assignment, it was agreed by and between the said parties to these presents that the said *E. F.* should immediately upon the execution thereof execute the defeasance hereinafter contained: NOW THIS INDENTURE WITNESSETH, that in pursuance and performance of the said agreement, he the said *E. F.* doth, for himself, his heirs, executors, administrators and assigns, covenant, promise, grant and agree to and with the said *A. B.*, his heirs, executors, administrators and assigns, by these presents, in manner following (that is to say), if the said yearly rent of 105*l.* reserved in and by the said in part recited indenture of lease, or any part thereof, shall be behind and unpaid by the

(*h*) See p. 496.

the other incidents mentioned in the within-written proviso or condition of re-entry: AND IT IS HEREBY DECLARED AND AGREED, by and between the said parties to these presents, that they and their respective heirs, executors, administrators and assigns, shall and will by these presents, during the continuance of the additional term of fourteen years hereby granted, stand and be bound, for and in respect of the said hereby demised premises, with the appurtenances, in such and the like covenants, provisoes, conditions and agreements respectively, as they the said parties and their respective heirs, executors, administrators and assigns, do now stand bound in and by the said within-written lease, for and during the now residue unexpired of the within-mentioned term thereby granted, it being the intent and meaning hereof, that this present indorsed lease and the additional term hereby granted, shall be upon such and the like footing as the within-written lease, and that all the covenants, provisoes, clauses, conditions and agreements respectively therein contained, be equally available, take place and have the like force and effect, to all intents and purposes, as if every article, clause, proviso, matter and thing, contained in the said within-written lease, were inserted and contained in this present indenture (i). IN WITNESS, &c.

Sect. 9.—*Memorial of Registry of an Assignment.*

A MEMORIAL to be registered of an indenture of assignment, bearing date the day of , made between *A. B.*, of, &c., of the one part, and *C. D.*, of, &c., of the other part: whereby the said *A. B.* [for the consideration therein mentioned] did assign to the said *C. D.* all and singular the messuage or tenement and premises situate in the parish of , which are particularly mentioned and set forth in a certain indenture of lease, dated the day of , made between [*lessor,*] therein described, of the one part, and the said *A. B.*, of the other part, a memorial whereof was registered on the day of , 1850, No. , B. : and which are therein described as follows [*here copy description from lease*]; To hold unto the said *C. D.*, his executors, administrators and assigns, for the residue of the term by the said indenture of lease granted, subject to the rent and covenants in the said indenture of lease contained; which said indenture of assignment is witnessed, as to the sealing and delivery thereof, by the said *A. B.* and *C. D.*, by [*witnesses*] of, &c.; and is hereby required to be registered by the said *C. D.* As witness his hand and seal.

[*Assignee's signature.*] (L. S.)

Signed and sealed in the presence of } [*Two witnesses.*]

Sect. 10.—*Tenant's Attornment.*

BE IT KNOWN UNTO ALL MEN by these presents, that whereas we, whose hands and seals are hereunto put, DO SEVERALLY HOLD the several messuages or dwelling-houses, with their appurtenances, at our respective names hereunder mentioned and particularly described, situate in , in the county of , or liberty of the same, heretofore in the

(i) This indorsement must be stamped and executed. And in general any memorandum indorsed upon a lease or other instrument subsequently to its execution, although it professes to refer to the intention of the parties at the time, is to all intents a new instrument, and must be executed and stamped accordingly. *Goodright* d. *Nichols* v. *Mark*, 4 Maule & Sel. 30. But an alteration of the provisions of the lease may be made previously to the execution, and it will be considered part of the lease; as for instance, where there is a proviso for the lessee to determine the lease at the end of seven or fourteen years (the lease of part of a house), a memorandum giving the lessee the same option indorsed before execution is good. Id.

possession of *R. S.*, Esq., lately recovered from him by an ejectment brou in the Court of Queen's Bench, on the demise of *G. H.*, Esq.; and a v of habere facias possessionem has been executed therein by the sheriff of said county, and possession thereof delivered by him to the use of the s *G. H.*; NOW WE THE SAID persons undernamed do hereby severa attorn tenants of and for the said premises in our respective holding u the said *G. H.*, at and under the several yearly rents, and payable at t days and times at our respective names undermentioned, he the said *G.* paying or allowing thereout all taxes and repairs; and we have this d severally paid to *H. H.*, for the use of the said *G. H.*, one shilling for a in the name of such attornment. IN WITNESS whereof we have her unto set our hands and seals this day of March, in the year of o Lord 1855.

SECT. 11.—*Attornment to be indorsed on a Lease.*

MEMORANDUM.—THAT the parties whose names are hereunde written, did the day of , 1855, attorn and become tenant unto the within-named *A. B.*, according to the purpose of the lease withi mentioned, having notice of the said grant, and for proof thereof ever one of them did give unto the said *A. B.* one shilling in the name o attornment.

Witness hereto. [*Tenants' names.*]

CHAPTER V.

SURRENDERS.

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SECT. 1.—*Surrender by Deed-Poll.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, the within-named *C. D.* sendeth greeting: NOW KNOW YE, that the said *C. D.*, at the special instance and request of the within-named *A. B.*, hath assigned, surrendered and yielded up, and by these presents doth assign, surrender and yield up unto the said *A. B.*, the messuages, lands, tenements and premises, in and by the within-written indenture granted and demised, for the within-mentioned term of twenty-one years, and all the estate, right, title and interest of him the said *C. D.*, by virtue of the said deed or otherwise howsoever, together with the same within-written indenture of lease; to have and to hold the said messuages, lands, tenements and premises, with their appurtenances, to the said *A. B.*, his heirs and assigns, for ever. IN WITNESS whereof, the said *C. D.* hath hereunto set his hand and seal (*a*) this day of , 1855 (*b*).

C. D.

SECT. 2.—*Surrender by Deed-Poll, the Indenture being set out shortly.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, *C. D.*, of, &c., send greeting: WHEREAS, by indenture bearing date on or about the day of , and made between *A. B.*, of the one part, and myself of the other part, it was witnessed that, for the consideration therein mentioned, he, the said *A. B.*, did demise, lease and to farm let, unto me the said *C. D.*, all those two messuages, or tenements and premises [*describe premises as in lease*]: to have and to hold unto me the said *C. D.*, my executors, administrators and assigns, from the day of , then next ensuing, for the term of twenty-one years, at and under the yearly rent therein mentioned, and under and subject to the covenants, provisoes and agreements therein contained, as by the said recited indenture of lease, reference being thereunto had, will more fully appear: NOW KNOW YE, that I, the said *C. D.*, do hereby, in consideration of 5*l.* of lawful money of Great Britain, to me in hand well and truly paid by the said *A. B.*, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, for myself, my executors and administrators, surrender and yield up, from the day of the date hereof, to the said *A. B.*, his heirs and assigns, all the said

(*a*) See 8 & 9 Vict. c. 106, s. 3, ante, 250.
(*b*) This instrument should be indorsed on the back of the lease.

messuages or tenements and premises, and the said term of years therein yet to come, and all right, title and interest therein, which I or they may claim by virtue of the said indenture of lease, or otherwise howsoever, and that free and clear, and freely and clearly, and absolutely freed and discharged of and from all incumbrances of what kind soever, at any time by me or by my privity, consent or procurement made, done, committed or suffered. IN WITNESS, &c.

SECT. 3.—*Agreement, under Seal, surrendering Part of the Premises.*

MEMORANDUM OF AGREEMENT, dated the 1st day of September, 1855, between the within-named *A. B.* and the within-named *C. D.* WHEREAS the said *A. B.*, having occasion now to use, occupy and enjoy, a stable and hay-loft, and also a piece of ground lying before the same, being part of the premises demised to the said *C. D.*, by the within-written indenture, hath requested the said *C. D.*, and the said *C. D.* hath thereupon agreed, to yield and surrender all his estate, right, interest and term of years of, in and to the same, in manner hereinafter mentioned: AND WHEREAS, in consideration of such surrender, the said *A. B.* hath agreed to abate unto the said *C. D.* the yearly sum of , of lawful money of Great Britain, out of the rent reserved in and by the within-written indenture: NOW IT IS HEREBY WITNESSED, that the said *C. D.*, in pursuance of the said agreement, and at the request of the said *A. B.* as aforesaid, and in consideration of the sum of *5s.* of such lawful money as aforesaid (the receipt whereof is hereby acknowledged), hath hereby clearly and absolutely surrendered, assigned and yielded up unto the said *A. B.*, all the said stables, &c., together with all ways, passages, waters, watercourses, profits, commodities and appurtenances whatsoever to the said hereby surrendered premises belonging, and therewith now used, occupied and enjoyed, and all the estate, right, title, interest and term of years to come, possession, property, claim and demand whatsoever, of him the said *C. D.*, of, in and to the said hereby surrendered premises, by virtue of the within-written indenture or otherwise howsoever: TO HAVE AND TO HOLD the said surrendered premises, with their appurtenances, to the said *A. B.*, his heirs, executors, administrators and assigns, for and during all the rest and residue of the said term of fourteen years, in and by the within-written indenture limited and created, which is now to come and unexpired, in as full, ample and large a manner, to all intents and purposes, as he the said *C. D.*, his executors, administrators or assigns, could or might have held, occupied or enjoyed the same in case these presents had not been made. AND IT IS FURTHER WITNESSED, that the said *A. B.*, in pursuance of the said recited agreement on his part, and in consideration of the said surrender so made of the said stable and premises aforesaid, for himself, his heirs, executors and administrators, hath freely, clearly and absolutely relinquished, abated, released and discharged, and by these premises doth, &c., the said *C. D.*, his executors, &c., from henceforth, during the now residue of the said term of fourteen years, so limited and created in and by the within-written indenture as aforesaid, of and from the payment of the said yearly sum of , being part of the yearly rent of , by the said within-written indenture of lease reserved and made payable to him the said *A. B.*, his heirs and assigns, and also of and from all actions, suits, distresses, claims and demands whatsoever, of him the said *A. B.*, his heirs, executors or administrators, touching or concerning the said sum of , hereby expressed or intended to be alienated and released as aforesaid. IN WITNESS, &c. (*c*

(*c*) This instrument should be indorsed on the back of the lease.

Sect. 4.—*The Surrender of Copyholds.*

(a) *Surrender to a Purchaser.*

Manor of H., in the county of Middlesex. MEMORANDUM, that on the 29th day of August, in the 19th year of the reign of our Sovereign Lady Victoria, &c., and in the year of our Lord 1855, *A. B.*, of, &c., in the county of York, one of the customary tenants of the said manor, by *E. F.*, gent., his attorney (by virtue of a letter of attorney to him made by the said *A. B.* for that purpose, bearing date the 4th day of August instant), did surrender into the hands of the lord of the said manor by the rod, according to the custom of the said manor, by the proper hands and acceptance of *G. H.*, Esq., lord of the said manor, ALL THAT, &c., to the use of *C. D.*, of, &c., widow, her heirs and assigns, for and according to the custom of the said manor.

A. B.

Taken the day and year first above written by me, *G. H.*, Lord of the said Manor (*d*).

(b) *Admittance.*

The Manor of H., in the county of Middlesex. MEMORANDUM, that after the making the surrender hereunto annexed, viz. on the 29th day of August, 1855, *C. D.*, in the same surrender named, in her proper person came before me, *G. H.*, Esq., lord of the said manor, at the mansion-house of the said *C. D.*, situated near *H.* aforesaid, and desired to be admitted tenant to all and singular the customary messuages, lands, tenements and hereditaments mentioned and contained in the same surrender, with their and every of their appurtenances, to whom the lord of the manor, by his own proper hands, in the presence of *J. C.*, the lord's steward for this turn, did then and there grant seisin thereof by the rod, TO HAVE AND TO HOLD the same messuages, lands, tenements and hereditaments, with their and every of their appurtenances, unto the said *C. D.*, her heirs and assigns, for ever, of the lord, at the will of the lord, according to the custom of the said manor, by fealty, suit of court, and the several yearly rents and services therefore due and of right accustomed: and the said *C. D.* gave to the lord for fine, for such her estate, and entry into the same premises respectively, as appears in the margin; the fealty was respited. And so saving to the lord his right, the said *C. D.* was admitted tenant to the said premises, in manner and form aforesaid.

Fine, three pounds six shillings and eightpence.

G. H.,
Lord of the said Manor.

In the presence of *J. C.*

(c) *Surrender to the Use of his Will.*

MEMORANDUM, that after the admission of the said *C. D.* as aforesaid, viz. on the said 29th day of August, in the year of our Lord 1855, aforesaid, the said *C. D.* did surrender into the hands of the said lord of the said manor, by the rod, according to the custom of the said manor, all and every the cus-

(*d*) It is more usual for the surrender to be taken by the steward, but it may be done by the lord himself.

tomary messuages, lands, meadows, pastures, tenements and hereditame
to which she was admitted as above mentioned, with their and every of t
appurtenances, and all other her customary and copyhold messuages, la
tenements and hereditaments, which are parcel of the said manor, or
held of the same manor by copy of court-roll, to such uses, intents
purposes as the said *C. D.* shall, in and by her last will and testament
writing limit, declare and appoint.

C. D

Taken the day and year above by me,
G. H., Lord of the said Manor.

CHAPTER VI.

NOTICES.

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SECT. 1.—*Notices to Quit.*

(a) *By Landlord, to Yearly Tenant.*

Mr. *C. D.*

BOOK IV. CHAPTER VI. SECT. 1.

I HEREBY give you notice to quit and deliver up the premises which you now hold of me, situate at , in the county of , on the day of next, or at the expiration of the current year of your tenancy (*a*).

Dated the day of , 1855.

Yours, &c.

A. B. [*the landlord.*]

To *C. D.* [*the tenant.*]

(b) *Another more particular.*

Mr. *C. D.*

YOU are hereby required to quit and deliver up the possession of the premises which you now hold of me as tenant at will [*or* "by virtue of an agreement," *or* "lease," *as the case may be*], namely, a messuage and garden with the appurtenances [*or* "farm-house, lands and premises," *describing the premises*], situate in the parish of , in the county of , now occupied by you or your under-tenant [*as the case may be*], on the

(*a*) This last clause may prevent a nonsuit in ejectment, which might otherwise happen where the time when the tenancy commenced is not certainly known (*Doe* d. *Gorst* v. *Timothy*, 2 Car. & Kir. 351); but the third form (c) must be used if there is a probability of the "current year" expiring within six months of the date of the notice. See ante, 295.

lands, tenements and hereditaments, with the appurtenances, which you now hold of me, situate at , in the parish of , in the county of , and in failure thereof I shall require and insist upon your paying thenceforth for the same double the yearly value thereof, for so long time as you shall keep possession of the said premises after the expiration of the said notice, according to the form of the statute in such case made and provided.

Dated this day of , 1855.

A. B. [*the landlord.*]

To Mr. *C. D.* [*the tenant.*]

(g) *To deliver up Possession, under the Statute* 1 & 2 *Vict. c.* 74.

Mr. *C. D.*

I , [owner, or agent to , the owner, *as the case may be*], do hereby give you notice, that unless peaceable possession of the tenement [*shortly describing it*], situate , which was held of me [*or* "of the said ," *as the case may be*], under a tenancy from year to year [*or as the case may be*], which expired [*or*, "was determined"] by notice to quit from the said [*or otherwise, as the case may be*], on the day of , and which tenement is now held over and detained from the said be given to [*the owner or agent*], on or before the expiration of seven clear days from the service of this notice, I , shall on next, the day of , at of the clock of the same day, at , apply to her Majesty's justices of the peace acting for the district of [*being the district, division or place in which the said tenement, or any part thereof, is situate*], in petty sessions assembled, to issue their warrant directing the constables of the said district to enter and take possession of the said tenement and to eject any person therefrom.

Dated this (Signed)

[*owner or agent.*]

To Mr. *C. D.*

(h) *By Landlord, to Quit Lodgings.*

Sir,

I HEREBY give you notice to quit and deliver up, on next, the rooms or apartments, and other tenements, which you now hold of me in this house [*as the case may be*].

Witness my hand, this day of , in the year 1855.

Yours, &c.

A. B. [*the landlord.*]

To *C. D.* [*the lodger.*]

(i) *By Tenant.*

Sir,

I HEREBY give you notice, that on the day of next (*e*), I shall quit and deliver up possession of the messuage or tenement and premises which I now hold of you, situate at , in the parish of , in the county of [agreeably to the covenants in the lease subsisting between us, and dated the, &c.]

Dated this day of , 1855.

Yours, &c.

To *A. B.* [*landlord.*] *C. D.* [*tenant.*]

(*e*) This day should be correctly inserted. See *Cadby* v. *Martinez*, 3 Per. & Dav. 326; 11 Ad. & El. 720; ante, 292.

(k) *Notice by the Tenant to Quit Lodgings.*

SIR,

THIS is to give you notice, that on the day of next I shall quit and deliver up possession of the rooms and apartments and other tenements, which I now hold of you in your house.

Witness my hand, this day of , 1855.

C. D. [*the lodger.*]

To *A. B.* [*landlord.*]

SECT. 2.—*Notices to Repair.*

(a) *General Notice.*

SIR,

YOU are hereby required to put in good and tenantable order and repair all and singular the messuage or tenement and premises, which you now hold of me, situate at, &c.: particularly the servants' hall in the said messuage or tenement, and the tiling or roof at the northern end thereof [*as the case may be, describing the repair necessary to be done according to the fact*].

Witness my hand, this day of , 1855.

A. B. [*the landlord.*]

To *C. D.* [*the tenant.*]

(b) *Another Form.*

To Mr. *C. D.*, his executors, administrators or assigns, tenant of the house situate at the east corner of street, next the high road leading from to , or to Mr. *E. F.*, under-tenant of the before-mentioned premises belonging to *A. B.*, of , Esq., or whomsoever it may concern.

SIR,

YOU are hereby required to do and perform, before the 25th day of March now next ensuing the date hereof, all and singular the following repairs, and reinstatement of waste, dilapidations and want of repairs, at and to the messuage or tenement which you now hold of the aforesaid *A. B.*, Esq., situate and being the east corner house of street, next the high road leading from to , in the county of , according to the following schedule or specification of dilapidations made by *G. H.*, the surveyor of the said *A. B.*, on a survey made of the aforesaid premises on the 11th of March, 1855.

As witness my hand, this day of , 1855.

G. H.,

Schedule, &c. Surveyor to the said *A. B.*, Esq.

(c) *Notice, after a Notice to Repair has not been complied with.*

To Mr. *C. D.*

IN pursuance of the notice delivered by me at your house at , on the 6th of June last, specifying sundry reparations and dilapidations in the house, barns, outbuildings and other premises, held by you under lease from *A. B.*, I have this day inspected and surveyed the said premises, and finding none of the said repairs and dilapidations repaired or reinstated, I do hereby give you notice that the several penalties recited in your covenants contained

in the above lease for such nonperformance, are and have been incurred by you, and that the attorney to the said *A. B.* will proceed to eject you accordingly.

As witness my hand, this 7th August, 1855.

E. F.,
Surveyor to the said *A. B.*

Delivered a true copy of the above at Mr. *C. D.*'s house, at , on the 7th August, 1855.

(d) *Another Notice, where the whole or any part of the former has been neglected.*

Survey, valuation and report of certain dilapidations, want of repairs and unperformed covenants agreed to have been done at a house situate No. , in street, in the county of Middlesex, in the tenure or occupation of Mr. *C. D.*, or his under-tenants, belonging to *A. B.*, in the county of , Esq.

WHEREAS by a lease granted by the aforesaid *A. B.* to the aforesaid *C. D.*, bearing date on or about the day of , 1850, for the term of seven years, he the said *C. D.* did covenant, promise and agree for himself, his executors, administrators or assigns, with the said *A. B.*, his heirs and assigns, once in three years, [*here set out the covenants to paint, to repair, and to leave in repair, in words of lease.*] AND THE SAID *A. B.* did, on or about the first day of June, 1853, apply to, employ and commission the undersigned *E. F.*, surveyor, to survey, value and report upon the several dilapidations, want of repairs, and other unperformed covenants of the aforesaid lease, who, on the 4th and other days of June following, did survey, value and assess the amount of the said dilapidations, want of repairs and other unperformed covenants by the said *C. D.*, to be of and to the amount of 100*l.*, which said sum he hereby declares to be due and owing to the said *A. B.* in consideration of the aforesaid dilapidations, want of repairs, and other unperformed covenants, and the following schedule is a true account of such dilapidations, want of repairs, and other unperformed covenants.

AS WITNESS my hand, the 20th day of November, 1854.

E. F., Surveyor.

SCHEDULE.

[*Here specify repairs to be done, and let the surveyor sign it at the end.*]

(e) *Notice under express Covenants.*

DILAPIDATIONS suffered to accrue, and reinstatement of waste, at and to the house and offices, No. , in street, in the city of London, belonging to *A. B.*, and in the tenure and occupation of *C. D.*, according to the covenants of the lease granted by the said *A. B.* to *E. F.*, and bearing date, &c. [*here specify the repairs*]: or in lieu of the reinstatements of damage and dilapidated parts of the aforesaid leasehold premises, which must all be done within three months from the date of this notice, according to the covenant in the said lease, the aforesaid tenant is to pay to his landlord, at the expiration of the same, as a fair compensation or assessment of dilapidations which have been suffered to acorue in and upon the aforesaid leasehold house and premises, the sum of 100*l.*

(f) *Notice to Repair during the Continuance of Lease.*

SIR,

HAVING surveyed the house and offices occupied by you, being , situate on the north side of , and belonging to Sir *A. B.*, Ba of the lease of which about thirteen years remain unexpired, I find following repairs necessary to be done, according to the express covena contained in the lease; and I give you notice, unless they are done wit the space of three calendar months from the date hereof, you will be subj to the forfeiture of the same, on the conditions therein expressed.

E. F.,
Surveyor to the said *A. B.*, Ba

SCHEDULE, &c.

All the before-mentioned works to be done in the best and most substa tial manner, using the best materials of their several sorts, and to the sati faction of *E. F.*, the landlord's surveyor.

(g) *Notice to Repair, when Six Months of the Lease are unexpired.*

To *C. D.*, tenant of the house No. , in street, belonging to *A. B* landlord, or whomsoever it may concern.

YOU are hereby required to do and perform, within six months from th present date, all and singular the following repairs and reinstatements c waste, dilapidations and want of repair, at and to the messuage or tenemen and premises, which you now hold of the aforesaid *A. B.*, of , situat and being No. , in street, in the county of Middlesex, [*or* "city o London," *as the case may be*,] according to the following schedule or specifi cation of dilapidations made by Mr. *J. E.*, the architect appointed by th aforesaid *A. B.*, on a proper survey of the premises, as follows; namely repair and paint, &c. [*and so on, specifying the repairs wanting to be done, and conclude, if the lease is within four or six months of expiring*,] or in lieu thereof pay to the aforesaid *A. B.* the sum of 100*l.* in lawful money of this kingdom, as a fair compensation or assessment of dilapidations, want of repairs and waste, which have been suffered to accrue in and upon the aforesaid leasehold premises.

E. F.,
Solicitor to the landlord, *A. B.*

Witness, *G. H.*

SECT. 3.—*Notices under Statutes.*

(a) *Notice to be affixed on the Premises being deserted, under Statute* 11 *Geo. II. c.* 19, *s.* 16, *and* 57 *Geo. III. c.* 52.

A. B.

TAKE NOTICE, that on the complaint of *E. A.*, of , in the county of , made unto us, *A. P.* and *B. P.*, Esqrs., two of her Majesty's justices of the peace for the said county, that you the said *A. B.* have deserted the messuage and tenement called , consisting of , situate, lying and being at aforesaid, in the county aforesaid, unto you demised at rack rent by the said *E. A.*, and that there is in arrear and due from you the said *A. B.* unto the said *E. A.*, one half-year's rent for the said demised premises, and that you having left the said premises uncultivated and unoccupied, so that no sufficient distress can be had to countervail the said arrears of rent; we the said justices (having no interest, nor either of us

having any interest in the said demised premises), on the said complaint as aforesaid, and at the request of the said *E. A.*, have this day come upon and viewed the said demised premises, and do find the said complaint to be true; and on the day of this present month of we will return to take a second view thereof; and if upon such second view, you or some other person on your behalf, shall not appear and pay the said rent in arrear, or there shall not be sufficient distress on the said premises, that we, the said justices, will put the said *E. A.* into possession of the said demised premises, according to the form of the statute in such case made and provided (*f*). IN WITNESS, we have put our hands and seals, and have caused this notice to be affixed on the outer door of the mansion-house, the same being the most notorious part of the said premises, this day of , in the year of the reign of our Sovereign Lady Victoria, of the United Kingdom of Great Britain and Ireland Queen.

(b) *Demand of Possession under Statute* 1 *Geo. IV. c.* 87, *s.* 1 (*g*).

To *C. D.* [*the tenant under the lease or agreement, or person claiming under him.*]

Demand in writing to be served upon person-ally or upon or near the dwelling-house of the tenant, under 1 Geo. IV. c. 87, s. 1.

I DO hereby [*or if given by an agent*, "I do hereby as the agent of *A. B.*"] according to the form of the statute in such case made and provided, demand and require you forthwith to quit and deliver up to me [*or* "to the said *A. B.*"] the possession of the dwelling-house [*or* "farm, lands and premises"], with the appurtenances, situate and being in the parish of , in the county of , and which were held by you [*or* "by *G. H.*"], as tenant thereof, under a lease [*or* "agreement in writing"], bearing date, &c. [*date of lease or agreement*], for the term of years, which expired on the day of last [*or* "from year to year, and which tenancy was determined by me," *or* "the said *A. B.*," *or* "by you," *or* "the said *G. H.*, by regular notice to quit, on the day of last"]. Dated the day of , 18 .

Yours, &c.

A. B. [*or* "*E. F.*, agent for the said *A. B.*"]

SECT. 4.—*Notices when Goods are taken in Execution.*

If the sheriff or high bailiff of a county court is in possession of the tenant's goods on an execution, the landlord need not make a distress, but should forthwith serve one of the following notices (*h*).

(a) *Notice to a Sheriff.*

To *N. O.* and *E. F.*, Esqs., Sheriff of Middlesex [*as the case may be*], and to his officer, and all others whom it may concern.

Notice by the Landlord to the Sheriff when in possession under an execution.

TAKE NOTICE, that the sum of twenty pounds, for one year's [*as the case may be*] rent due at Christmas-day last, is now due from *C. D.* [*the person to whom the goods belong*], of which you are now in possession, by virtue of her Majesty's writ of *fieri facias*, &c., returnable [*state the writ and return.*]

As witness my hand, this day of , 1855.

A. B., landlord of the premises.

(*f*) See ante, 827, 828. If the tenant held under a lease, it will be void by the above statute, but by sect. 17, the tenant may appeal from the justices to the superior judges.

(*g*) See ante, 748, 789.

(*h*) See Book II., Chap. II., Sect. 9 (a), p. 401, &c.

(b) *Notice to a Sheriff by a Receiver.*

To the Sheriff of the county of Kent, and Mr. , his officer, and all others whom it may concern.

A. B. v. *C. D.*

SIR,

I DO hereby give you notice, that there is due to *E. F.* and the mortgagees of his estates, in the parish of , in the county of , from *C. D.* the defendant, the sum of for two years' rent due at Christmas-day last past, which you are to pay to me as receiver of the rents of the same estates.

Dated this day of , 1855.

R. S.

The like notice to the Sheriff by Receiver.

(c) *Notice to the High Bailiff of a County Court.*

To the High Bailiff of the County Court of , at , and to his bailiffs making the levy hereinafter mentioned.

WHEREAS I have been informed that you have taken the goods of *C. D.*, in the house occupied by him at , under and by virtue of a warrant of execution issued from the said County Court of , at , Now I hereby give you notice that the said *C. D.* holds the said house with the appurtenances as tenant to me from year to year from the day of , 185 , at the yearly rent of payable quarterly, on ; and that I now claim the sum of , as due to me, for (two) quarters of the said rent due, and ending on , and now in arrear and unpaid.

Dated this day of , 185 .

(Signed) *A. B.* (*i*).

The like notice to the High Bailiff of a County Court.

(*i*) This form is taken from Arch. Pract. of the New County Courts, p. 100, 3rd ed.

CHAPTER VII.

PROCEDURE IN DISTRESS AND REPLEVIN.

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SECT. 1.—*Proceedings to distrain.*

IV. VII. 1.

THE landlord himself, or any other person, as his bailiff, by an authority from him in writing, may make the distress. The warrant or authority may be in the following form:—

Authority Warrant to distrain (a).

To Mr. *A. B.*, my bailiff.

I DO hereby authorize and require you to distrain the goods and chattels of *C. D.* [*the tenant*], in the house he now dwells in [*or* "on the premises in his possession"], situate at , in the county of , for pounds, being one year's rent, due to me for the same at Christmas-day last, and to proceed thereon for the recovery of the said rent as the law directs.

Dated the day of , 1855. *J. S.*

Bailiff to make the distress.

Being legally authorized to distrain, you enter on the premises and make a seizure of the distress. If it be made in a house, seize a chair or other piece of furniture, and say, "I seize this chair, in the name of all the other goods on the premises, for the sum of pounds, being one year's rent due to me [*or* to "*J. S.*, your landlord"] at Christmas-day last, ["by virtue of an authority to me from the said *J. S.*, your landlord, for that purpose," *provided you distrain as bailiff.*]

Then take an inventory of so many goods as you judge will be sufficient to cover the rent distrained for, and also the charges of the distress. Make a copy thereof, as follows:—

The Inventory.

AN INVENTORY of the several goods and chattels distrained by me, *A. B.* [*or, if as bailiff, say,* "*E. F.* as bailiff to Mr. *A. B.*"] this day of , in the year of our Lord 1855, in the dwelling-house, outhouses and lands [*as the case may be*] of *C. D.*, situate in the parish of , in the county of [*and, if as bailiff, say,* "by the authority and on the behalf of the said *A. B.*"], for the sum of pounds, being one year's rent due to me [*or* "to the said *A. B.*"] for the said house and premises at Christmas-day last, and as yet in arrear and unpaid.

In the Dwelling-House.

1. *In the Kitchen.*

Two wainscot tables, six old chairs, five copper saucepans, &c.

2. *In the Parlour.*

One large pier looking-glass, two sconces in gilt frames, two mahogany card tables, one pembroke table, &c.

(a) The warrant must be signed by the person entitled to receive the rent; *Buller's case*, 1 Leon. 50; 2 Leon. 215. It does not require a stamp; *Pyle* v. *Partridge*, 15 Mees. & Wels. 20.

ing to the form of the statute in such case made and provided. Given under my hand the day of , in the year of our Lord 1855.

A. B.

Memorandum of delivering a true Copy of the Inventory to the Tenant.

A true copy of the above inventory and notice was this day of 1855, delivered to the above-mentioned *C. D.*, in the presence of us,

G. H.
J. K.

How served.

A true copy of the above inventory and notice must either be given to the tenant himself, or to the owner of the goods, or left at the tenant's house, with any person dwelling therein, or if there be no person in the house, on some notorious part of it; or if there be no house, on the most notorious place on the premises. And it is proper to have a person with you when you make the distress, and also when you serve the inventory and notice, to examine the same, and to attest the regularity of the proceedings, if there should be occasion.

Of removing the Goods.

When they may be sold.

The goods may be removed immediately, and in the notice the tenant may be acquainted where they are removed to, but it is now most usual to put a man in possession, and let them remain on the premises till you are entitled by law to sell them, which is when five days have expired, after the distress made, *i.e.* goods distrained on the Saturday *morning* may be removed and sold on the Thursday *afternoon* following. *Wallace* v. *King*, 1 H. Black. 13; *Harper* v. *Taswell*, 6 Car. & Pay. 166.

How, if further Time required.

If the tenant require further time for the payment of the rent, and the landlord choose to allow it, it is best to take a memorandum in writing from the tenant to the following effect, so as to prevent the landlord from being deemed a trespasser, which, after the expiration of five days, he otherwise would be, and might have an action of trespass brought against him for staying longer upon the premises.

Consent of the Tenant to the Landlord's keeping possession of the Goods, where further Time is required.

Mr. *A. B.*

I HEREBY desire you will keep possession of my goods, which you have this day distrained for rent due (or alleged to be due) from me to you, in the place where they now are, being in the back room on the second floor of the house, No. 3, Dean-street, Soho, in the county of Middlesex [*or* "the house, No. 7, Crown-street, Seven Dials, in the county of Middlesex," *being the premises where the distress was made*], for the space of seven days from the date hereof, on your undertaking to delay the sale of the said goods and chattels for that time, to enable me to discharge the said rent; and I will pay the man for keeping the said possession. Witness my hand this 31st day of July, 1855.

Witness, *R. S.* *C. D.*

How to search for Replevin and proceed to sale.

If there is no allowance of or agreement for further time, search at the expiration of the five days at the sheriff's office to see if the goods have been replevied; if not, and the rent and charges of distress still remain unpaid, after a demand made on the tenant, or other person on his behalf on the premises, send for a constable and two sworn appraisers, who having viewed the goods, the former must administer to the latter the following oath:

Appraisers' Oath, &c.

You, and each of you, shall well and truly appraise the goods and chattels mentioned in this inventory [*the constable holding in his hand the inventory and showing it to the appraisers*], according to the best of your judgment.

So help you God.

Then indorse on the inventory the following memorandum:

Memorandum thereof.

Memorandum, that on the day of , in the year of our

Lord 1855, *P. B.* of, &c., and *T. D.* of, &c., two sworn appraisers, were sworn upon the Holy Evangelists, by me *G. H.* of, &c., constable [*or* "sheriff" *or* "under-sheriff,"] well and truly to appraise the goods and chattels mentioned in this inventory, according to the best of their judgment. As witness my hand.

G. H. Constable.

Present at the time of swearing
the said *P. B.* and *T. D.* as
above, and witnesses thereto,
L. M.
O. P.

After the appraisers have viewed and valued the goods, continue the indorsement on the inventory as follows, which the appraisers must sign:

Appraisement

We the above-named *P. B.* and *T. D.* being sworn upon the Holy Evangelists, by *G. H.* the constable above named, well and truly to appraise the goods and chattels mentioned in the inventory, according to the best of our judgment; and having viewed the said goods and chattels, do appraise and value the same at the sum of one hundred pounds and no more. As witness our hands, the day of , in the year of our Lord 1855.

Witness, *R. S.* *P. B.* / *T. D.* } Sworn Appraisers.

How disposed of.

When the goods are thus valued, it is usual for the appraisers to buy them at their own valuation, and a receipt at the bottom of the inventory, witnessed by the constable, or sheriff, &c., is usually held a sufficient discharge. But if the distress be of considerable value, it is much more advisable to have a proper bargain and sale between the landlord, the constable, the appraiser and the purchaser, for the better proving of the transaction afterwards, if there should be occasion.

The goods being sold, deduct the arrears of rent and all reasonable charges attending the distress, and return the overplus (if any) to the tenant.

If the produce is not sufficient to cover the demand, you may distrain again (*c*).

Note. The man in possession of the goods, &c., is to be paid two shillings and sixpence *per diem*, if the tenant keep him; and three shillings and sixpence if he keep himself, if the rent do not exceed twenty pounds.

SECT. 2.—*Proceedings in Replevin.*

Replevin Bond under the Statute of Westminster, where Cattle are taken Damage feasant; and also under the Statute 11 Geo. II. c. 19, s. 23, where Goods are distrained for Rent.

KNOW ALL MEN BY THESE PRESENTS, that we, *A. B.* of , *W. C.* of , and *T. S.* of are jointly and severally held and firmly bound to *W. T.* Esq., sheriff of the county of , in the sum of (*d*) [*the full value of the cattle or goods distrained*], of lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, and each and every of us, in the whole, our and each and every of our heirs, executors and administrators, firmly by these presents. Sealed with our seals. Dated the second day of January, in the eighteenth year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and in the year of our Lord 1855.

THE CONDITION of the above obligation is such, that if the above-bounden *A. B.* do appear at the next District County Court (*e*) to be holden

(*c*) But see ante, 393.
(*d*) If the goods are distrained for rent, the sum should be double the value.
(*e*) *Edmonds* v. *Challis*, 7 C. B. R. 413; 6 Dowl. & Low. 581.

in and for the county of , at , on the day of next, and do (*f*) prosecute his suit with effect, and without delay, against *J. S.* for the taking and unjustly detaining his cattle, goods and chattels, to wit [*here set forth the cattle or goods distrained*], and do truly make a return of the said cattle, goods and chattels, if return thereof shall be awarded, that then the said obligation shall be void and of none effect; or else to be and remain in full force and virtue.

Sealed and delivered in the presence of } *A. B.* *W. C.* *T. S.*

ment levin the

KNOW ALL MEN BY THESE PRESENTS, that I, *W. T.*, Esq., sheriff [*or* "late sheriff"] of the county of Kent, have, at the request of the above-named *C. D.*, the avowant [*or* "person making cognizance"] in this cause, assigned over unto him the said *C. D.* this replevin bond, pursuant to the statute in that case made and provided: IN WITNESS whereof I have hereunto set my hand and seal of office [*or if late sheriff, say* "seal" *only*] this day of , in the year of our Lord 1855.

Sealed and delivered in the presence of } *W. T.*

and on receiving a in Re- out of New County Courts.

KNOW ALL MEN BY THESE PRESENTS, that we, *C. D.*, of , maltster, *E. F.*, of , butcher, and *G. H.*, of , carpenter, are jointly and severally held and firmly bound to *A. B.* in the sum of pounds of lawful money of Great Britain, to be paid to the said *A. B.*, his certain attorney, executors or administrators; for which payment well and truly to be made, we bind ourselves and each and every of us, our and each and every of our heirs, executors and administrators, firmly by these presents. Sealed with our seals. Dated this day of , in the eighteenth year of the reign of her Majesty Queen Victoria, and of our Lord 1855.

Whereas a certain action of replevin was on commenced in the District County Court of , at , wherein *A. B.* was plaintiff, and *C. D.* the defendant: And whereas the said *C. D.* hath declared to the said court that (the title to certain corporeal property is in question in the said suit, *or* that the rent or damage in respect of which the distress in this behalf was taken, amounts to more than twenty pounds): Now the condition of this obligation is such, that if the above-bounden *C. D.* shall prosecute the said suit with effect, and without delay, in the court of , into which it is now about to be removed, and shall prove before the said last-mentioned court (that such title as is aforesaid is in dispute between the said parties, or that there was ground for believing that the said rent or damage was of greater amount than twenty pounds), then this present obligation shall be void, otherwise to remain in full force and virtue (*g*).

Signed, sealed and delivered in the presence of } *C. D.* (L.S.) *E. F.* (L.S.) *G. H.* (L.S.)

Plaint in the ancient County Courts.

A. B. complains against *C. D.* in a plea of taking and unjustly detaining his goods and chattels [*or* "cattle"] against sureties and pledges, &c.

Pledges to prosecute { *E. F.* and *G. H.*

(*f*) The words "then and there," inserted in this place, seem to be improper; see *Jackson* v. *Hanson*, 8 Mees. & Wels. 477; 1 Dowl., N. S., 69; *Morris* v. *Matthews*, 1 Gale & Dav. 677; 2 Queen's B. Rep. 293; and *Rider* v. *Edwards*, 3 Scott, N. R., 456; 3 Man. & Gran. 202.

(*g*) This form is taken from Arch. Pract. of the New County Courts, p. 125, 3rd edit. See ante, Book III., Chap. VI., Sect. 4, p. 672, and Chap. IX., Sect. 3, p. 837.

IN THE COUNTY COURT OF MIDDLESEX, *to wit.* } *C. D.* (the defendant in this suit) was summon to answer *A. B.* (the plaintiff in this suit) of a pl wherefore he took the cattle [*or* "the goods and chattels," *or* "the corn," of the said plaintiff, and unjustly detained the same, against sureties an pledges until, &c.: and thereupon the said plaintiff by *E. F.* his attorne complains for that the said defendant, on the (*h*) day of in the year of our Lord 1855, in the parish of , in the county c Middlesex, and within the jurisdiction of this court, in a certain dwelling house there (*i*) [*or if on land*, "in a certain close," *or* "in a certain commo there called "] took the cattle or goods [*or* "chattels," *or* "th corn" (*k*)], to wit, &c., of the said plaintiff, of great value, to wit, of the valu of 200*l.*, and unjustly detained the same against sureties and pledges, until &c.: wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of 50*l.*, and therefore he brings his suit, &c.

In the County Court of , at , the day of , 1855.
Between *A. B.* Plaintiff,
and
C. D. Defendant.

The following are the particulars of the [cattle, goods and chattels] of *A. B.* taken under a distress for ["rent," *or* "damage feasant"] by *C. D.* at , in the county of , and within the district of this court, on , and with respect to which I now enter my plaint in the said court.

[*Here enumerate the cattle, goods, &c., distrained, and let the particulars be signed by the plaintiff*] (*l*).

(*h*) The day is generally that on which the distress was made, although the day is not material.

(*i*) Great care should be had, in the description of the place where the distress was made, the place being both material and traversable; and it is not sufficient to state that the taking was in a parish or town, it being necessary that the place itself should be stated. See 2 Chit. Plead. 646, 7th edit.; 1 Saund. 347, n. 1.

(*k*) If standing corn, &c., be taken under the 11 Geo. II c. 19, s. 8, the description will be as follows: "In a certain field there called took the corn of the said *A. B.*, to wit, 20 acres of standing wheat, thereon then growing and being, and divers, to wit, cart loads of other wheat of the said *A. B.*, there then also being, of great value, to wit, &c."

(*l*) Taken from Arch. Pract. of the New County Courts, p. 124, 3rd edit. See ante, Book III., Chap. VI., Sect. 3 (b), p. 664, and Chap. IX., Sect. 3, p. 837.

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